

# RELIGIOUS FREEDOM RESTORATION ACT OF 1991

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**HEARINGS**  
BEFORE THE  
SUBCOMMITTEE ON  
CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SECOND CONGRESS

SECOND SESSION

ON

**H.R. 2797**

RELIGIOUS FREEDOM RESTORATION ACT OF 1991

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MAY 13 AND 14, 1992

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# RELIGIOUS FREEDOM RESTORATION ACT OF 1991

WEDNESDAY, MAY 13, 1992

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.

The subcommittee met, pursuant to notice, at 9:36 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Patricia Schroeder, Michael J. Kopetski, Craig A. Washington, Henry J. Hyde, Howard Coble, and Bill McCollum.

Also present: Melody C. Barnes, assistant counsel, and Kathryn Hazeem, minority counsel.

## OPENING STATEMENT OF CHAIRMAN EDWARDS

Mr. EDWARDS. The subcommittee will come to order.

The first amendment free exercise clause is one of the most important rights granted to Americans. We are here today because that right has been threatened.

In April 1990, the U.S. Supreme Court decided the *Employment Division* against *Smith* case. In that decision the Court rejected the use of the "compelling governmental interest" test, which is the most stringent test applied to constitutional questions, and the Court announced a fundamentally different and lower standard. The majority of the Court determined that the use of this important test in the free exercise claims is a luxury—that is the word of the Court—that could not be afforded interest in the highest order. This decision has had a far-reaching and disturbing effect upon the exercise of religion in America.

H.R. 2797, the Religious Freedom Restoration Act, was drafted to respond to the void left by the Supreme Court's decision. The bill simply restores the compelling governmental interest test. However, there are opponents to this legislation, and we're going to hear from some today and tomorrow. The opponents claim that the bill does more than meets the eye. I believe they are wrong. I think we drew the bill very carefully. I believe that the bill is neutral with respect to all issues and determinations. Its intent is simply to protect what we believe is one of the most important freedoms in our Constitution.

[The bill, H.R. 2797, follows:]

102<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 2797

To protect the free exercise of religion.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 26, 1991

Mr. SOLARZ (for himself, Mr. AUCOIN, Mr. ACKERMAN, Mr. BERMAN, Mr. BRYANT, Mr. CARDIN, Mr. COX of Illinois, Mr. DREIER of California, Mr. DEFAZIO, Mr. EDWARDS of California, Mr. FEIGHAN, Mr. FOGLIETTA, Mr. FROST, Mr. GEREN of Texas, Mr. HOCHBRUECKNER, Mr. HUGHES, Mr. JAMES, Mr. JEFFERSON, Mr. KOPETSKY, Mr. LAGOMARSINO, Mr. LEHMAN of Florida, Mr. LENT, Mr. MARKEY, Mr. MATSUI, Mr. MCMILLEN of Maryland, Mr. MOODY, Mr. MRAZEK, Mr. NEAL of North Carolina, Mr. OWENS of New York, Mr. OWENS of Utah, Mr. PRICE, Mr. SCHEUER, Mr. SCHIFF, Mr. SHAYS, Mr. SMITH of Texas, Mr. STALLINGS, Mr. STUDDS, Mr. TRAFICANT, Mr. TORRICELLI, Mr. TOWNS, Mr. YATES, and Mr. WOLPE) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To protect the free exercise of religion.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Religious Freedom  
5 Restoration Act of 1991".

1 **SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF**  
2 **PURPOSES.**

3 (a) FINDINGS.—The Congress finds—

4 (1) the framers of the American Constitution,  
5 recognizing free exercise of religion as an  
6 unalienable right, secured its protection in the First  
7 Amendment to the Constitution;

8 (2) laws “neutral” toward religion may burden  
9 religious exercise as surely as laws intended to inter-  
10 fere with religious exercise;

11 (3) governments should not burden religious ex-  
12 ercise without compelling justification;

13 (4) in *Employment Division of Oregon v. Smith*  
14 the Supreme Court virtually eliminated the require-  
15 ment that the government justify burdens on reli-  
16 gious exercise imposed by laws neutral toward reli-  
17 gion; and

18 (5) the compelling interest test as set forth in  
19 *Sherbert v. Verner* and *Wisconsin v. Yoder* is a  
20 workable test for striking sensible balances between  
21 religious liberty and competing governmental inter-  
22 ests.

23 (b) PURPOSES.—The purposes of this Act—

24 (1) to restore the compelling interest test as set  
25 forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*

1 and to guarantee its application in all cases where  
2 free exercise of religion is burdened; and

3 (2) to provide a claim or defense to persons  
4 whose religious exercise is burdened by government.

5 **SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.**

6 (a) **IN GENERAL.**—Government shall not burden a  
7 person’s exercise of religion even if the burden results  
8 from a rule of general applicability, except as provided in  
9 subsection (b).

10 (b) **EXCEPTION.**—Government may burden a per-  
11 son’s exercise of religion only if it demonstrates that appli-  
12 cation of the burden to the person—

13 (1) is essential to further a compelling govern-  
14 mental interest; and

15 (2) is the least restrictive means of furthering  
16 that compelling governmental interest.

17 (c) **JUDICIAL RELIEF.**—A person whose religious ex-  
18 ercise has been burdened in violation of this section may  
19 assert that violation as a claim or defense in a judicial  
20 proceeding and obtain appropriate relief against a govern-  
21 ment. Standing to assert a claim or defense under this  
22 section shall be governed by the general rules of standing  
23 under article III of the Constitution.

1 **SEC. 4. ATTORNEYS FEES.**

2 (a) **JUDICIAL PROCEEDINGS.**—Section 722 of the Re-  
3 vised Statutes of the United States (42 U.S.C. 1988) is  
4 amended by inserting “the Religious Freedom Restoration  
5 Act of 1991,” before “or title VI of the Civil Rights Act  
6 of 1964”.

7 (b) **ADMINISTRATIVE PROCEEDINGS.**—Section  
8 504(b)(1)(C) of title 5, United States Code, is amended—

- 9 (1) by striking “and” at the end of clause (ii);  
10 (2) by striking the semicolon at the end of  
11 clause (iii) and inserting “; and”; and  
12 (3) by inserting “(iv) the Religious Freedom  
13 Restoration Act of 1991” after clause (iii).

14 **SEC. 5. DEFINITIONS.**

15 As used in this Act—

- 16 (1) the term “government” includes a branch,  
17 department, agency, instrumentality, and official (or  
18 other person acting under color of law) of the Unit-  
19 ed States, a State, or a subdivision of a State;  
20 (2) the term “State” includes the District of  
21 Columbia, the Commonwealth of Puerto Rico, and  
22 each territory and possession of the United States;  
23 and  
24 (3) the term “demonstrates” means meets the  
25 burdens of going forward with the evidence and of  
26 persuasion.

1 **SEC. 6. APPLICABILITY.**

2 (a) **IN GENERAL.**—This Act applies to all Federal  
3 and State law, and the implementation of that law, wheth-  
4 er statutory or otherwise, and whether adopted before or  
5 after the enactment of this Act.

6 (b) **RULE OF CONSTRUCTION.**—Federal law adopted  
7 after the date of the enactment of this Act is subject to  
8 this Act unless such law explicitly excludes such applica-  
9 tion by reference to this Act.

10 (c) **RELIGIOUS BELIEF UNAFFECTED.**—Nothing in  
11 this Act shall be construed to authorize any government  
12 to burden any religious belief.

13 **SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.**

14 Nothing in this Act shall be construed to affect, inter-  
15 pret, or in any way address that portion of the First  
16 Amendment prohibiting laws respecting the establishment  
17 of religion.

Mr. EDWARDS. The purpose of these hearings, of course, is to shed light and to hear both sides and all sides of this important issue.

And I yield to the gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Freedom of religion, the ability to discharge the duty which we owe to our Creator, is perhaps our most treasured and most precious liberty. I share the concern of many religious leaders over the decision of the Supreme Court in *Employment Services v. Smith* which abandoned the traditional strict scrutiny analysis for free exercise claims in favor of a rational basis test. The *Smith* decision makes it more difficult, if not impossible, for individuals to successfully assert a free exercise exemption or defense to laws of general application.

H.R. 2797 seeks to overturn the *Smith* decision. While I agree that legislation is necessary, in light of the propensity of important proabortion groups such as the ACLU and the Religious Coalition for Abortion Rights to assert a first amendment right to abortion under the free exercise clause, I cannot support H.R. 2797 in its current form. My primary objection is based on the bill's predictable impact on abortion law.

In the litigation brought by attorneys for the American Civil Liberties Union in Utah over that State's recently enacted abortion bill, the plaintiff, one Jane Liberty, in a sworn affidavit told the court—and I quote:

"I am a practicing Christian and I have talked to my minister about how to handle this unintended pregnancy. He helped me come to the conclusion that terminating this pregnancy was the choice consistent with my faith. It would be wrong for me to give up my goal of independence for myself and my children."

On April 10, 1992, U.S. District Court Judge Thomas Green summarily dismissed the free exercise claim citing the *Smith* decision as his sole authority. In numerous other cases challenging prolife laws this same claim has been raised. Proponents of H.R. 2797 will argue that since this claim has only been successful once, in the decision of the trial court in *Harris v. McRae*, we should not worry about its future success should this bill become law.

All H.R. 2797 does, proponents argue, is restore the strict scrutiny standard for free exercise claims which was the law prior to *Smith*. If all H.R. 2797 really did was restore the law as it existed prior to *Smith*, I would be less concerned about its practical effects. It is all too apparent, however, that H.R. 2797 does not and cannot so restore the law.

First, this is an exercise in incompetence. We lack the legal competence to overrule a Supreme Court interpretation of the Constitution. Congress is institutionally unable to restore a prior interpretation of the first amendment once the Supreme Court has rejected that interpretation. We are a legislature, not the Court.

The legislation before us proposes an independent Federal statute, and we must carefully consider the likely or possible legal effects that statute will have apart from prior Supreme Court interpretations.

The meaning of this legislation, if it becomes law, will be determined by the plain words of the statute, and to some extent by the

intent of Congress in enacting it. Therefore, if by Federal statute Congress requires courts to utilize the strict scrutiny standard, the most rigorous constitutional inquiry as applied in *Sherbert* and *Yoder*, the admitted highwater mark of free exercise jurisprudence, it is far more likely that plaintiffs asserting a free exercise claim will prevail on their claims than they did prior to *Smith*.

Second, and arguably of less concern, H.R. 2797 does not restore the law because it would apply the strict scrutiny standard to free exercise claims involving prison and military regulations and government management of its own internal affairs. Prior to *Smith*, the Supreme Court has held on numerous occasions that the strict scrutiny analysis was not applicable in these situations. H.R. 2797 contains no exceptions, and would thus apply the strict scrutiny analysis to all government action, burdening religious exercise.

While the policy behind this application may or may not be sound, it is undoubtedly a significant expansion of the law which existed prior to *Smith* and not a restoration. My greatest concern with this legislation remains, however, that as presently drafted it would provide an independent statutory basis for abortion should the Court determine that the fundamental right to abortion in *Roe v. Wade* is neither fundamental nor right. I want to solve one problem without creating another.

If the proponents want broad-based support for this legislation, then it must be made abortion neutral. If the same wisdom and prudent judgment that solved ultimately the Grove City problem can be applied here, specific abortion neutral language, then we can obtain broad support for this legislation and join together in urging the President to sign it. I, and many in Congress, do not want to provide a legislative scalpel to those who seek the expansion of abortion services.

In closing, I would note the debate here is broader than whether we should enact H.R. 2797 with or without an abortion neutral amendment. Some of the witnesses will question whether Congress has the authority to enact this legislation or whether any action should be taken by the Congress. Others will examine the meaning and nature of religious liberty. I am confident, however, that all of us are reunited in a common goal: to protect this important and cherished right.

And I want to thank each of the witnesses for their thoughtful consideration of these issues and for taking the time to appear before us this morning.

Mr. EDWARDS. Thank you, Mr. Hyde.

The gentlewoman from Colorado, Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman. And I am very pleased that you called these hearings because I think they go to the very core of what I thought this country was about, and that is, the basic belief that this country is big enough for more than one opinion and it is big enough for more than one set of religious beliefs, and the very fundamental cornerstone of religious freedom really is being dealt with, I think, in H.R. 2797.

I am sorry to have people bring the abortion issue into this. When you look at H.R. 2797 it is neutral on the issue of abortion. When you look at what the Congressional Research said when it was asked to examine the question vis-a-vis that bill, it said very



clearly that the free exercise clause operates to protect a person who is forced to do an act required by his religion or insists that he can't perform an act because his religion forbids him from doing that.

I think that is very, very different than what we are hearing here today by some who feel that this has to be drug in. There are religions in which one person's decision to have an abortion is consistent with their doctrine or not forbidden by it. But that is a very different matter than being compelled to do or not to do something, and that I think is very clearly the status of the law.

I had always felt that all our laws were written generically—liberty and justice for all, freedom for all, religious freedom for all, the Congress shall not make laws. But, if we are always going to put in one little disclaimer saying “except vis-a-vis women,” I think that goes to a very fundamental issue of how we are treating over half the population of this country.

And I just think that we can be treated like everyone else—as adults. I think the Congressional Research Service is right. I think the bill is written properly.

And I must apologize because I am going to have to leave a little early because we start Armed Services markup this morning, Mr. Chairman. You know how that goes. If you miss 5 minutes you could miss \$10 billion. So I don't dare miss very much of it. But my heart will be here and I will read the testimony very carefully.

Mr. EDWARDS. Thank you, Mrs. Schroeder. And I might add that the lead editorial in the New York Times today said your committee is spending too much.

Mrs. SCHROEDER. They are right. That is why I have to be there.

Mr. EDWARDS. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I have no opening statement, Mr. Chairman.

Mr. EDWARDS. I would request Mr. Hyde to please introduce the three witnesses of the first panel.

Mr. HYDE. Thank you, Mr. Chairman.

Robert Dugan, Jr., is director of the office of public affairs of the National Association of Evangelicals. The association includes approximately 45,000 churches and serves an evangelical constituency of approximately 15 million people. Dr. Dugan is a Baptist minister and author of “Winning the New Civil War, Recapturing America's Values.”

Elder Dallin Oaks is a member of the Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints. Elder Oaks formerly served as a justice of the Utah Supreme Court and president of Brigham Young University. A graduate of the University of Chicago Law School, Elder Oaks served as a law clerk to former Chief Justice Earl Warren.

Third, Mark Chopko serves as general counsel to the National Conference of Catholic Bishops and the U.S. Catholic Conference. Mr. Chopko serves on the advisory board of the Center for Church-State Studies of DePauw University College of Law.

That is our first panel, Mr. Chairman.

Mr. EDWARDS. Thank you. Will the witnesses come to the witness table?

[Witnesses sworn.]

Mr. EDWARDS. Mr. Dugan, you are first.

Without objection, all of the full statements will be made a part of the record. We request that you limit your testimony to around 5 or 6 minutes, because the members of the subcommittee do have questions for each of you.

**STATEMENT OF ROBERT DUGAN, JR., DIRECTOR, OFFICE OF PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS**

Mr. DUGAN. Mr. Chairman, and members of the committee, I am Robert Dugan.

On behalf of the National Association of Evangelicals, I express deep appreciation for the opportunity to testify before this distinguished committee on the pressing need for enactment of H.R. 2797, the Religious Freedom Restoration Act.

We were stunned when the Court used the seemingly innocuous *Employment Division v. Smith* case to announce a complete overhaul of established first amendment law. The Supreme Court, the very guardian of our liberties, has taken the free exercise clause and emptied it of meaning.

Of course, religious liberty remains a God-given right, as the Declaration of Independence indicates, but it is no longer secured by the Constitution as interpreted by a 5 to 4 majority. It is now to be bestowed by a beneficent majority as a matter of the grace of Congress, not the grace of God.

To add insult to injury, the majority opinion, with a seemingly callous indifference, characterizes the compelling governmental interest test as a luxury which the people can ill afford. But what we can ill afford is a Court that misconstrues precedent, ignores landmark cases interpreting the free exercise clause, and guts our free exercise rights.

Mr. Chairman, other members of the panels today will establish the positive need for the Religious Freedom Restoration Act. Let me speak specifically, turning to page 7 of my testimony, to the abortion issue.

Unfortunately, bipartisan support for RFRA is suffering because some in the prolife community are calling RFRA an abortion bill. That allegation reminds me of the remark traditionally attributed to Lincoln: If you call a tail a leg, how many legs does a dog have? Five? No. Calling a tail a leg don't make it a leg.

The provision that gives rise to this abortion absurdity is the very heart of RFRA. Section 3(b) of the bill provides that government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is essential to further a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. This provision is nothing more than a paraphrase of the Supreme Court's own compelling interest test since discarded. It faithfully reflects the purpose of the bill, which is to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is burdened.

The compelling interest test set forth in these cases, as Justice Sandra Day O'Connor observed in *Smith*, had proved to be a workable test for striking sensible balances between religious liberty and competing governmental interests.

This balancing process is just that, a process. RFRA would restore a legal standard, the compelling interest test. It confers no substantive rights.

The argument that RFRA would create a new statutory right to abortion is fatally flawed. Obviously, Congress can only overrule *Smith* by enacting a statute, but it does not follow that a statute restoring a legal standard confers a substantive right to abortion based upon free exercise of religion.

RFRA creates no new or enhanced free exercise claims different from those that could have been raised under the free exercise clause itself before *Smith*. Those who claim that RFRA would open the floodgates to abortion offer an abortion neutral amendment ostensibly to remove this issue from the field of controversy. Would that things were that simple? Politically, no such amendment stands a chance of being passed.

But apart from the charged politics of this singularly divisive issue, consider the implications of passing any amendment to RFRA which would bar free exercise claims from access to the courts. The whole idea of the Bill of Rights was to secure certain fundamental, God-given rights from majoritarian rule. As James Madison put it, "The judiciary was meant to be the bulwark of our liberties." It would be catastrophic for Congress to hold rollcall votes on the religious practices of devout Americans. The popular will must never be allowed to determine whether or not particular religious practices are entitled to a fair hearing in the law.

There is simply no principled way an abortion neutral amendment or any other amendment slamming the courthouse door on free exercise claims can be added to RFRA. The Religious Freedom Restoration Act cannot live up to its title if it restores religious freedom for some but denies it to others.

As an organization with an unabashed prolife commitment, NAE cannot agree with those in the prolife movement who say that RFRA will be used by prochoice advocates to secure a free exercise right to abortion. RFRA is designed to be used just as the free exercise clause itself could be used before *Smith*. Thus, if a free exercise claim could be raised under the first amendment, it could likewise be raised under RFRA. Of course, raising a free exercise claim whether to abortion or some other religious practice is not the functional equivalent of success. Every free exercise claim must run the gauntlet of the compelling interest test.

Let's look at the free exercise claim under RFRA and assume for the sake of argument that the claim to abortion is found to be based on sincere religious belief, and let us assume that this case winds up in the Supreme Court, as it surely would if a State law restricting abortion were ever to be struck down on free exercise grounds. Let us also assume that this is not an extreme case; in other words, a generalized right to abortion would be raised on the grounds of free exercise of religion. The State involved in defending the validity of its law restricting abortion would assert a compelling interest in protecting the life of the unborn. That compelling interest would seem self-evident. Moreover, five Justices presently sitting on the Supreme Court other than Justices Souter and Thomas have unequivocally said that the State does have a compel-

ling interest in protecting unborn human life throughout the pregnancy. We document that at the end of the page.

Some in the prolife community opposing RFRA say that it is pure speculation to conjecture how the Supreme Court will overrule *Roe v. Wade*. That is true but irrelevant. Nothing in our analysis depends on the future treatment of *Roe v. Wade* by the Court. Our analysis rests on what five Justices are on record as saying about the compelling State interest in protecting unborn life throughout pregnancy. Those statements, regardless of the Court's disposition of *Roe*, plainly indicate that the Court will not find a right to abortion based on the free exercise clause itself, or RFRA.

Surely the entire prolife community agrees that there is a compelling interest in protecting unborn human life throughout pregnancy. That view is reiterated in the amicus brief filed by the U.S. Catholic Conference in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Both the National Association of Evangelicals and the Southern Baptist Convention's Christian Life Commission were happy to join in that brief because we share that view.

Neither the first amendment nor RFRA needs an abortion neutral amendment. Congress will have an opportunity to express its will on the abortion issue when it votes on the Freedom of Choice Act. The abortion issue is divisive enough without raising it where it does not exist. Congress should pay no heed to the bogus abortion claim.

RFRA is not a wolf in sheep's clothing. Religious liberty must not be held hostage to irrational fears. We respectfully urge this committee to report out H.R. 2797 favorably. Our first liberty is in your hands.

Mr. EDWARDS. Thank you very much, Mr. Dugan.

[The prepared statement of Mr. Dugan follows:]

PREPARED STATEMENT OF ROBERT P. DUGAN, JR., DIRECTOR, OFFICE OF  
PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS

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Mr. Chairman and Members of the Committee:

On behalf of the National Association of Evangelicals (NAE) I want to express deep appreciation for the opportunity to testify before this distinguished Committee on the pressing need for enactment of H.R. 2797, the Religious Freedom Restoration Act (RFRA).

NAE is a non-profit association. It includes some 45,000 U.S. churches from 74 denominations. Through its commissions and affiliates, such as the National Religious Broadcasters and World Relief, NAE serves an evangelical constituency of approximately 15 million people.

Evangelicals are characterized not only by their emphasis on a personal conversion to Jesus Christ, but also by a high view of Scripture. The Bible is to us the infallible Word of God, our absolute standard for belief and behavior. Gallup polls have consistently categorized evangelicals as 20% of the nation's population, although in a 1990 poll 38% of the population identified themselves as evangelicals.

At its 1991 convention, NAE passed a resolution urging Congress "to pass bipartisan remedial legislation, such as the 'Religious Freedom Restoration Act,' which will restore the traditional 'compelling interest' test and thus protect the free exercise of religion." That is why we are here today.

On September 27, 1990 we testified before this Committee with respect to RFRA. Nothing that has happened in the interim leads us to believe that remedial legislation is any less crucial today than it was then. Indeed, with every passing day it becomes clearer to government officials from the high to the petty that, as the result of the Supreme Court's decision in Employment Division v. Smith, government is completely free to pass laws of general applicability without any regard whatsoever for the convictions of religious majorities.

It could not be more ironic that a people who fled religious persecution and then fought a tyrannical king to secure their freedom, now face tyranny of

a different kind -- tyranny of the majority. We had thought that our Bill of Rights secured religious freedom from majoritarian rule. However, the Supreme Court of the United States, which was intended by the drafters of the Bill of Rights to be a guardian of our most cherished freedoms, has deprived us of our birthright as Americans. Fortunately, in our system of checks and balances, Congress has the power to overrule the Court by restoring the compelling interest test.

#### I. The Smith case

In Employment Division v. Smith five Justices of the Supreme Court gutted the Free Exercise Clause of the First Amendment. In the post-Smith world, government no longer needs to demonstrate a compelling governmental interest to justify an erosion of religious freedom. Now all that is needed to restrict religious exercise is a neutral law of general applicability. Our ability to put our faith into action is now totally subject to majoritarian rule.

The issue in Smith was whether the sacramental use of peyote by members of the Native American Church was protected under the Free Exercise Clause. Reversing the state supreme court, the U.S. Supreme Court ruled that Oregon could deny unemployment benefits to persons discharged from their jobs for sacramental peyote use. If that is all the Court had done, we would not be here today. But the Court, on its own volition, and without benefit of briefing or argument, abandoned decades of precedent and announced a sea change in First Amendment law.

This was the rule of law before Smith: Laws of general applicability could constitutionally burden religious practice only if the government demonstrated a compelling governmental interest and used the least restrictive means to further that interest. This test involved balancing the government's interest against the individual's religious liberty interest in the context of each particular case.

This is the new rule of law: If prohibiting the exercise of religion is

"merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." The government no longer has to justify any burden it imposes on free exercise, no matter how adverse.

Thus did the Court metamorphose the Free Exercise Clause from fundamental right to hollow promise.

We are dismayed. So are many others, including the 50-member coalition supporting RFRA which spans the political/religious spectrum. A common threat has galvanized ideologically diverse organizations to band together in a common, nonpartisan cause. Every American should be concerned about the loss of religious freedom engendered by Smith.

Smith was thought to present a narrow question of constitutional law: Whether the State of Oregon had a compelling interest in regulating illegal drugs that overrode free exercise rights in the sacramental use of peyote. That was the issue briefed; that was the issue argued. This was thought to be a routine Free Exercise case which would no doubt be decided within the parameters of well-established precedent.

Thus we were stunned when the Court used this seemingly innocuous case to announce a complete overhaul of established First Amendment law. No liberty is more precious in the American experience than religious liberty -- our First Freedom. Yet the Supreme Court, the very guardian of our liberties, has taken the Free Exercise Clause and emptied it of meaning. Justice O'Connor is right on target when she says the Court's holding "not only misreads settled First Amendment precedents," but also "appears to be unnecessary to this case."

Religious liberty remains a God-given right, as the Declaration of Independence indicates, but it is no longer secured by the Constitution as interpreted by the 5-4 majority. It is now to be bestowed by a beneficent majority as a matter of legislative grace, not the grace of God.

To add insult to injury, the majority opinion, with a seemingly callous indifference, characterizes the compelling governmental interest test as a "luxury" which we as a people can ill afford. But what we can ill afford is a Court that misconstrues precedent, ignores landmark cases interpreting the Free Exercise Clause, and guts our free exercise rights. Abundant scholarship on the origins and historical understanding of the Free Exercise Clause clearly indicates that religious liberty was to be a preferred freedom, a fundamental right not to be submitted to rule by legislative majorities. The Supreme Court in Smith failed to take that scholarship into account with disastrous results.

As matters stand now, the free exercise of religion cannot be used as an effective defense against unwarranted governmental action. According to the Court, if free exercise is burdened by a generally applicable law, that's just the price of democracy. It apparently doesn't want to be bothered with the time-honored test used to balance government's interest against individuals' religious liberty interests. No religious Americans need apply.

According to Justice Scalia, applying the compelling interest test to all actions thought to be religiously commanded would be "courting anarchy." He informs us that in our religiously pluralistic society, we cannot afford the "luxury" of the compelling governmental interest test. It is ironic that Scalia's professed fear of "courting anarchy" instead courts despotism.

While the compelling governmental interest test has been around for three decades, the principle embodied in that verbal construct is almost a half century old. If we have not experienced anarchy over this long period, it seems highly unlikely that religious minorities pose any threat to society.

Justice Scalia concedes that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." But he shrugs this concession off with the remark that this result is the "unavoidable consequence of democratic government." That brutal statement cannot be reconciled with the Bill of Rights.



Contrast this mindset with that of the Supreme Court in an earlier and more enlightened day: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

This familiar quotation is drawn from West Virginia State Board of Education v. Barnette, the famous flag salute case decided on Flag Day, 1943. The Court held that school children could not be forced, against their religious beliefs, to salute the flag. Besides ignoring the teaching of Barnette, Justice Scalia unaccountably relies on the Gobitis case which was reconsidered and expressly overruled in Barnette!

In his able dissenting opinion, Justice Blackmun pointedly observes that the majority opinion "effectuates a wholesale overturning of settled law" concerning the Free Exercise Clause, and expresses the hope that the majority is "aware of the consequences." Let's look at some of those consequences.

First and foremost, claims to include free exercise exemptions in future statutes are likely to fall on deaf ears, now that the Supreme Court has ruled they have no constitutional basis.

Generally applicable laws prohibiting the serving of alcoholic beverages to minors threaten the sacramental use of wine.

Must a Catholic church get permission from a landmarks commission before it can relocate its altar?

Can orthodox Jewish basketball players be excluded from interscholastic competition because their religious belief requires them to wear yarmulkes?

Are certain evangelical denominations going to be forced to ordain fe-

male ministers, or the Catholic Church to ordain female priests?

Are public school students going to be forced to attend sex education classes that are antithetical to their religious beliefs and practices, or to read books they believe are profane?

Are young women to be forced to comply with gym uniform requirements contrary to their religious tenets of modesty?

Are school children, contrary to their religious beliefs, to be forced to salute the flag?

Are the Amish to be forced to display an orange triangle on their horse-drawn buggies when silver reflective tape would suffice?

These are but a few of the consequences which Smith would apparently visit on the religious community. The worst, of course, is that government officials who were formerly under obligation to be reasonable and attempt, if possible, to accommodate religious practice, are now free to impose laws without any regard whatsoever to the religious sensibilities of minorities.

Justice Scalia, we are forced to conclude, does not realize the full import of his ruling. We are speaking today about religious practice. For high-demand religions, there are practices that are immutable.

When it comes down to obeying God or Caesar, the devout have no choice. Which is to say that Employment Division v. Smith leads inevitably to civil disobedience. We recognize that free exercise is not an absolute, and that it must yield to compelling governmental interest. Yet we cannot but remonstrate against the present rule which requires no justification whatsoever for the abridgement of religious freedom, and will -- I repeat -- lead inevitably to civil disobedience.

We applaud the bipartisan bill introduced by Representative Stephen Solarz which now has more than 175 co-sponsors. H.R. 2797 would restore the

balancing process which formerly prevented government from running roughshod over religious freedom. Congress must overrule the Smith case and restore the compelling interest test which is the heart and soul of free exercise jurisprudence.

## II. The Abortion "Issue"

Unfortunately, bipartisan support for RFRA is suffering because some in the pro-life community are calling RFRA an "abortion bill." That allegation reminds me of the remark traditionally attributed to Lincoln: "If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't make it a leg."

The provision that gives rise to this abortion absurdity is the very heart of RFRA. Section 3(b) of the bill provides that "Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is essential to further a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest."

This provision is nothing more than a paraphrase of the Supreme Court's own compelling interest test, since discarded. It faithfully reflects the purpose of the bill, which is to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is burdened." The compelling interest test set forth in these cases, as Justice Sandra Day O'Connor observed in Smith (and as provided in section 2(a)(5) of the bill), had proven to be "a workable test for striking sensible balances between religious liberty and competing governmental interests." This balancing process is just that, a process. RFRA would restore a legal standard, the compelling interest test; it confers no substantive rights.

The argument that RFRA would create a new statutory right to abortion is fatally flawed. Obviously Congress can only overrule Smith by enacting a statute. But it does not follow that a statute restoring a legal standard

confers a substantive right to abortion based upon free exercise of religion. RFRA creates no new or enhanced free exercise claims different from those that could have been raised under the Free Exercise Clause itself before Smith.

RFRA dictates no results. It would not instruct to the Court how to apply the compelling interest test in a case involving the sacramental use of peyote, nor would it direct the Court how to apply that balancing test in a case involving a free exercise claim to abortion, or any other free exercise claim.

Those who claim that RFRA would "open the floodgates to abortion" offer an "abortion neutral" amendment, ostensibly to remove this issue from the field of controversy. Would that things were that simple. Politically, no such amendment stands a chance of being passed. But apart from the charged politics of this singularly divisive issue, consider the implications of passing any amendment to RFRA which would bar free exercise claims from access to the courts.

The whole idea of the Bill of Rights was to secure certain fundamental, God-given rights from majoritarian rule. The framers of the Bill of Rights were convinced that an independent judiciary was the correct branch of government to decide fact-dependent questions involving fundamental, unalienable rights.

As James Madison put it, the judiciary was meant to be "the bulwark of our liberties." It would be catastrophic for Congress to hold roll call votes on the religious practices of devout Americans. The popular will must never be allowed to determine whether or not particular religious practices are entitled to a fair hearing in a court of law. There is simply no principled way an abortion neutral amendment, or any other amendment slamming the courthouse door on free exercise claims, can be added to RFRA. The Religious Freedom Restoration Act cannot live up to its title if it restores religious freedom for some, but denies it to others.

As an organization with an unabashed pro-life commitment, NAE cannot

agree with those in the pro-life movement who say that if RFRA is passed it will be used by pro-choice advocates to secure a free exercise right to abortion. RFRA is designed to be used just as the Free Exercise Clause itself could be used before Smith. Thus if a free exercise claim could be raised under the First Amendment, it could likewise be raised under RFRA. Of course raising a free exercise claim, whether to abortion or some other "religious practice," is not the functional equivalent of success. Every free exercise claim must run the gauntlet of the compelling interest test.

Let's look at the free exercise claim under RFRA, and assume, for the sake of argument, that the claim to abortion is found to be based on sincere religious belief. And let us assume that this case winds up in the Supreme Court, as it surely would if a state law restricting abortion were ever to be struck down on free exercise grounds. Let us also assume that this is not an extreme case, such as a threat to the life of the mother (Orthodox Jewish belief mandates abortion in such cases) or a case involving rape or incest. In other words, a generalized right to abortion would be raised on the grounds of free exercise of religion.

The state involved, in defending the validity of its law restricting abortion, would assert a compelling interest in protecting the life of the unborn. That compelling interest would seem self-evident. Moreover, five justices presently sitting on the Supreme Court (other than Justices Souter and Thomas) have unequivocally said that the state has a compelling interest in protecting unborn human life throughout pregnancy. As Justice O'Connor said in Akron v. Akron Center for Reproductive Health, 462 U.S. at 461 (1983), joined by Justices Rehnquist and White, "the State possesses compelling interests in the protection of potential human life \* \* \* throughout pregnancy \* \* \*." For other such statements, see the plurality opinion of Chief Justice Rehnquist, joined by Justices White and Kennedy, and Justice Scalia's concurring opinion in Webster v. Reproductive Health Services, 492 U.S. at 519, 532 (1989). The result is a foregone conclusion -- the state's law restricting abortion would be upheld by the Supreme Court, applying RFRA's compelling interest test.

Some in the pro-life community opposing RFRA say that it is pure speculation to conjecture how the Supreme Court will overrule Roe v. Wade. That is true, but irrelevant. Nothing in our analysis depends on the future treatment of Roe v. Wade by the Court. Our analysis rests on what five justices are on record as saying about the compelling state interest in protecting unborn life throughout pregnancy. Those statements, regardless of the Court's disposition of Roe, plainly indicate that the Court will not find a right to abortion based on the Free Exercise Clause itself, or RFRA.

Surely the entire pro-life community agrees that there is a compelling interest in protecting unborn human life throughout pregnancy. That view is reiterated in the amicus brief filed by the United States Catholic Conference in Planned Parenthood of Southeastern Pennsylvania v. Casey. Both the National Association of Evangelicals and the Southern Baptist Convention's Christian Life Commission were happy to join in that brief because we share that view.

Neither the First Amendment nor RFRA needs an abortion-neutral amendment. Congress will have an opportunity to express its will on the abortion issue when it votes on the Freedom of Choice Act. The abortion issue is divisive enough without raising it where it does not exist. Congress should pay no heed to the bogus abortion claim. RFRA is not a wolf in sheep's clothing. Religious liberty must not be held hostage to irrational fears.

We respectfully urge this Committee to report out H.R. 2797 favorably. We hope that it will be brought to the House floor for a vote as soon as possible.

Our First Liberty is in your hands.

Mr. EDWARDS. Elder Oaks, pleased to have you here, and you may proceed.

**STATEMENT OF ELDER DALLIN H. OAKS, QUORUM OF THE  
TWELVE APOSTLES, THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS**

Mr. OAKS. Thank you, Mr. Chairman. I am privileged to appear before you today to testify in behalf of the Church of Jesus Christ of Latter-day Saints in support of congressional enactment of H.R. 2797. I am here to represent the official position of our 8-million-member church at the request of its highest governing bodies, the first presidency and the Quorum of the Twelve Apostles, of which I am a member.

As a general rule, our church does not take positions on specific legislative initiatives pending in Congress or State legislatures. Our action in this matter is an exception to this rule. It underscores the importance we attach to this congressional initiative to restore to the free exercise of religion what a divided Supreme Court took away in *Employment Division v. Smith*.

The history of the Church of Jesus Christ of Latter-day Saints, sometimes called Mormon or LDS, in America illustrates the importance of requiring a compelling governmental interest before laws can be allowed to interfere with the free exercise of religion.

I know of no other major religious group in America that has endured anything comparable to the officially sanctioned persecution that was imposed upon members of my church by Federal, State, and local government officials. In the 19th century our members were literally driven from State to State, sometimes by direct Government action, and finally expelled from the existing borders of the United States.

On October 27, 1838, Missouri Governor Lilburn W. Boggs issued an order to the State militia that Mormons "must be treated as enemies and must be exterminated or driven from the State, if necessary for the public good." Three days later, segments of the Missouri militia attacked a small Mormon settlement at Jacob Haun's mill. Seventeen men, women, and children were killed and 13 more were wounded. After a reign of terror that included the burning of homes, the seizing of private property, the beating of men and the raping of women, over 10,000 Mormons were driven from that State.

In the 1840's, after founder and church president Joseph Smith was murdered by a mob while in State custody, Illinois State authorities supported or condoned the lawless element who evicted the Mormons from their cities and drove them across the Mississippi River to the West. This expulsion compelled the Mormon's epic migration to the Great Basin, which was then beyond the borders of the United States.

The experience of the Mormon pioneers is analogous to the compelled migration of many of this country's founding settlers—the Pilgrims, Separatists, Quakers, Catholics, and Puritans, who fled England and Holland to escape religious persecution and to seek a sanctuary where they could practice their religion free from persecution.

I have a personal feeling for these persecutions, since some of my forebearers came to America as refugees from religious persecution in their native lands. And most of my ancestors suffered with the Mormons in their earlier persecutions. For example, my third great-grandmother, Connecticut-born Catherine Elmira Prichard Oaks, was among the Mormons expelled from Missouri and later driven from Illinois. Fleeing religious persecution, she died on the plains of Iowa, a martyr to her faith.

Following the pattern set by William Penn, whose 1682 constitution for the Quaker Colony of Pennsylvania had a model provision for safeguarding the religious liberties of its citizens, leaders of my church drafted a constitution for the proposed State of Deseret that contained a strongly worded guarantee of religious freedom. This proposed State applied for admission to the Union in 1849, but in the Compromise of 1850, Congress organized the Mormon areas into the Territory of Utah.

The persecutions, however, continued. In the 1850's, the Government of the United States, too willing to believe lies about conditions in Utah, sent an army of several thousand Federal troops to subdue the supposedly rebellious Mormons.

From the 1860's through the 1880's, Congress and some State legislatures passed laws penalizing the religious practices, and even the religious beliefs, of Latter-day Saints. Under this legislation, the corporate entity of the Church of Jesus Christ of Latter-day Saints was dissolved and its properties were seized. Many church leaders and members were imprisoned. People signifying a belief in the doctrine of my church were deprived of the right to hold public office or to sit on juries, and they were even denied the right to vote in elections.

Most of these denials of religious freedom received the express approval of the U.S. Supreme Court. It was a dark chapter in the history of religious freedom in this Nation. I have a personal feeling for this chapter as well. My grandfather's oldest sister, my great-aunt Belle Harris, was the first woman to be imprisoned during the polygamy persecutions. In 1883, when she was 22 years of age, she refused to testify before a grand jury investigating polygamy charges against her husband. Sentenced for contempt, she served 3½ months in the Utah territorial penitentiary.

With the abandonment of the compelling governmental interest test in the case of *Employment Division v. Smith*, the Supreme Court has permitted any level of government to interfere with an individual's religious practice or worship so long as it does so by a law of general applicability that is not seen as overtly targeting a specific region. This allows government a greatly increased latitude to restrict the free exercise of religion.

If past is prologue, the forces of local, State and Federal governmental power, now freed from the compelling governmental interest test, will increasingly interfere with the free exercise of religion. We fear that the end result will be a serious diminution of the religious freedom guaranteed by the U.S. Constitution.

You will hear from others today whose religious practices have already fallen victim to government interference under the Supreme Court's new standard. They will demonstrate the detrimental effects of the *Smith* decision in a manner more powerful than



I could. I wish to point out, however, that most of the court cases involving government interference with religious freedom involve religious practices that appear out of the ordinary to many. By their nature, elected officials are unlikely to pass ordinances, statutes, or laws that interfere with large mainstream religions whose adherents possess significant political power at the ballot box. But political power or impact must not be the measure of which religious practices can be forbidden by law.

The Bill of Rights protects principles, not constituencies. The worshipers who need its protections are the oppressed minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that principle. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members repeatedly fell victim to officially sanctioned persecution because of their religious beliefs and practices. We have special interest to call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless this is clearly required by compelling governmental interest.

When the Supreme Court determines that a right is guaranteed by the Constitution, it has routinely imposed the compelling governmental interest test to prevent undue official infringement of that right. It is nothing short of outrageous that the Supreme Court continues to apply this protection to words that cannot be found within the Constitution, such as the right to privacy, and yet has removed this protective standard from application to the express provisions in the Constitution's Bill of Rights that guarantee the free exercise of religion. The Constitution's two express provisions on religion suggest that protection of religious freedom was to have a preferred position, but the *Smith* case has now consigned it to an inferior one. That mistake must be remedied, and H.R. 2797 is appropriate for that purpose.

Mr. Chairman, the Church of Jesus Christ of Latter-day Saints commends the sponsors of H.R. 2797 for their recognition of the importance of the free exercise of religion to the freedom and well-being of our pluralistic society. Although we would prefer that the Supreme Court reverse the *Smith* case and restore the full constitutional dimensions of the first amendment protection of the freedom of religion, we believe that this statutory restoration of the compelling governmental interest standard is both a legitimate and a necessary response by the legislative branch to the degradation of religious freedom resulting from the *Smith* case. For Mormons, this legislation implements in Federal law a vital principle of general application embodied in our church's Eleventh Article of Faith, written in 1842:

"We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may."

Thank you, Mr. Chairman.

Mr. EDWARDS. Well, thank you very much, Elder Oaks.  
[The prepared statement of Elder Oaks follows:]

STATEMENT OF ELDER DALLIN H. OAKS  
QUORUM OF THE TWELVE APOSTLES  
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS  
H.R. 2797, THE RELIGIOUS FREEDOM RESTORATION ACT  
HOUSE JUDICIARY SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
MAY 13, 1992

INTRODUCTION

Mr. Chairman, I am privileged to appear before you to testify on behalf of The Church of Jesus Christ of Latter-day Saints in support of Congressional enactment of H.R. 2797, the Religious Freedom Restoration Act. I am here to present the official position of our eight million member church at the request of its highest governing bodies, the First Presidency and the Quorum of the Twelve Apostles, of which I am a member. As a general rule, our church does not take positions on specific legislative initiatives pending in Congress or state legislatures. Our action in this matter is an exception to this rule. It underscores the importance we attach to this Congressional initiative to restore to the free exercise of religion what a divided Supreme Court took away in Employment Division v. Smith (1990).

I have had considerable personal experience with the constitution and laws governing the free exercise of religion. Upon graduation from The University of Chicago Law School in 1957, I served as a law clerk to Chief Justice Earl Warren. For a decade I was a professor of law at The University of Chicago. During the last year of that service, I was also the executive director of the American Bar Foundation. For nine years I was president of Brigham Young University, the nation's largest church-related university. I then served for three and one-half years as a justice on the Utah Supreme Court. I concluded that service in 1984 when I was called to full-time service as a member of the Quorum of the

Twelve Apostles. My professional publications have included three books and numerous articles on the legal relationships between church and state.

## HISTORY

The history of The Church of Jesus Christ of Latter-day Saints (sometimes called Mormon or LDS) in America illustrates the importance of requiring a "compelling governmental interest" before laws can be allowed to interfere with the free exercise of religion.

I know of no other major religious group in America that has endured anything comparable to the officially sanctioned persecution that was imposed upon members of my church by federal, state, and local government officials. In the nineteenth century our members were literally driven from state to state, sometimes by direct government action, and finally expelled from the existing borders of the United States.

On October 27, 1838, Missouri Governor Lilburn W. Boggs issued an order to the state militia that the Mormons "must be treated as enemies and must be exterminated or driven from the state, if necessary for the public good." Three days later, segments of the Missouri militia attacked a small Mormon settlement at Jacob Haun's mill. Seventeen men, women, and children were killed and thirteen more were wounded. After a reign of terror that included the burning of homes, the seizing of private property, the beating of men and the raping of women, over 10,000 Mormons were driven from that state.

In the 1840s, after founder and church president Joseph Smith was murdered by a mob while in state custody, Illinois state authorities supported or condoned the lawless

element who evicted the Mormons from their cities and drove them across the Mississippi River to the west. This expulsion compelled the Mormons' epic migration to the Great Basin, which was then beyond the borders of the United States.

The experience of the Mormon pioneers is analogous to the compelled migration of many of this country's founding settlers—the Pilgrims, Separatists, Quakers, Catholics, and Puritans who fled England and Holland to escape religious persecution and to seek a sanctuary where they could practice their religion free from persecution.

I have a personal feeling for these persecutions, since some of my forbearers came to America as refugees from religious persecution in their native lands. And most of my ancestors suffered with the Mormons in their earliest persecutions. For example, my third great-grandmother, Connecticut-born Catherine Prichard Oaks, was among the Mormons expelled from Missouri and later driven out of Illinois. Fleeing religious persecution, she died on the plains of Iowa, a martyr to her faith.

Following the pattern set by William Penn, whose 1682 constitution for the Quaker Colony of Pennsylvania had a model provision for safeguarding the religious liberties of its citizens, leaders of my church drafted a constitution for the proposed State of Deseret that contained a strongly worded guarantee of religious freedom. This proposed state applied for admission to the Union in 1849, but in the Compromise of 1850, Congress organized the Mormon areas into the Territory of Utah.

The persecutions continued. In the 1850s, the government of the United States, too willing to believe lies about conditions in Utah, sent an army of several thousand federal troops to subdue the supposedly rebellious Mormons.

From the 1860s through the 1880s, Congress and some state legislatures passed laws penalizing the religious practices and even the religious beliefs of the Latter-day Saints. Under this legislation, the corporate entity of The Church of Jesus Christ of Latter-day Saints was dissolved and its properties were seized.<sup>1</sup> Many church leaders and members were imprisoned. People signifying a belief in the doctrine of my church were deprived of the right to hold public office or sit on juries<sup>2</sup> and they were even denied the right to vote in elections.<sup>3</sup>

Most of these denials of religious freedom received the express approval of the United States Supreme Court. It was a dark chapter in the history of religious freedom in this nation. I have a personal feeling for this chapter as well. My grandfather's oldest sister, my great aunt Belle Harris, was the first woman to be imprisoned during the polygamy prosecutions. In 1883, when she was 22 years of age, she refused to testify before a grand jury investigating polygamy charges against her husband. Sentenced for contempt, she served three and one-half months in the Utah territorial penitentiary.<sup>4</sup>

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<sup>1</sup> See The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890).

<sup>2</sup> Edmunds Act, ch. 47, sec. 5, 22 Stat. 30 (1882); Tucker Amendments, ch. 397, sec. 24, 24 Stat. 635 (1887).

<sup>3</sup> Davis v. Beason, 133 U.S. 333 (1890).

<sup>4</sup> In re Harris, 4 Utah 5, 5 P. 129 (1884).

THE COMPELLING GOVERNMENTAL INTEREST TEST MUST BE RESTORED

The conflict between individual rights to freely worship God and government attempts to regulate or interfere with religious practices remains today. For decades the United States Supreme Court adhered to the First Amendment guarantee of free exercise by requiring the state to demonstrate a "compelling governmental interest" before interference with religious freedom would be tolerated. This test struck an appropriate balance between the needs of government to establish rules for the orderly governance of our society and the rights of citizens not to be unduly restricted in their religious practices. In those instances where elected officials approved laws which interfered with a specific religious practice, they had to sustain the burden of justifying their action by identifying a compelling government reason or interest for doing so. They also had to demonstrate that they had interfered with the religious practice by the least restrictive means possible. The compelling governmental interest test provided an essential protection for the free exercise of religion. Such a protection is vital. There is nothing more private or personal than the relationship of an individual to his or her God. There is nothing more sacred to a religious person than the service or worship of God.

With the abandonment of the "compelling governmental interest" test in the case of Employment Division v. Smith, the Supreme Court has permitted any level of government to interfere with an individual's religious practice or worship so long as it does so by a law of general applicability that is not seen as overtly targeting a specific religion. This allows government a greatly increased latitude to restrict the free exercise of religion.

If past is prologue, the forces of local, state and federal governmental power, now freed from the compelling governmental interest test, will increasingly interfere with the free exercise of religion. We fear that the end result will be a serious diminution of the religious freedom guaranteed by the United States Constitution.

You will hear from others today whose religious practices have already fallen victim to government interference under the Supreme Court's new standard. They will demonstrate the detrimental effects of the Smith decision in a manner more powerful than I could. I wish to point out, however, that most of the court cases involving government interference with religious liberty involve religious practices that appear out of the ordinary to many. By their nature, elected officials are unlikely to pass ordinances, statutes, or laws that interfere with large mainstream religions whose adherents possess significant political power at the ballot box. But political power or impact must not be the measure of which religious practices can be forbidden by law.

The Bill of Rights protects principles, not constituencies. The worshippers who need its protections are the oppressed minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that principle. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members repeatedly fell victim to officially sanctioned persecution because of their religious beliefs and practices. We have special reason to call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless this is clearly required by a "compelling governmental interest."

When the Supreme Court determines that a right is guaranteed by the Constitution, it has routinely imposed the compelling governmental interest test to prevent undue official infringement of that right. –It is nothing short of outrageous that the Supreme Court continues to apply this protection to words that cannot be found within the Constitution, such as the "right to privacy," and yet has removed this protective standard from application to the express provision in the Constitution's Bill of Rights that guarantees the free exercise of religion. The Constitution's two express provisions on religion suggest that protection of religious freedom was to have a preferred position, but the Smith case has now consigned it to an inferior one. That mistake must be remedied, and H.R. 2797 is appropriate for that purpose.

#### CONCLUSION

Mr. Chairman, The Church of Jesus Christ of Latter-day Saints commends the sponsors of H.R. 2797, the Religious Freedom Restoration Act, for their recognition of the importance of the free exercise of religion to the freedom and well-being of our pluralistic society. Although we would prefer that the Supreme Court reverse the Smith case and restore the full constitutional dimensions of the First Amendment protection of freedom of religion, we believe that this statutory restoration of the "compelling governmental interest" standard is both a legitimate and a necessary response by the legislative branch to the degradation of religious freedom resulting from the Smith case. For Mormons, this legislation implements in federal law a vital principle of general application embodied in our church's eleventh Article of Faith, written in 1842:

"We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may."

Thank you, Mr. Chairman.



Mr. EDWARDS. Mr. Chopko, we welcome you, and you may proceed.

**STATEMENT OF MARK E. CHOPKO, GENERAL COUNSEL, ON BEHALF OF THE UNITED STATES CATHOLIC CONFERENCE**

Mr. CHOPKO. Thank you, Mr. Chairman, and members of the subcommittee. I thank you for the opportunity to testify on behalf of the U.S. Catholic Conference and National Conference of Catholic Bishops.

The conference speaks to the public policy agenda of the Nation's Roman Catholic bishops. As their chief legal adviser, it falls to me to outline the concerns of the conference with respect to religious liberty, to the *Smith* decision, and to H.R. 2797, the point of these hearings.

I thank the committee for accepting my written testimony for the record. In that testimony I promised to bring with me a further commentary on the subject of *Employment Division v. Smith* and the subject of legislative remedies generally, and I offer that for submission into the record and ask that it be received.

Mr. EDWARDS. Without objection, it will be accepted.

Mr. CHOPKO. Thank you. Rather than go through my prepared text, I would like to make six brief points for the record this morning.

First, as a matter of judicial process, *Smith* was wrongly decided. The Court reached for an issue that was not presented by the parties in the briefs. In doing so, it swept away a procedural test, although it left in place the series of rather complex exceptions, the scope of which still remain to be construed by the Court.

However, this much is clear. Instead of the Government bearing the burden of proving that it has a narrowly focused compelling justification to burden religious practice, henceforth the claimant has the burden to prove that the Government has behaved unreasonably for most claims. It is true that this does not confer any particular substantive result, but as is so often true in the law, especially in constitutional law, who bears the burden of proof and under what test has a lot to do with the success or failure of claims. In this case, it is plain that religion will lose more easily than it has in the past, and that is a very important point.

The compelling interest test which had been applied generally by the courts prior to *Smith* has not been a panacea for religion. It has allowed the Government to win anyway, as Judge John Noonan said in his dissenting opinion in *EEOC v. Townley Engineering*. In 65 of 72 court of appeals cases religion lost through the application of that test. In other cases, as documented by the Congressional Research Service, the courts did not apply this test at all, especially when it had to do with government operations.

Thus, perhaps the majority in *Smith* found it was a small step to take to sweep the compelling interest test altogether. For us in religious institutions, as is so amply stated by my colleagues here on the panel, the implications loom large.

Second, the Supreme Court defers to the political process. At least this Supreme Court does. Meaning that for purposes of defining H.R. 2797 it is very important what the Congress says about its scope, direction and intent. Here we are writing a statute. We

are not rewriting the Constitution. And we are not putting into place constitutional protections. We are writing a statute.

Third, the only avenue for restoration, as that term might be understood in constitutional law, is through the Supreme Court. It seems that by vacating and remanding cases, especially a case involving the landmarking of the Covenant Church in Seattle, the majority of the Supreme Court is not interested in too soon revisiting the implications of *Smith*. The *Santeria* case pending in the Court now has both sides arguing that *Smith* applies. They both say that under *Smith* they win. Referring back to my first point that the Court does not generally stray beyond the briefs and arguments of the parties—*Smith* is an exception—it is not likely, if one were to predict the outcome, that the Court will use that case as a vehicle to revisit *Smith*. Therefore the legislative process has become more important.

Fourth, the bishops of the United States as religious superiors and as civil administrators of large and complex structures in the society provide health care, education, social and welfare services to millions of people. They do so out of religious commitment and out of a commitment to serve the common good. They speak to the central issues that pervade U.S. life: freedom of religion, abortion, war and peace, the evils of racism, and economic injustice. They are concerned about freighting government power with too great a handle to interfere into religious activities. Whatever happens in this forum or in the Court, they will not stop their prophetic witness or their actions to serve the public interest and to speak out whenever it is required. But they do believe that the Government may not impair religious practices without compelling justification, and therefore they join the search for a solution to the *Smith* case.

Fifth, we do have concerns borne of long and sometimes bitter, divisive and expensive experience in the public arena in the area of abortion, in the area of public services. Whether the Religious Freedom Restoration Act if enacted in its present form will be used to promote access to abortion is a serious issue. The details are provided in my written testimony and in the commentary, and I will not restate those details here. Claims have been, are being and will continue to be made that religious practices, however they may be understood, justify access to abortion. There is no question that abortion is within the scope of activities which the people who drafted this legislation intend will be offered into the courts, and it is certainly, if you believe the public statements of those drafters, a certain number of them are expected to succeed. The risk that abortion on account of religion can be obtained under the Religious Freedom Restoration Act is one the conference believes cannot be ignored.

The second level of concern, whether the Religious Freedom Restoration Act can be used to attack beneficial participation of religious groups in government programs and government exemptions is another important issue. The details, again, are in my written statement and in the commentary.

The central theme is this: The Religious Freedom Restoration Act will become the preferred mode to attack such cooperation because of the stringent test which the Congress intends to apply. It is fairly easy to state a claim under a remedial statute designed to pro-

mote litigation. It is not restoration to apply that test to the operation of government programs where the Congressional Research Service and others bear out that test has not been applied before.

Finally, sixth. The conference can support legislation but not an unamended or unstructured H.R. 2797. The risk to human life and to government programs and the beneficial cooperation between religion and government is too serious a risk to be taken through an unamended H.R. 2797.

And I thank the subcommittee for the opportunity to present this statement.

Mr. EDWARDS. Thank you very much, Mr. Chopko.  
[The prepared statement of Mr. Chopko follows.]

PREPARED STATEMENT OF MARK E. CHOPKO, GENERAL COUNSEL, ON  
BEHALF OF THE UNITED STATES CATHOLIC CONFERENCE

Thank you, Mr. Chairman, for the opportunity to present the views of the United States Catholic Conference ("Conference") on the Religious Freedom Restoration Act of 1991 (H.R. 2797). As a major religious denomination in this country, the Catholic Church deeply appreciates the critical need to protect the right of individuals and religious organizations to practice their religion free of unwarranted governmental intrusion at any level. Embodied in the Religion Clauses of the First Amendment, this principle is at the foundation of our American heritage and has served our country well since the beginning of the Republic.

We shared the concern of those in the religious community when the U.S. Supreme Court rendered its decision in Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872 (1990). In its majority opinion the Court declined to apply the strict scrutiny/compelling state interest test to an Oregon criminal statute that prohibited the sacramental use of peyote by Native American Indians. Rather than confine its ruling to the criminal statute before it, the Court went out of its way to suggest that in most cases government need only demonstrate a rational basis to sustain a generally applicable regulation or restriction that infringes on religious practice. As the April 17, 1992 Report for Congress prepared by the Congressional Research Service indicates, many lower courts have followed the Court's suggestion and applied the Smith analysis to a variety of civil statutes. The result in these cases generally is that the religious claim loses.

While the reaction of the religious community to Smith was generally negative, candor compels us to acknowledge that religious claims brought under the Free Exercise Clause prior to Smith generally had not fared well either. In the years prior to Smith the Court had not used the compelling state interest test in a number of cases. Even when it employed a strict scrutiny analysis, religious claims still failed before the Court in several cases, particularly where federal statutes were involved. The track record for religious claims in the lower courts was even worse, as Judge Noonan aptly demonstrated in his dissenting opinion in EEOC v. Townley Engineering, 859 F.2d 610, 622-25 (9th Cir. 1988). In an appendix to his opinion, Judge Noonan lists seventy-two decisions by the federal circuit courts of appeals, sixty-five of which were decided against the religious claimant.

There is general agreement in the religious community that Smith is troublesome. There is, however, no consensus at this time on the appropriate legislative response. This reflects in part the reality that there are longstanding differences over the proper interpretation of the Religion Clauses of the First Amendment. Religious freedom and how best to protect it are complex issues that do not lend themselves readily to simple solutions. A major problem with Smith is that it seemed to adopt a uniform single test to be applied to a multitude of situations. In this respect H.R. 2797 suffers from the same defect as the Smith decision.

While H.R. 2797 has the potential to accomplish much good in protecting religious practices, it also has the potential to create much mischief. Under the appealing rubric of "restoration" H.R. 2797 purportedly would return the state of the law to the status quo prior to Smith by guaranteeing the application of the compelling governmental interest test in every instance in which a plaintiff claims the free exercise of religion has been burdened in any way or to any extent. Simply put, this was not the case prior to Smith. The Court had not used the compelling interest test in all cases, as the CRS Report confirms. Not surprisingly, the Court in its constitutional jurisprudence had not locked itself into a single test to determine all free exercise claims. Yet, this is precisely what H.R. 2797 attempts to accomplish legislatively. In this sense, restoration is a misnomer.

In addition, because statutes by their nature are different from constitutional provisions, it is impossible for a statute enacted by Congress to restore interpretations of constitutional law by the Supreme Court. It must be emphasized that we are not rewriting the Constitution here, but rather attempting to enact a new statute. Courts, particularly this Supreme Court, often defer to legislative decisions, even when they disagree with the decision. Thus, it is critical that Congress carefully consider and avoid the potential adverse applications of any legislation that it might enact, in this case H.R. 2797.

Given the absence of further direction from the Court, the Conference favors a legislative response to Smith. We are concerned, however, that the rigid single test approach of H.R. 2797 can produce significant adverse results, if applied to all claims at all times. More specifically, we are concerned that H.R. 2797, if enacted, will provide a powerful procedural litigation advantage for some, not for the protection of religion from unwarranted governmental intrusion, but to attack the rights and interests of other individuals and religious groups. When taken seriously, as H.R. 2797 says it must be, the compelling interest test is a very difficult procedural hurdle for government to overcome. Indeed, Justice Scalia described it in Smith as creating a presumption of invalidity. And the Court itself recognized in Speiser v. Randall, 357 U.S. 513, 520 (1958), that the outcome of litigation, and the resulting vindication of legal rights, depends very often on the procedures by which cases are adjudicated. Thus, before enacting legislation, such as H.R. 2797, that provides significant procedural advantages in litigation, Congress has the responsibility to anticipate, and avoid if possible, the potential use of the legislation to produce negative results contrary to the public interest.

The Conference has legitimate concerns that H.R. 2797 will be utilized to attempt to promote the destruction of innocent unborn human lives, and to pit religious groups and individuals against one another in disputes over a variety of social and

education programs as well as tax exempt status. These concerns are based on years of experience in the public arena.

There is now no question that from the beginning of its drafting process H.R. 2797 was intended to include religiously based abortion claims. Supporters of the legislation, including those directly involved in the drafting process, acknowledge this, but they suggest that these claims will be limited to a handful of situations in which the life of the mother is seriously threatened. In any event, the argument continues, the Supreme Court will eventually overturn Roe v. Wade by finding a compelling interest in protecting unborn life throughout pregnancy. Therefore, most abortion claims brought under H.R. 2797 would fail its test because they are outweighed by a compelling state interest. Two key points are obvious from this reasoning - H.R. 2797 will allow abortion claims to be litigated and its backers expect a certain number to succeed.

In addition, we are not at all reassured by this analysis. First, past and current litigation demonstrates that religiously based abortion claims are framed far more broadly than the rare life-threatening situation. Reasons will include the age of the mother, potential defects in the unborn, family and economic concerns, mental health and others - in short, the gamut of interests framed by Roe v. Wade and Doe v. Bolton. In the pending litigation challenging Utah's abortion statute the



plaintiff stated, in support of her religious claim, that she "could not, morally, continue in school and have too little time to devote to a newborn." H.R. 2797 does not distinguish between these kinds of claims and a life-threatening situation; both will be subjected to strict scrutiny. In addition, courts adjudicate claims on the basis of the sincerely held religious beliefs of the individual involved, which need not be in conformity with the teachings of any particular denomination. Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989). The range of possible claims is extensive.

Second, one cannot presume that the Supreme Court will overturn Roe v. Wade by finding a compelling interest in unborn life throughout pregnancy. More commentators conclude it is probable if that Roe is overruled, it will be by recognizing that abortion is not a fundamental right but at most a "species of liberty interest," as the Justice Department recently argued before the Supreme Court in the Pennsylvania abortion case. Constitutional challenges to abortion laws will likely then be subjected to a form of rational basis balancing. Challenges to abortion restrictions under H.R. 2797 must be subjected to a compelling interest analysis, a stringent judicial test that has provided no protection for the unborn for twenty years. If you were an abortion advocate after such a demise of Roe, which route would you choose to litigate?

Third, under the current state of the legislative record, abortion claims brought under H.R. 2797 could succeed. As a matter of constitutional construction, we would agree with Professor McConnell and his colleagues that the Court is not likely to re-create constitutional abortion under a different right if it reverses Roe v. Wade. If there is no privacy right, it is unlikely there will be a constitutional free exercise right to abortion. Whether the Supreme Court allows abortion claims under H.R. 2797 depends on legislative intent, not judicial predilections. We are writing a statute, not the Constitution. This Court defers to legislatures, especially when it says these issues belong in the political realm anyway. Even if only a few claims to obtain abortions do succeed under H.R. 2797, what restraint will remain on district and state attorneys to deny abortions to others who offer affidavits conforming their claims, beliefs, and motions to the prior successful claims? These claims will be numerous and far-reaching in their impact.

Finally, it is sometimes said that H.R. 2797 says nothing about abortion, but simply throws the matter to the judiciary. If Congress says absolutely nothing about this matter, the only two significant abortion cases in which free exercise abortion claims have been decided on the merits provide a stark contrast that illustrates the risk to the unborn embodied in H.R. 2797. In 1980, a federal district court held that the Hyde Amendment's restriction on abortion funding violated the Free Exercise Clause. This holding was later reversed on procedural grounds.

In 1992, the Utah federal district court, relying solely on Smith, rejected plaintiffs' free exercise challenge to the Utah abortion statute. The conclusion invited by these two cases is that constitutional free exercise claims are not now likely to succeed but could be revived in statutory claims brought under H.R. 2797.

The lives of the unborn are too important to be put at risk under H.R. 2797. If as we foresee, H.R. 2797 creates a wide alternative route to the Court's abortion jurisprudence for those who favor abortion on demand, an amendment is needed. If, as some supporters of H.R. 2797 so confidently insist, these abortion claims are doomed to failure anyway, there is no reason why they cannot be eliminated from the bill.

Another area where H.R. 2797 could cause great harm is in the operation of government programs. For more than forty years, litigants have repeatedly used the Free Exercise Clause as well as the Establishment Clause to challenge the involvement of religious organizations in public programs. Such claims have been made expressly in litigation challenging the involvement of children attending religiously affiliated schools in federal and state education programs, the extension of tax deductions and credits to parents, the participation of colleges and universities in education programs, and the participation of religiously affiliated social service organizations in public welfare programs such as the Adolescent Family Life Act. As recently as

1989, testimony submitted to another committee of this House threatened First Amendment litigation over the involvement of religious providers in the successful Head Start program as well as the recently enacted Child Care and Development Block Grant program.

Religious groups and others have long disagreed over the amount of interaction between religion and government in public programs permitted by the Religion Clauses. Some argue for absolute separation of church and state - contending that religious liberty is infringed if any tax money is used in any way that may benefit a religious group directly or indirectly. This absolutist approach has consistently been rejected by the Supreme Court and the Congress, as evidenced by the wide variety of federal programs in which the government and religiously affiliated agencies cooperate in the delivery of social, health, education and other services to those in need. No one's practice of his or her own religion is actually impeded by the operation of such programs. Yet arguments and litigation contending that they violate religious liberty persist.

This basic disagreement over the meaning of religious liberty characterizes the dispute over the potential use of H.R. 2797 to disrupt public programs. Anticipating that the Supreme Court is becoming more accommodationist in its Establishment Clause jurisprudence, it would be naive to assume that those who would champion absolute separation will not use every alternative

means available, including H.R. 2797, to attempt to exclude religious organizations from participating in public programs. Congress should not provide a new federal statute that would permit one person or group to sue the government to exclude some other person or group from participating in a public program. There is simply no need for another vehicle for this kind of third party litigation, as H.R. 2797 would provide.

The threat of litigation in this area is real, and the basis for predicting success or failure is untested. We are not aware of any case that has applied the compelling state interest/least restrictive means analysis to these kinds of programs prior to Smith. Yet H.R. 2797 explicitly requires the compelling interest test in every case brought under it. It is hardly "restoration" to require the application of the test to situations where it had never been applied in the past. In any event, if successful, challenges brought under H.R. 2797 could seriously disrupt a myriad of federal and state programs where legislatures, including the Congress, have wisely concluded that the participation of religious providers contributes to the successful operation of government programs and thus to the public good.

In the end it is the individual beneficiaries of government services who will suffer from the disruption of these programs. It is ironic indeed that H.R. 2797, a bill intended to protect religious liberty, could be used to harm religious organizations and the many needy individuals they serve. This is a risk that

Congress need not include in this legislation.

Finally, the Conference is concerned that H.R. 2797 will provide a mechanism by which groups or organizations will be able to challenge another organization's tax exempt status. The Conference was subjected to this kind of litigation for eight years in the 1980's. From firsthand experience, I can assure you that such litigation is very expensive to defend. Whether a litigant could actually win is not the only issue - - the prospect of any church being compelled to submit to rampant discovery requests for sensitive internal documents and for the depositions of its leaders from all parts of the country is frightful. After our successful defense to this litigation, Establishment Clause standing for these kinds of claims is less likely. Free Exercise standing is more debatable. But debate about the constitutional standard is not the issue -- we are writing a statute here. Standing to bring this kind of litigation should be precluded under any legislative response to Smith. We are aware that section 3(c) of H.R. 2797 attempts to accomplish this, but we do not feel that it does the job adequately. If there is no free exercise standing to challenge another's tax exemption anywhere, as our critics insist, what harm is there to say it in the legislation? This would remove any doubt and would benefit all religious groups, and have the effect of moving the Conference closer to support.

In summary, the Conference can support an appropriate legislative response to Smith but we do not agree that H.R. 2797 is that legislation. We cannot support legislation that will put unborn lives at risk. Nor do we think it wise to enact legislation that will encourage third party litigation by one person or group to challenge the way the government is treating another person, e.g., by allowing someone else to participate in a program or by granting an exemption. Religious groups and others have litigated with each other and with the government for years over the participation of religious groups in government programs. Those claims can and should be litigated under the Establishment Clause which is supposedly unaffected by H.R. 2797. It does not serve the public interest to expand the potential for disruption of public programs as H.R. 2797 would.

Many of the issues discussed here are explained in more detail in the May 24, 1991 Commentary on Legislative Remedies to Smith prepared by my Office which I submit for inclusion in the record.

Again, I thank you for this opportunity to present the Conference's views on the Religious Freedom Restoration Act of 1991.

Mr. EDWARDS. The gentleman from Oregon, Mr. Kopetski. We will be operating under the 5-minute rule.

Mr. KOPETSKI. Thank you, Mr. Chairman. I appreciated Elder Oaks' brief review of religious persecution of Mormons in this country. I come from a State where, unfortunately, our history is tarnished as well with respect to our treatment of the Mormons. I did some research, I know, in college in old newspapers and came across some really scurrilous attacks on individuals in the faith.

We have a large Mormon population in our State and we are very proud of that. We also have a large Catholic population in our State as well, and they too in the twenties were persecuted in our State. And here we are today trying to address this most serious of issues because so many people came to the United States because of religious persecution in other lands and are here today because of wanting that free exercise of their faith.

It seems that every time we turn around there is an abortion issue on Capitol Hill. I wish we could get beyond this.

I thought, Mr. Chopko, that your statement that the Supreme Court defers to the political process is so true in many ways, and that is why I think that this committee and this Congress needs to act in this area. The *Smith* case came out of Oregon. It is great for lawyers to debate these heavy first amendment issues, but I think we need to resolve this issue and I think this is proper and correct legislation to do that.

I was looking, Mr. Chopko, at your testimony. To begin with, I want to question a statement on page 2. You say, "There is, however, no consensus at this time on the appropriate legislative response." Well, it seems to me that in the religious community, and there is a wide array of special interest groups that are the religious community in our country, and they do lobby up here on Capitol Hill, that we have the Elder as spokesperson from the Church of Jesus Christ, we have the Evangelicals who are in support of this bill, and it is the Catholic Conference singly, it is my understanding, that is not in agreement. But sort of almost in agreement but for the abortion issue.

It seems like, therefore, that if we look at the numbers of people in this country through these representatives that we do have a consensus.

Mr. Chopko, I feel there is a consensus. It is not unanimous but it seems that there is. And, if the Quakers were here, they would say, you know, "We've got to bring the Catholics into the fold," so to speak.

Do you want to respond to this?

Mr. CHOPKO. I think that in many respects there is a consensus. There is a consensus of concern about *Smith* and its potential implications. There is a consensus about the numerous other things which *Smith* has done and has the potential to do to the religious community. But I think as the written statement, and certainly the commentary, in more detail will bear out there is no consensus on other aspects of what religion means, what religious liberty means, and in the specific area of abortion, the variety of views on that subject.

So I do not think that there is a consensus that we have arrived at the proper vehicle among all of us, the proper specific vehicle to



resolve these claims. There is a consensus among us about a number of issues and the importance of a number of issues, but no consensus about the proper and specific way in which they may and should be addressed.

I also think, for the record, the Lutheran Church, Missouri Synod, is also not in support of this legislation.

Mr. KOPETSKI. OK.

Mr. CHOPKO. There are a number of other groups that are outside as well.

Mr. KOPETSKI. In your testimony you say that "whether the Supreme Court allows abortion claims under H.R. 2797 depends on legislative intent, not judicial predilections." If that is true, and the chief sponsor of the bill states that is neutral on the issue of abortion, and the coalition supporting the legislation consists of anti-abortion and prochoice organizations who state that the legislation is neutral, isn't your—well, is your argument meritorious or not? I mean everybody is saying this is neutral but you.

Mr. CHOPKO. That is a fair question. I think that the answer to that is found in part in the statement of findings and purposes in the legislation, and also based on the nature of the statute itself.

The findings and purposes guarantee the application of the compelling interest test to all claims brought under this act. Second, the statute is intended to be remedial, which means that under traditional canons of construction it will be construed broadly and exceptions will be narrowly construed. It is also clear that the people who were involved in drafting the legislation have said both in their newspaper interviews, in their correspondence and in their other statements for the record here and elsewhere that the abortion issue did arise in the drafting process, that it was specifically recognized that abortion would be part and parcel of this legislation, and that at least for a specific number of claims they were expected to succeed.

Abortion claims, however motivated, whether the standard is compelled, motivated, strongly felt or any other test will be allowed under this statute. We think that the current state of the law in this procedural test gives it an uncertain future.

Mr. KOPETSKI. Thank you. My time has expired.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. And I regret imposing on my good friend, Mr. Kopetski by bringing up abortion so frequently. Every time we turn around there is an abortion issue. I am as weary of it as the gentleman. Perhaps more weary. It is just a million and a half abortions a year bothers my conscience, and a lot of people's conscience. And as long as it takes, through exhaustion or expiration, some of us are going to fight to protect unborn children. And, if it gets burdensome, so be it. We think it is worth the fight.

Mr. KOPETSKI. Will the gentleman yield?

Mr. HYDE. Sure.

Mr. KOPETSKI. I don't mind the fight.

Mr. HYDE. Thank you.

Mr. KOPETSKI. But we differ on this issue.

Mr. HYDE. I know that. Tell me something I don't know, Mike.

Mr. KOPETSKI. Well, we differ legally and on the moral issue as well, and the emphasis in terms of whether we should protect the rights of the woman's choice in this issue as well.

Mr. HYDE. Sure.

Mr. KOPETSKI. I respect your decisions and your position tremendously.

Mr. HYDE. I respect yours. I just disagree vigorously. I believe I am fighting to protect innocent human life. You believe you are fighting to protect the sovereignty of a woman in deciding whether or not she should carry her child—she already has a child. It isn't whether to have the child. When you are pregnant you have got a child. The question is do you deliver it dead or alive. That is the difference.

But this is not the time or the place. I would be delighted to argue, debate, discuss, exchange rhetoric with the gentleman. But I just wanted to comment on your comment about how weary you are of hearing about this issue. I assure you I share your weariness. But I don't intend to desist as long as I have breath.

Now, it seems to me there is an assumption being made that *Roe v. Wade* is going to be overturned by finding a compelling State interest in protecting unborn life throughout pregnancy. I don't accept that. As a matter of fact, I think if it ever is overturned, and I don't assume it will be necessarily, but in the *Webster* case Chief Justice Rehnquist and Justices White and Kennedy clearly indicated that *Roe* may be overturned, if it is, by finding that the privacy right, wherein rests the right to exterminate your unborn child, which you gentlemen are against, I take it, is a liberty interest protected by the due process clause. That is what they said in that case.

Now, if that is so, and if *Roe* ever is overturned, not by finding a compelling State interest in the protection of preborn life or human life during the entire term of pregnancy, then how does that protect an unborn child from an assertion under this statute: Government may burden a person's exercise of religion only, and the claim is made my religion requires me to exterminate my unborn child, or, to use the preferred phrase, terminate the pregnancy, only if it demonstrates that application of the burden to the person is essential to further a compelling governmental interest.

So the only way you can deny an assertion, a claim by a pregnant woman that she wants an abortion and her religion requires her to do so, and there are plenty of claims along that line—we have got a whole organization, the Religious Coalition for Abortion Rights. By the way, I commend them for using the word "abortion," just as I do the National Abortion Rights Action League. At least they don't say reproductive rights or choice. They talk about what they are talking about.

But how do you overcome this statutory basis for asserting that my right to an abortion is based on a religious conviction and you can't stop me because you have not asserted a compelling State interest in the protection of prenatal life? Do you have an answer to that, Mr. Chopko?

Mr. CHOPKO. I think that I share the concern that the Supreme Court may not use the compelling interest in life as a way to restructure the abortion right, and that it will do so, I think, be-

cause—the more likely avenue for the Court to do that would be to return the matter to the States and allow it to be a matter of State choice. And therefore I think it becomes much more problematic under the state of the law and under H.R. 2797, if it is passed tomorrow, whether a State will be able to assert a compelling interest sufficient to justify a restriction on an abortion claim.

Again, the question is not one of constitutional authority, but statutory intent. I think that all claims are intended to be included within the scope. The test is supposed to apply to all claims across the board. You are applying a compelling interest analysis to abortion which over the last 20 years has not proven to be satisfactory protection to the lives of unborn children. In fact, under the application of that test over the last 20 years abortion restrictions have been uniformly rejected by the courts. So throwing the matter to the courts with this test without guidance and without adequate legislative direction in these circumstances, in my view, is not a satisfactory conclusion.

Mr. HYDE. Another problem, one of considerable interest to me, is the competency of Congress to overrule the Supreme Court. We have three coequal branches of government, but we each have different functions, an executive, a legislative and a judiciary. Now, the judiciary has said some things. They have established standards. They have said, erroneously I believe, in the *Smith* case that a rational basis for a law is enough and you don't need strict scrutiny or a compelling State interest.

Do we, a legislative branch, have the competency to reach over to the Court and to change its interpretation of the first amendment Constitution? Where do we get that power, Mr. Chopko?

Mr. CHOPKO. I have not definitively studied that issue, but I had raised the question with legal scholars 2 years ago who had been instrumental in drafting what became H.R. 2797, and I am satisfied that there is a colorable argument under section 5 of the 14th amendment. I know that there are some questions about, and perhaps others either on this panel or on tomorrow's panel of the law professors would be in a better position to comment on that. I needed to satisfy myself at least that I was not asking my clients, the bishops, to explore a legislative remedy that would be doomed to an unconstitutional result.

Mr. HYDE. Well, Nadine Strossen, who will testify on the next panel, in the summary of her testimony says by adopting this standard the act merely reflects what has been the constitutional standard under the first amendment prior to *Smith*. It does not decide any issue, but merely returns the issue to its previous standard of analysis. Congress has the power to restore this standard by virtue of the 14th amendment and because, though it could never take away constitutional rights, it always has the power to enhance those rights.

I am wondering whether that justifies Congress changing the standard of review that the Court must give to legislative acts by elevating it back, raising it back to a compelling State interest from a rational basis.

Mr. CHOPKO. Well, I think, Congressman Hyde, that is what has led us to some of our concern about the scope and direction of H.R. 2797, because specifically the Court has not applied a compelling

interest analysis with any uniformity across the board to all claims and all times and all circumstances. That has led us to be a little bit skeptical about especially the area of abortion and the cooperation with public programs.

Mr. HYDE. Now, the last question, and I thank you for your indulgence, Mr. Chairman.

We have been very selective in drafting this law. We picked the cases whose standards we like. We have picked *Sherbert v. Verner* and *Wisconsin v. Yoder*. Now, Judge Noonan has cited some 75 cases, as I believe, pertaining to religious freedom and pertaining to free exercise where the compelling State interest standard pre-*Smith* was not used.

So are we able to narrow down to the very cases that we support that we wish to reimpose on the Court? Have we got that kind of a selective membrane and we are able to do that and tell the Court, "You guys follow *Sherbert* and *Yoder*, not these other 75 cases?" Is that a little arrogant, do you think, on the part of the legislative branch?

Mr. CHOPKO. Not necessarily. What you are setting up is a burden of proof and a procedural hurdle, as I think will be pointed out in the commentary when you have the chance to review it. I apologize that we did not submit it in advance now. It seemed to us throughout this process that simply putting—that if all we're doing is putting back the law the way it was the day before *Smith* it really is not as good as we can do to protect religious liberty in the United States. That we ought to show that we are serious about it. I think that at least the people who are involved in H.R. 2797 intended to try to pick a procedural test to convey that they were, in fact, serious about it, and so they reached back. I think it is unfortunate that they had to go back 20 or 30 years to find judicial commitment to religious freedom. And that is why I think putting the law back the way it was on April 16, 1990, the day before *Smith*, maybe somewhat problematic for religion. In many respects, that would be a preferred mode. As I said, the conference has joined the search for legislative solutions, but I am not at all sanguine that this test and this statute to apply to all cases is the best route.

Mr. HYDE. Very lastly. When it comes to determining whether you are right or wrong in these struggles over constitutional rights, the first amendment rights, don't you feel kind of—do you feel it is appropriate that you should count noses before you make your mind up, and if most of the big guys are against you, maybe you are wrong? Is that the way you approach these things?

Mr. CHOPKO. I think if I approached life and law that way I would probably do very little.

Mr. HYDE. I don't think we would ever have any civil rights laws if it was a question of counting noses at the time you begin to assert the desirability, the constitutionality of these important rights.

Mr. CHOPKO. But I think that it is also dangerous to rely simply on counting noses, whether you are counting Supreme Court Justices or reindeer. The idea that five Justices have spoken in favor of a compelling interest in life throughout pregnancy is, of course, true. But they have not all five said it the same in the same place, and that is what gives the people who litigate these claims, like

National Right to Life or Americans United for Life and us, some pause about the ability and willingness of the Court to do that in any case.

And, as another example, if you look at the Lemon test, for example, six of the current Justices of the Supreme Court have spoken ill of *Lemon v. Kurtzman*, as if they were waiting, you know, for that demise. But no six of them have joined in opinions supporting an alternative, and so it continues to be good law.

Mr. HYDE. Thank you very much.

The gentleman from Texas, Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Mr. HYDE. Temporary chairman—pro tempore.

Mr. WASHINGTON. You are the chairman at the moment.

I first would like to apologize to all three of the members of the first panel for not being here at the beginning of the meeting to hear your remarks. I am sure they were capsulated. Please take comfort in the knowledge that between 1 o'clock and about 4 this morning I read all of your testimony in its entirety.

Mr. Dugan, I find your statement to be very forceful and forthright. Elder Oaks, a most loquacious statement, directly to the point. So, since I agree with you on the subject matter that we have under consideration, pardon me if I turn my attention to Mr. Chopko.

Borrowing from my friend from Oregon, he and I thought that the Catholic Church was one of the big powers around here. Are we incorrect in that?

Mr. CHOPKO. Sorry. I didn't hear the end of that.

Mr. WASHINGTON. The Catholic Church is one of the big forces. In response to questioning from the gentleman from Illinois, Mr. Hyde, talking about the relative positions of those who are powerful and those who are not, it seems to me that at least in the sphere of political influence the Catholic Church is much more powerful than the Church of Jesus Christ of Latter-day Saints, at least in perception. Wouldn't you agree?

Mr. CHOPKO. Although we are the largest denomination in the United States, it is apparent that we are one of many. That there is no majority religion in this country.

Mr. WASHINGTON. No. I didn't say that. That wasn't what you suggested in your answer to Mr. Hyde, if I may cut you off. You didn't say the majority denomination, you said one of the big wheels, or some words to that effect. And, if there is such a definition, the Catholic Church certainly fits it. But let me not waste my time with that.

On page 2 of your written testimony, at the bottom, in the last paragraph on that page, summing up the thought expressed in that, and perhaps in part the preceding paragraph, you said a major problem with *Smith* is that it seems to adopt a uniform single test to be applied in a multitude of situations. In this respect H.R. 2797 suffers from the same defect as the *Smith* case. And I don't understand exactly where you are going.

Your metaphysical reasoning went off in five different directions for me. You criticize the *Smith* case in your earlier statement and then you say that the bill suffers from the same infirmity, and I just don't understand what you mean by that, please.

Mr. CHOPKO. Well, conceptually *Smith* says that regardless of the interest that is implicated, regardless of the practice that is implicated, regardless of the Government's reason for doing what it is doing it will apply one test, and there are a number of exceptions, as I said in my statement.

Mr. WASHINGTON. Right.

Mr. CHOPKO. And we are not sure exactly what all those exceptions will mean.

Mr. WASHINGTON. OK.

Mr. CHOPKO. But there will be one test across the board in all situations.

Mr. WASHINGTON. Let me stop you right there. Hold the point and then go on with your answer when I interject this.

Mr. CHOPKO. OK.

Mr. WASHINGTON. Were you not, before the *Smith* case was decided with respect to the exercise of religion, under the assumption that there was one test to be applied?

Mr. CHOPKO. No.

Mr. WASHINGTON. Procedural test being the compelling State interest. You don't consider that to be a test?

Mr. CHOPKO. It is a test, but it was not the only test that was applied, first. And second, it was not applied in all cases, as the Congressional Research Service report to the Congress on April 17 of this year bears out.

Mr. WASHINGTON. I haven't seen that report. You made reference to it. There are two previous reports: one from 1990, one from 1991, which I have seen.

Mr. CHOPKO. Yes.

Mr. WASHINGTON. But I take your word for what it says.

Mr. CHOPKO. It is interesting in two respects. One, it lays out a development of the cases and it specifically identifies the cases in which a compelling interest test was stated but, perhaps, resulted in more balancing, not strict scrutiny at all. So it identifies the cases in which the Court did not even engage in the pretext of applying compelling interest.

Mr. WASHINGTON. I see a danger in the way that you are taking this, though.

Mr. CHOPKO. Pardon?

Mr. WASHINGTON. I see a danger. Let's assume for the sake of discussion, because I don't think it is necessary to the conclusion, that there were—and I suggest that there were several tests. And Mr. Hyde is right. I think those of us who believe in the free exercise of religion, at least as I define it, find much comfort in *Sherbert*, and perhaps there is some consternation in some of the other tests. But isn't the point that Elder Oaks makes, the very fact that if you have considered by some an unpopular religion, those are the people who need protection the most. That is why I asked you the question about whether the Catholic Church was a big dog in the fight or not.

Those who are looked upon with disfavor for whatever reason are those who need protection the most. The Constitution is to protect unpopular ideas, not popular ideas. If we take a vote on it and 51 percent of the people in the United States agree on hither, thither or yon, they don't need their rights protected. It is the people who

are in the minority, not ethnicity, based on how much melanin is in their skin or anything like that, but on the question of religion, who need the protection the most, so they can practice it. That is what this country was founded for, so the people could, by God, like you said in the final statement of—I like that—we claim the privilege of worshiping Almighty God according to the dictates of our own conscience and allow all men—and I am sure they mean women—the same privilege. Let them worship how, where or what they may.

I mean isn't that what religion is really all about? The freedom of religion is really all about?

Mr. CHOPKO. I agree.

Mr. WASHINGTON. OK. So then who do you decide gets the compelling State interest test and who gets the lesser constitutional burden test then? Isn't there a danger there? You don't want us to decide that.

Mr. CHOPKO. But I do think that the, for example, when there is a clash of competing assertions of fundamental right—

Mr. WASHINGTON. Such as?

Mr. CHOPKO. Let's say a right to privacy and take it back to the context of abortion.

Mr. WASHINGTON. But you have already said that there is no right to privacy in the Constitution?

Mr. CHOPKO. Pardon me?

Mr. WASHINGTON. I am sorry I cut you off. But you have already said in your statement that there is no right to privacy in the Constitution.

Mr. CHOPKO. Elder Oaks made that assertion. All I am talking about right now is judicial process.

Mr. WASHINGTON. OK.

Mr. CHOPKO. In judicial process when there is a claimed clash of fundamental interests—

Mr. WASHINGTON. All right.

Mr. CHOPKO. For example, let's say the right of parents to educate their children and the right of the State to engage in, let's say, child protection. OK?

Mr. WASHINGTON. Loosely defined.

Mr. CHOPKO. Loosely—well, that is right. Just for purposes of this hypothetical. The Court would engage in relative balancing of those interests regardless of who goes first or who has the burden of proof or what test and theory applied. The matter of judicial process, the courts balance those interests.

Another example would be in the parental notification decisions decided in 1990 by the Supreme Court. Again, Supreme Court, when there is a clash of claimed fundamental right the Court engages in a relative balance. It does not apply one test or any one in particular test to these circumstances.

In H.R. 2797 the Congress is making the determination that where there are these situations presented in the future where there are claimed clashes of fundamental right the only test that will apply, and will apply in each and every case because the legislation guarantees its application, will be the compelling interest test.

Mr. WASHINGTON. On the side of free exercise of religion.

Mr. CHOPKO. On the side of the assertion of the religious claim, whatever free exercise means. It is not defined.

Mr. WASHINGTON. So you are saying you don't agree that where religion is on one side of the scales, euphemistically, and another claimed or perceived or recognized fundamental right, whether constitutional or not, is on the other side, that since religion was agreed all the way back to William Penn and others in writings to be—and we think there is something magic in the Founding Fathers having put it in the first amendment to the Constitution, rather than in the 10th or the 11th or the 12th or whatever, that they intended for it to go first. You are saying that when there is a relative claim between this right, whatever we want to hypothetically call it—

Mr. CHOPKO. Two first amendment rights, for purposes of discussion.

Mr. WASHINGTON. Two first amendment rights, OK. That the freedom to exercise religion shouldn't take precedent over the other?

Mr. CHOPKO. All I am saying, for purposes of this discussion, is that the existing judicial process, in my opinion, would be that the Supreme Court or any court would balance those two interests and come to some conclusion.

I will say this. That where you are talking about religious practices, and these are matters of worship, liturgy, organization of churches, selection of ministers, doctrine, dogma, how that is asserted and so on in the faith community, that those are the kind of things that generally have resulted in the application of a compelling interest test, and have not been the result of litigation where there is an assertion of a fundamental right going against that. So they have not been subject to balancing. They would not be subject to balancing under H.R. 2797, and I don't think they ought to be subject to balancing.

That is what I think we are talking about when we talk about—that is what I talk about when I talk about religious practices.

Mr. WASHINGTON. And the purpose clause to which you referred in response to the question from the gentleman from Oregon, you complain that preeminence is given to the application of the compelling State interest test in favor of the free exercise of religion. Don't you want that?

Mr. CHOPKO. I think in a vast majority of cases the answer to that question is yes.

Mr. WASHINGTON. Well, who gets to choose when it doesn't apply?

Mr. CHOPKO. In this case, because we are writing legislation, the Congress gets to choose. If we were not writing legislation and we were in the courts, the Supreme Court ultimately would make that choice about the application of a test.

Mr. WASHINGTON. I didn't finish, but my time has expired. Thank you very much.

Mr. EDWARDS. Thank you, Mr. Washington.

Elder Oaks, what do you think might happen insofar as your religion is concerned if this bill is not passed?

Mr. OAKS. If it is not passed?



Mr. EDWARDS. If it is not passed. It does not become law, what is the danger you see to the Mormons?

Mr. OAKS. I don't foresee a specific danger to my church. I think the danger is to churches and religious groups that are small and lack an effective voice and a significant influence. Perhaps my church could be at some disadvantage in some State where we had very few members. That is not the gravamen of our concern here. We are looking to the larger good and using the experience of our faith in history as a motivation to lend our voice to the protection of smaller groups against future incursions on their freedom.

Mr. EDWARDS. Thank you. Do either you or Mr. Dugan contemplate the *Smith* decision and see some bad things that have happened?

Mr. DUGAN. Yes, Mr. Chairman. I disagree that it is simply a matter of small religions. We have listed some of the "for instances" in my testimony. Take one of these large faith groups, the Roman Catholic Church. Must the Catholic Church get permission from the Landmarks Commission before it can relocate its altar, an instance of mischief here and the denial of free exercise of religion? Or will the Roman Catholic Church or some evangelical denominations be forced to ordain women—in the Catholic case, they have priests, and the evangelical denominations has ministers—when it is contrary to their interpretation of the scriptures?

So large groups as well will be affected. I don't think we can anticipate all of the mischief that is going to be done. That is a terrible choice of words. It is far more than mischief—a denial of our right to exercise our religion. So we are seriously concerned, very seriously.

Mr. OAKS. May I add, Mr. Chairman, I agree with what Mr. Dugan has said. I interpreted the earlier question as asking whether there was some unique vulnerability of my church. I don't foresee that. But I concur that every church large and small has reason to be gravely concerned with the current circumstance, as I said in my prepared and delivered testimony.

Mr. EDWARDS. Thank you. Mr. Chopko, you would be satisfied with the bill if there was a disclaimer on abortion in it?

Mr. CHOPKO. That and on operation of public programs.

Mr. EDWARDS. Pardon?

Mr. CHOPKO. That issue is very important, but also I think a measure to protect the cooperative nature of religious institutions with government in the public service. Those are the areas of concern that I outline in my testimony.

Mr. EDWARDS. Are you talking about Federal financing of religion?

Mr. CHOPKO. No, not at all. Oh. Not at all.

Mr. EDWARDS. Or schools?

Mr. CHOPKO. No, I am not talking about that. What I am talking about is the potential uses of this legislation to try to set aside the involvement of religious organizations in providing some form of public service; for example, soup kitchens or homeless shelters. Religious groups in this country provide a third of all of the homeless shelters and soup kitchens in the country, especially on an emergency basis. The participation of religious groups in that program

has been challenged among other things under the establishment clause.

It is claimed that taxing people through the general tax structure to support a program in which religion is in any way involved violates the taxpayers' freedom of religion. That certainly asserts a claim under the Religious Freedom Restoration Act, and I believe that in the absence of evidence to the contrary, and especially coming out of 40 or more years of litigation experience the conference has had in this area, that the statute will become yet another vehicle for litigation against these cooperative ventures. I think, you know, to the detriment of religion.

And again, H.R. 2797 does many good things. If it is putting the focus on what harm occurs to an individual in the practice of his or her religion, that is one thing. But where the target of the complaint under this statute or any other litigation vehicle is somebody else's interaction with the Government I have expressed a concern about that here, and we have provide documentation for the record.

Mr. EDWARDS. Do either of the other witnesses share that concern?

Mr. OAKS. Our study of the legislation persuades us that there is a legitimate basis for the concern that has been explained by Congressman Hyde and by Mr. Chopko, but we see that concern as largely a theoretical concern. As a practical matter, we do not assess it for legal and practical reasons as being of sufficient concern to withhold support from H.R. 2797.

After careful and prolonged study and conferring with our counsel and our academic advisers, we made a very deliberate decision to support H.R. 2797 and not to get into the special issue exceptions. We think H.R. 2797 is the best response to a problem that is very wide and not limited to the special issues, as important as they are and as important as they are to us, and that is why we favor H.R. 2797.

Mr. EDWARDS. Thank you.

Mr. DUGAN. Just two quick observations; namely, Congress should not try to slam the courthouse gate on any free exercise claim, that reflects terminology in my statement and then reverting to earlier discussion, where the Court has not applied the compelling interest case in all cases; particularly in some prison cases, for instance, government should have to—or the Court should have to justify interference with free exercise in every case.

Mr. EDWARDS. Thank you.

Unless there are more questions—Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

I think government can make a lot of mischief. When I was in the State House, I had a good partnership with the Seventh-day Adventists because there are so many times when government acts, and if you are not sensitized to these issues then government will interfere with exercising religion. You know, you look through a lot of a State codes and they are replete with that, and that does not even get into city councils and all the other thousands of forms of government; the Bill of Rights was put in place to protect us, we individuals against the actions of government. It is not an individual against an individual, it is government action against an indi-

vidual. So this is really important stuff that is very pervasive through our society.

We tend to—maybe in this hearing we are focusing a little bit too much on the abortion issue, and that is significant. Mr. Hyde, whom I respect immensely, and I differ on this issue. We differ on the emphasis, we differ on when life begins, and all of that.

But let's focus a little bit on what I think the chairman was getting at. The fact is, our society gets more complex, more regulations, and they do impact churches. There are environmental laws, there are health laws, there are public safety laws, there are discrimination laws, there are societal mores and emphases that say that Sunday is the Lord's day; well, not for everybody; and so we have to be mindful of that in our society if we are going to continue to progress as a nation.

I was interested that there are—and this is very real. You mentioned the altar case—you know, the landmark case—but also there is a recent case on an autopsy being performed on a Hmong where it is very fundamentally against their religion; there is the case of the prisoners being denied a rosary or scapulars, and I think that people in each religion need to examine these very items that they take for granted, that they take for granted as something that is very much a part of their religion, but it is at risk today because of the Supreme Court and its ruling, and that is why we are here today to change that.

I want to ask each of you this question, and it is my last question, and, Mr. Oaks, you got at it, I think you got at the heart of the issue, because we started off this hearing saying that every time we turn around it seems like there is an abortion-related issue here. But you are aware of that, you are mindful of that fully, and you are saying that the free exercise of religion is so fundamental, it is so important that when you have a choice of a possible abortion-related issue, possible, even though we are all saying this is a neutral act, you can still say that the possibility is still there, even given that and the significance of the abortion issue to you and to your institution, that you are willing to support this piece of legislation.

Mr. OAKS. That is correct, a good statement of the position.

Mr. KOPETSKI. Mr. Dugan.

Mr. DUGAN. And, absolutely, without religious freedom there wouldn't be much of a prolife movement; there would be some but not a great deal.

Mr. HYDE. But without life there wouldn't be any need for religious freedom.

Mr. WASHINGTON. Regular order.

Mr. HYDE. I apologize to the gentleman from Houston.

Mr. KOPETSKI. That is OK.

Mr. WASHINGTON. It is his time.

Mr. KOPETSKI. That is OK.

And, Mr. Chopko, the Catholic Church believes differently, that the abortion issue supersedes the importance of the free exercise of religion in the United States of America in 1992?

Mr. CHOPKO. That would not be an accurate statement. We are joining the search for a legislative solution, but we do not believe that the risk on abortion is a risk worth taking. I think to illustrate

the difference between Elder Oaks and myself on this, his view is that perhaps we have overstated the risk, and my view is that perhaps they have understated the risk on uses of this statute on abortion.

But as to the core of what we stand for, which is protecting of religious practices, I answered that in response to questions about what that might mean. On those issues we stand together, and I do think that by bracketing abortion and removing it from the debate we could pass this legislation tomorrow.

Mr. KOPETSKI. But because the threat is there, and it is not even real, it is not definitive—

Mr. CHOPKO. I disagree.

Mr. KOPETSKI. Well, I'm sorry. You disagree. A lot of us believe otherwise and have tried to craft the legislation that way. But that is sort of the nuclear bomb to the legislation; that destroys it, wipes it out, you know; it ends it because of the abortion issue.

Mr. CHOPKO. Well, we think that both issues—again, it is both and—religious liberty in this society and the right to life in this society are fundamental human rights issues, and the bishops of the United States are unwilling, even though they have health care institutions and schools and welfare systems and social service entities that are sufficiently at risk from governmental action, and we are concerned about that, we will not put human lives at risk to get these other benefits.

Mr. KOPETSKI. But you will allow the Supreme Court to continue to erode the religious freedoms of every person in this country who believes in exercising their religious beliefs. You are willing to allow the courts to chip away and take those rights away because of the abortion issue.

Mr. CHOPKO. Not at all, not at all.

Mr. KOPETSKI. That is what you are saying. If this piece of legislation fixes—if it fixes the problem, but because there is the taint of abortion to it, you are saying no to the legislation. It is OK to admit that; it's OK.

Mr. CHOPKO. I disagree.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Mr. CHOPKO. Because I think it is OK also to admit that this debate, if all we are focusing on is whether to bracket abortion and take it out, is no longer about religious liberty, it is about abortion, and we think that by—with our solution, again, not only could we pass legislation but we could solve all of the cases which are documented in the CRS report and in all the testimony that the three of us and others will submit; we could solve those problems.

Mr. EDWARDS. We have other witnesses. We would like to move along.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Washington, do you have questions?

Mr. WASHINGTON. Very briefly, Mr. Chairman.

On page 5, Mr. Chopko, of your written statement in the first full paragraph, you make reference to Members of Congress who have acknowledged that the purpose in drafting this legislation relates to abortion. Who are they, please?

Mr. CHOPKO. I didn't say—the testimony for the record says supporters of the legislation, including those directly involved in the

drafting process acknowledge this but they suggest these claims will be limited—

Mr. WASHINGTON. Excuse me. What question are you answering now? My question was: Who were the Members of Congress that you alluded to under oath in your testimony?

Mr. CHOPKO. Again, it doesn't say members, it says supporters of—

Mr. WASHINGTON. Are you saying that there are no Members of Congress then that fit in that category? That would be the simple, short answer to the question.

Mr. CHOPKO. I was not referring specifically to Members of Congress.

Mr. WASHINGTON. Were you referring in general to Members of Congress? You are a lawyer; now you know the difference between—you say specifically.

Mr. CHOPKO. Yes, I am, and what I was referring to—members of the congressional—again, you can't tell because of reading press reports, so that—we have letters from people; I'd be happy to provide the letters to you. But there are members of congressional staff, for example, who are unnamed but quoted in news reports over the last 2 years as saying specifically that it is included and that they do suggest that these claims will be made and that some of them are expected to succeed. Again, I would be happy to provide copies—

Mr. WASHINGTON. So the answer to the question that I asked and wanted an answer to is that there were no Members of Congress that you were alluding to. Would that be accurate?

Mr. CHOPKO. Yes.

Mr. WASHINGTON. All right.

Now then, one further point just for clarification. You are suggesting that, assuming, arguendo, that the Supreme Court decides *Roe v. Wade* adversely, well, the case from Pennsylvania or some other case—it doesn't have to be the Pennsylvania case; I've forgotten the style of it, but some other case—on the question of the fundamental right of privacy of a woman to make a decision with respect to abortion for herself in consultation with her God and her doctor, assuming that they explicitly or implicitly overrule—they being the Supreme Court—*Roe v. Wade*, I found it inextricably interwoven into your suggestion and, frankly, your objection to this legislation that the same Supreme Court that would reach that decision based upon existing precedents would find some solace in H.R. 2797 and would reestablish the right under the free exercise clause, and I frankly find that to be a most fallacious argument, that the same Court that wouldn't find the right to exist under what is already in the Constitution and what is already precedent would then, of the whole cloth, make up a new avenue to protect the same right.

Mr. CHOPKO. Well, if I made that argument I would agree that that would be fallacious, but the argument that I was making was not that the Court would reestablish a right to constitutional abortion under some other avenue.

Mr. WASHINGTON. All right.

Mr. CHOPKO. OK? And I share on that point the scholarship of Prof. Michael McConnell and others, some of whom will be here to-

morrow to testify, so that would be fair to direct to them. But what I'm talking about is construing a statutory right.

Mr. WASHINGTON. All right.

Mr. CHOPKO. And that, I think, in the ultimate analysis, depends on the intent of Congress, because the will of this majority is to defer to the political branch wherever it can, and that if you look at cases like *Johnson Controls* and some other decisions over the last term, you see that, even where Court—even where Justice Scalia himself believes that the result is wrong, he will nonetheless defer to what he thinks the Congress intended to provide, and that is the basis of my argument.

Mr. WASHINGTON. We come back to my friend from Illinois' point. In that case, you would have a statutory edict by the Congress as opposed to a constitutional—I mean if the Supreme Court redetermines—that is not the right word. If they make a decision that is contrary to what many believe the law is at least now in *Roe v. Wade*, it presumably would have to do it on some constitutional basis. So you are then suggesting that you have a constitutional right that the Supreme Court has then invested in the life of the child in being, or to be, depending on how you determine the issue, but that then the constitutional right shifts from the mother to the child in order to overrule *Roe v. Wade*. Then you have a statutory right on the other side. Everything I remember from law school is, when you have a constitutional right coming in conflict with a statutory right, necessarily the statutory right has to yield.

Mr. CHOPKO. That is true, but I guess—and this I didn't understand until you clarified that for me, and thank you for doing that.

Mr. WASHINGTON. OK.

Mr. CHOPKO. I think that the compelling—the Court is less likely to find a compelling interest in life throughout pregnancy than it is simply to say that an abortion decision is a species of protected liberty that will be subject to balancing in whatever manner the State chooses through its legislative process to give it, and so you have thrown the matter into the hands of legislatures and ultimately into the hands of courts to say whether there is a compelling interest in life.

I think the Supreme Court has resisted, at least in the last 10 or 15 years, saying that there is such a compelling interest, and I—it is my opinion—and this is only my opinion, although others share it—that the Court is much more likely to go down the avenue that I have suggested rather than find a compelling interest in life throughout pregnancy. If it does, and if it does that before the Congress moves this legislation, I think that, you know, I will have to go back and revisit my legal advice and my legal conclusions, but I, quite frankly, do not expect that that will be the avenue taken by the Court and that therefore the claims and the analysis which we have made will continue to have legitimacy.

Mr. WASHINGTON. Thank you, sir; and thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Washington, and we thank the witnesses very much for very helpful testimony.

Mr. Hyde, will you introduce the next panel.

Mr. HYDE. Thank you, Mr. Chairman.

We have a distinguished second panel, panel two. Nadine Strossen is currently the president of the American Civil Liberties

Union's National Board of Directors. Professor Strossen is a graduate of Harvard Law School, is widely published, and teaches constitutional law at New York Law School.

Joining Nadine Strossen is Herbert Titus, the dean of the college of law and government of Regent University. Dean Titus is the author of numerous books and articles, including "In Defense of Smith, II: The Free Exercise Clause Is Alive and Well."

Is that Robert S. Peck joining you?

Ms. STROSSEN. Yes, Congressman Hyde and Chairman Edwards. I would ask the committee's permission for Robert Peck, legislative counsel of the ACLU, to join us.

Mr. EDWARDS. Will the witnesses please raise your right hand.  
[Witnesses sworn.]

Mr. EDWARDS. Thank you.

Ms. Strossen, we welcome you. Without objection, the full testimony of all of the witnesses will be made a part of the record, and you may proceed.

**STATEMENT OF NADINE STROSSEN, PRESIDENT, NATIONAL BOARD OF DIRECTORS, AMERICAN CIVIL LIBERTIES UNION, NEW YORK, NY, ACCOMPANIED BY ROBERT S. PECK, LEGISLATIVE COUNSEL, ACLU**

Ms. STROSSEN. Thank you very much, Mr. Chairman, and my thanks to members of the committee. It is a great privilege to be here testifying in behalf of a critically important statute.

To paraphrase the great bard, I think it is all in the name: the Religious Freedom Restoration Act. That is an accurate description of what this legislation would do, no more and no less. It is hardly a radical proposal to restore religious freedom. Indeed, I think the only radical thing at issue here is the Supreme Court's decision in the *Smith* case which took religious freedom effectively out of the Constitution.

Now all we are asking this legislature to do is to restore to Americans the religious liberties that we took for granted under our Constitution until that Supreme Court decision in *Smith*, and let me describe. Basically, what this would do would be to restore to religious liberty the same kind of protection that the Court has given and still does give to other fundamental freedoms under our constitutional system. They are not absolutely protected, but in order for government to infringe on a liberty, including religious liberty, it has to show some compelling interest, and it has to show that the measure is narrowly tailored so as to do as little damage as possible to religious liberty.

Under that kind of strict scrutiny approach in the past, some religious freedom claims were sustained and some were not; this is hardly a radical approach. And I would like to emphasize how much damage the Supreme Court's decision did to those established principles by quoting some authorities who are hardly viewed as radical libertarians—for example, Justice Sandra Day O'Connor, who disagreed sharply with the majority's approach to religious freedom in the *Smith* decision. She said, "Today's holding dramatically departs from well settled first amendment jurisprudence and is incompatible with our Nation's fundamental commitment to individual religious liberty. To reach this sweeping result,

the Court must not only give a strained reading to the first amendment itself but must also disregard our consistent application of free exercise doctrine.”

In addition to Justice O'Connor, one can look to the numerous lower court opinions by both State and Federal courts which have been forced since *Smith* to apply the Court's radical revised version of free exercise, which is almost free exercise at all. In my experience as a constitutional law professor and scholar, I do not recall such sustained and vigorous and vitriolic criticism of a Supreme Court's decision in a constitutional law area by lower courts, and that pertains to lower courts across the political spectrum.

Likewise, in terms of constitutional law professors, religious organizations, public interest organizations, this decision has deserved and received an unprecedented degree of criticism for departing so dramatically from traditional constitutional principles.

Essentially, the Court has told us that all that is left of religious liberty is this: You only have a claim under the Constitution if you can show, as a member of a minority religious group, that the Government that passed a measure that infringes your religious liberty did so intentionally and deliberately—maliciously, willfully, and wantonly singling you out on the basis of your religion. Obviously, that is a virtually impossible burden to sustain. As Justice O'Connor said in her opinion in the *Smith* case, “Few States would be so naive as to enact a law directly burdening a religious practice as such.”

If the first amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice, and yet that is all that the Supreme Court has left us under the *Smith* decision.

It is ironic that we have to be here, we who believe in religious liberty for minority religions as well as majority religions, asking Congress to restore that right to us because, of course, by definition, the nature of a fundamental right is that it should be one that is not dependent on the good graces of the legislature, and that is something that the Supreme Court turned its back on in the *Smith* case.

In the majority opinion, Justice Scalia suggested to the Native American—the members of the Native American Church whose religious freedom was severely burdened in that case—he said, “Well, you can go to the Oregon Legislature and seek to get them to pass an exemption to this law that happens to criminalize your most sacred religious ritual.” He then candidly said, “We recognize that, as a minority religion, you are unlikely to be able to persuade them to do so. That, however,” he said, “is the unavoidable consequence of democratic government.”

Members of the subcommittee, it is precisely the purpose of the Bill of Rights, including the free exercise clause, to avoid those consequences. Individual religious adherence, members of minority religious groups, should not have to depend on accidents of political process to protect their fundamental freedoms. Now, however, the Supreme Court has cast us back into the good graces of this legislature, and it does depend on you, our elected representatives, to restore to all of us the religious freedom that should be protected by the Constitution but that the U.S. Supreme Court has refused to



protect that way. Please restore our religious liberty through legislation.

Thank you.

Mr. EDWARDS. Well, thank you very much, Ms. Strossen. That is very compelling testimony.

[The prepared statement of Ms. Strossen and Mr. Peck follows:]

PREPARED STATEMENT OF NADINE STROSSEN, PRESIDENT, AND ROBERT S.  
PECK, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to present testimony on behalf of the American Civil Liberties Union concerning H.R. 2797, the Religious Freedom Restoration Act. The American Civil Liberties Union is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and, most particularly, in the Bill of Rights. Throughout its 70-year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment.

The ACLU strongly supports H.R. 2797 because it restores religious liberty to its rightful place as a preferred value and a fundamental right within the American constitutional system. The First Amendment's guarantee of the "free exercise of religion" has proven to be the boldest and most successful experiment in religious freedom the world has known. That is, until recently.

In a sweeping decision two years ago that struck at the heart of religious liberty and evinced disdain for the very purposes of the Bill of Rights, the Supreme Court reduced constitutional protections for religious practices to what is otherwise already available under the Free Speech and Equal Protection Clauses. In essence, the Court wrote the First Amendment's guarantee of the "free exercise of religion" out of the Constitution. The Court reached this conclusion by ignoring constitutional history,

precedent, and the Court's normal practices and procedures. Congress should correct this severe constitutional misjudgment that carries devastating consequences, and do so quickly. H.R. 2797 does precisely that.

The Supreme Court's Decision Abandoned Established Constitutional Principles.

The case that placed all religions in jeopardy because of the Court's decision began as a relatively simple unemployment compensation case. Alfred Smith and Galen Black are Native Americans and members of the Native American Church. They were employed at a private drug and alcohol rehabilitation facility, but were fired after they admitted ingesting peyote as a sacrament in a religious ceremony while off-duty. Eating peyote is considered an act of worship and communion for members of the Native American Church that dates back at least 1400 years. Moreover, the church regards the non-ritual use of peyote as a sacrilege. Peyote is also a controlled substance. Because of its fundamental importance to the Native American religion and despite its hallucinogenic qualities, the federal government and at least 24 states exempt Native Americans who use peyote in religious ceremonies from drug laws. Oregon did not at the time; it now does.

After being fired, Smith and Black sought unemployment benefits and were approved for compensation by the state hearing officer. The state statute disallowed benefits when the applicant was discharged for "misconduct," but the officer decided that

following one's religious beliefs could not be regarded as misconduct. In doing so, the hearing officer followed the precedent set in the relevant landmark Supreme Court decision, Sherbert v. Verner,<sup>1</sup> which held that the State could not "force [an applicant for unemployment benefits] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the benefits of her religion in order to accept work, on the other hand."<sup>2</sup> Adele Sherbert, a Seventh-Day Adventist, had refused to work on Saturdays, the Sabbath of her faith, and had been fired from her job. The Supreme Court ruled that the state could not condition her eligibility for unemployment benefits on giving up a tenet of her religious faith unless the government could demonstrate "any incidental burden on the free exercise of [her] religion may be justified by a compelling state interest."<sup>3</sup>

In Smith's and Black's cases, the administrative appeals board reversed the hearing officer's decision in favor of the Native Americans. They too applied the Sherbert precedent but determined that peyote use did constitute misconduct. The board said that the state had a compelling interest in proscribing the use of illegal drugs, sufficient to overcome religious objections. Smith and

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<sup>1</sup>374 U.S. 398 (1963).

<sup>2</sup>*Id.* at 404.

<sup>3</sup>*Id.* at 403.

Black successfully appealed to the courts. The Oregon Supreme Court found that whatever compelling interest may exist for the State to enforce its criminal laws does not apply with respect to unemployment benefits. On remand from the U.S. Supreme Court, the Oregon Supreme Court reached the same result, finding that the First Amendment guarantee of religious freedom required an exemption for religious use even if the Oregon criminal law did not explicitly provide one.

The case reached the U.S. Supreme Court for its ultimate decision with Oregon officials asserting that the state had a compelling interest in preventing the illegal use of drugs in every possible way, including the denial of unemployment benefits.<sup>4</sup> Smith and Black meanwhile countered that the State's interest in preventing people from benefiting from public funds for their misconduct was not a sufficiently compelling interest to overcome the burden it placed on their religious beliefs. Neither party suggested that the Supreme Court abandon the compelling-interest test; that issue was neither argued nor briefed.

The Court's decision in Employment Division v. Smith,<sup>5</sup> stunned all who hold religious liberty dear. In a concurring opinion, Justice Sandra Day O'Connor accurately stated that "today's holding

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<sup>4</sup>Subsequent to the Supreme Court's decision, Oregon enacted an exemption to its controlled substances act covering the religious use of peyote.

<sup>5</sup>494 U.S. 872 (1990).

dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."<sup>6</sup> Three other justices dissented from the Court's ruling. The Court's central holding found that an individual's religious beliefs do not relieve that person from compliance with an otherwise valid and neutral law of general applicability.<sup>7</sup> In so ruling, the Court consciously echoed the 1940 decision in Minersville School District v. Gobitis,<sup>8</sup> where the Court had held that school boards had the authority to require students to participate in flag-salute ceremonies even if the students had sincere religious objections. In Gobitis, the Court wrote: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."<sup>9</sup> The Smith Court quoted that statement from Gobitis approvingly. Yet, the Court disingenuously failed to note that Gobitis was the subject of unprecedented

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<sup>6</sup>Id. at 891 (O'Connor, J., concurring).

<sup>7</sup>Id. at 879.

<sup>8</sup>310 U.S. 586 (1940), overruled, West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

<sup>9</sup>310 U.S. at 594.

scholarly and editorial criticism when it was issued and was expressly overruled in three short years in West Virginia State Board of Education v. Barnette,<sup>10</sup> perhaps the most celebrated and quoteworthy Bill of Rights decision in judicial history.

The Smith Court, nonetheless, appears to have revived Gobitis. In Gobitis, Justice Frankfurter's majority opinion asserted that courts were ill-equipped to weigh the religious claims against the school board's decisions.<sup>11</sup> In Smith, Justice Scalia's majority opinion asserts that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."<sup>12</sup> In Gobitis, Frankfurter advises those aggrieved by general laws that burden their religious beliefs to rely upon the "remedial channels of the democratic process."<sup>13</sup> In Smith, Scalia similarly advises that those seeking vindication of values enshrined in the Bill of Rights "are not thereby banished from the political process."<sup>14</sup>

Scalia went on in Smith to recognize the difficult position the decision placed those whose religious beliefs were outside

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<sup>10</sup>319 U.S. 624 (1943).

<sup>11</sup>310 U.S. at 597-598.

<sup>12</sup>494 U.S. at 889-90 n. 5.

<sup>13</sup>310 U.S. at 599.

<sup>14</sup>494 U.S. at 890.

their particular community's mainstream:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.<sup>15</sup>

Interestingly, Barnette, the case that overruled Gobitis, provides a complete answer to both Justice Frankfurter, at whom it was aimed in 1943, and Justice Scalia today. In Barnette, Justice Jackson eloquently wrote:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>16</sup>

The Bill of Rights, added at the people's insistence as the price of ratification of the Constitution, is a limitation on the power of government. Since the First Amendment affirmatively prohibits the government from "prohibiting the free exercise of religion," it speaks to a political and constitutional philosophy that is centered on individual liberty and familiar with the political process's inability to protect that liberty at all times.

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<sup>15</sup>Id.

<sup>16</sup>319 U.S. at 638.

Without warning and without having the issue properly placed before it, the Court abandoned that guiding philosophy.

As a result of Smith, no longer would the Court balance the interests between religious rights and an asserted governmental regulatory authority. In its place, the Court presumes that government has whatever power it claims even if it burdens religious practices. The only restrictions on that public power are that religious speech cannot be treated with less respect than other speech protected by the First Amendment's free-speech guarantee and that religious practices cannot be treated with discriminatory intent. As members of this committee know from its experience in the field of civil rights, it is much more difficult for someone to prove discriminatory intent than to prove discriminatory effect. The Court's decision leaves one to wonder why the Framers of the Bill of Rights bothered to have a Free Exercise Clause if that is all that it was intended to accomplish.

The Court's decision not only turned its back on longstanding precedent, but also on a recent promise it had made. In 1987, the Court had said with respect to religious freedom that it would not approve a judicial standard that "relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."<sup>17</sup> In Smith, the Court reneged on that pledge and served notice that it will no longer

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<sup>17</sup>Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987), quoting Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring in part, dissenting in part).



stand as a bulwark of religious liberty.

The Smith Decision Is at Odds with Constitutional History.

The rights enshrined in the First Amendment have traditionally been considered preferred rights. They are fundamental to a constitutional system of limited government and individual liberty. These rights provide many of the reasons why this land was originally settled and why it has prospered as it has. It cannot be disputed that much of what was to become the United States was settled by those who sought to escape the religious intolerance, persecution, and conflicts of Europe. Many of the American colonies were founded as a refuge for religious dissenters -- Maryland by Catholics, Rhode Island for Protestants and other dissenters, and Pennsylvania and Delaware by Quakers, to name a few.

William Penn, founder of Pennsylvania, was deeply dedicated to the concept of religious liberty, especially after he was prosecuted in an infamous trial in 1670 for the crime of preaching on Gracechurch Street. His vindication predisposed him to making a guarantee of religious liberty a part of the frame of government he gave Pennsylvania in 1682 as well as the subsequent charter that went into effect in 1701. The latter's very first article proclaimed religious freedom "[b]ecause no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious

Profession and Worship."<sup>18</sup> The importance Penn attached to this provision is evidenced by its status as the only portion of that charter that could not be amended.<sup>19</sup>

These principles were carried over after the colonies declared their independence. Eleven states included a provision guaranteeing some degree of religious liberty in their foundational documents. Regarded at the time as "the rising sun of Religious liberty,"<sup>20</sup> the Virginia Declaration of Rights viewed religion as a matter of "reason and conviction" that should be exercised freely "according to the dictates of conscience."<sup>21</sup> To the extent these early state constitutions empowered governments to regulate religious practices, the government's power was limited to those practices "repugnant to the peace and safety of the State,"<sup>22</sup> a very high standard.

It is important to remember that the federal Constitution could not have been ratified without the promise of a bill of

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<sup>18</sup>Penn. Charter of Privileges art. I (1701), reprinted in Sources of Our Liberties 256 (R. Perry ed. 1978).

<sup>19</sup>Id. art. VIII, at 259.

<sup>20</sup>R. Rutland, The Birth of the Bill of Rights, 1776-1791, at 84 (1983).

<sup>21</sup>Va. Dec. of Rts. art. 16 (1776).

<sup>22</sup>Ga. Const. art. LVI (1777). Similar provisions were contained in the constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New York, and South Carolina.

rights that would specify further limitations on government power that proponents of the Constitution claimed were implied anyway. When the Bill of Rights was drafted, there was never any doubt that religious freedom would be one of those enumerated rights. In an earlier debate in Virginia over Thomas Jefferson's Bill for Establishing Religious Freedom, James Madison, father of both the Constitution and Bill of Rights, wrote that to grant the legislature a power to abridges religious freedom is to agree that legislators "may sweep away all our fundamental rights,"<sup>23</sup> claim all possible powers, and render a constitution meaningless.

Madison certainly would have been appalled at the Court's Smith decision. To think that the courts have no special responsibility to act on the First Amendment's guarantee of religious freedom is to render the Constitution meaningless. It also undoes Madison's prediction during the debate over the Bill of Rights in the First Congress that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."<sup>24</sup> The Religious Freedom Restoration Act would again make the courts

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<sup>23</sup>Memorial and Remonstrance (1785), reprinted in, *The Mind of the Founder 13* (M. Meyer ed. 1981).

<sup>24</sup>*1 Annals of Cong.* 457 (J. Gales ed. 1834) (June 8, 1789).

a bulwark of religious liberty.

Government Should not Encroach on Fundamental Rights, such as Religious Liberty, without a Compelling Interest.

Before Smith, it was a fundamental premise of constitutional law that fundamental rights could not be infringed without the justification of a compelling state interest and, even so, the regulation had to be narrowly tailored to serve that interest without unnecessarily burdening those rights. Just one year before the Smith decision, the Supreme Court unanimously ruled that the compelling interest standard applied to the speech and associational rights of political parties.<sup>25</sup> In that case, the Court correctly invalidated, inter alia, regulations that affected the organization, composition, and internal rules of political parties. Because of Smith, state and local governments have the power to regulate the kinds of internal rules of religious bodies that they would be constitutionally powerless to regulate for political parties. Obviously, something is amiss when religious practices do not receive at least the same level of constitutional protection as political parties.

Sherbert, as previously noted, clearly relied on the compelling interest standard. In the same year, in NAACP v.

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<sup>25</sup>Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989).

Button,<sup>26</sup> the Court declared that "[t]he decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms." Ever since, the Court has consistently applied the standard to issues of free speech,<sup>27</sup> symbolic speech,<sup>28</sup> campaign expenditures,<sup>29</sup> freedom of the press,<sup>30</sup> the right of association,<sup>31</sup> right to picket,<sup>32</sup> right of access to criminal trials,<sup>33</sup> the right to vote,<sup>34</sup> the right of ballot access,<sup>35</sup> the right of interstate

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<sup>26</sup>371 U.S. 415, 438 (1963) (applying the compelling interest standard to free expression and the right to judicial redress).

<sup>27</sup>Sable Communications v. FCC, 492 U.S. 115, 126 (1989) and Boos v. Barry, 485 U.S. 312 (1988).

<sup>28</sup>United States v. O'Brien, 391 U.S. 367 (1968).

<sup>29</sup>Buckley v. Valeo, 424 U.S. 1 (1976).

<sup>30</sup>Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

<sup>31</sup>NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

<sup>32</sup>Carey v. Brown, 447 U.S. 455 (1980).

<sup>33</sup>Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

<sup>34</sup>Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

<sup>35</sup>Williams v. Rhodes, 393 U.S. 23 (1968).

travel,<sup>36</sup> the right to marry,<sup>37</sup> and the right to privacy.<sup>38</sup>

Until Smith, religious freedom enjoyed similar protection. The Smith Court itself acknowledged the relevance of the compelling interest test to unemployment compensation cases, but treated the matter before it as a criminal case. Yet, this distinction had never been used before and makes no sense. Certainly, a state seeking to enforce a criminal law ought to have a compelling interest when that law abridges religious freedom. As Chief Justice Burger wrote for the Court in Wisconsin v. Yoder,<sup>39</sup> "[w]here fundamental claims of religious freedom are at stake, . . . [the Supreme Court] must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that flow from recognizing the claimed . . . exemption." The decision went on to find that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."<sup>40</sup> Thus, the Court applied a compelling interest test to find that a Wisconsin penal statute that enforced

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<sup>36</sup>Shapiro v. Thompson, 394 U.S. 618 (1969).

<sup>37</sup>Zablocki v. Redhail, 434 U.S. 374 (1978).

<sup>38</sup>Carey v. Population Services International, 431 U.S. 678 (1978); Roe v. Wade, 410 U.S. 113 (1973); and Griswold v. Connecticut, 381 U.S. 479 (1965).

<sup>39</sup>406 U.S. 205, 221 (1972) (citations omitted).

<sup>40</sup>Id. at 215.

the state's compulsory school attendance law could not be applied to the Amish after the eighth grade over their religiously based objections. To emphasize, Yoder did involve a criminal law.

In Larsen v. Valente,<sup>41</sup> the Court also applied the compelling interest test to the right of religious organizations to solicit contributions from non-members.

Instead of acting consistently with these precedents and dismissing the non-employment compensation cases as immaterial precedents involving hybrid rights, instead of following the constitutional language, American history, and judicial precedent, the Supreme Court reserved enforceable constitutional protection solely to religious speech (as opposed to practices) and to equal treatment among religions.

Religious speech, it said, was fully protected, but not those practices that are prohibited to all religions equally. The absurdity of these distinctions was made apparent centuries ago by Oliver Cromwell's equally cramped view of religious liberty for Catholics in Ireland: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be

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<sup>41</sup>456 U.S. 228 (1982).

permitted."<sup>42</sup> If it was previously thought that no such view of government could ever prevail where the First Amendment exists, the Smith decision wiped out that presumption.

Equal treatment is also unsatisfactory as a standard. The substantive guarantees of the Bill of Rights are always stronger than the protections available through the Equal Protection Clause because otherwise neutral laws affect different people in different ways. It would seem neutral, for example, to prohibit headwear in federal buildings. The same rule applies to everyone, no matter what their religious beliefs. Yet, Orthodox Jews and Sikhs who cover their heads as part of their religious faith would find themselves faced with a choice of avoiding federal buildings or violating their religious beliefs. The Smith precedent would uphold such a law; the compelling interest test would require some overriding justification, one that we cannot imagine, before it could be upheld.

Without H.R. 2797, Religious Liberty is Gravely Threatened.

In the aftermath of the Smith decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. At risk were such familiar practices as the sacramental use of wine, kosher slaughter, the sanctity of the confessional,

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<sup>42</sup>Quoted in McDaniel v. Paty, 435 U.S. 618, 631 n. 2 (1978) (Brennan, J., concurring), quoting S. Hook, Paradoxes of Freedom 23 (1962).



religious preferences in church hiring, establishing places of worship in areas zoned for other use, permitting religiously sponsored hospitals to decline to provide abortion or contraception services, sex segregation during worship services, exemptions from mandatory retirements laws, a church's refusal to ordain women or homosexuals, exemption from landmark regulations, and the inapplicability of highly intrusive educational rules to parochial schools. These were decisions in areas that society had previously assumed that religious groups had the right to make for themselves and could not be compelled to change just because society thought otherwise. No longer will the courts prevent government from encroaching on those decisions.

Courts are now reaching decisions that were unthinkable before Smith. Today, you will hear about one such case involving a state's insistence on an autopsy over the religious objections of a Hmong family.<sup>43</sup> A similar issue was resolved against a Jewish family in Michigan.<sup>44</sup> In several cases, churches have been denied the right to make alterations on their properties because of landmark laws.<sup>45</sup> The trend will only continue as state and local officials become used to the permissiveness of the new standard.

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<sup>43</sup>Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

<sup>44</sup>Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990).

<sup>45</sup>See, e.g., St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S.Ct. 1103 (1991).

H.R. 2797 is Scrupulously and Properly Neutral on the Issue of Abortion.

It is unfortunate that H.R. 2797 has been held back from passage because a few groups mistakenly claim that it is a stalking horse for establishing a religiously based right to abortion if Roe v. Wade is overruled. The diversity of the coalition behind H.R. 2797, including groups who actively oppose each other on the abortion issue, should be substantial testimony by itself that H.R. 2797 gives no advocate an advantage or disadvantage on that issue.

No where in the bill is abortion mentioned. Indeed, it is as neutral on this question as the First Amendment is itself. Instead, the claim is made that Roe would be reestablished as a free exercise right by the same court that overrules that landmark precedent. The exposition of this claim is its own refutation. No Court that takes away women's rights to reproductive freedom will then give it back under the guise of religious freedom, particularly not one that reached the Smith decision. If Roe is overruled, it will no doubt be because the Court is willing to recognize compelling state interests in controlling this freedom. The same compelling interests that might overcome privacy rights will also be sufficient to overcome religious claims. Five of the current justices are already on record that they would recognize a compelling state interest in restricting abortion access.

It is worth noting that Jewish law requires an abortion when the mother's life is in danger. If a state were not to permit that

kind of abortion, certainly a religious claim would be made. And, with or without H.R. 2797, we would expect the claim to be upheld because even in his Roe dissent now-Chief Justice Rehnquist recognized that preventing an abortion to save a woman's life was beyond the State's power.<sup>46</sup> Will other religiously based claims for abortion be made? Yes, and they deserve to be measured by the Court by the same yardstick as any other religious based claim.

Some have suggested that language, such as that proposed in H.R. 4040, to exempt from its operation a religious freedom claim on abortion. Any religious freedom legislation that specifically excluded abortion (and no other possible religious freedom claim) would violate the very principles it sets out to establish. In one breath, both H.R. 2797 and H.R. 4040 announces that the compelling interest test is "a workable test for striking sensible balances between religious liberty and competing governmental interests" and that the legislation is intended "to codify the compelling interest test," and in a second breath such an exemption states that the compelling interest standard is not available when the religious claim is about access to abortion. By specifically targeting religious abortion claims, the legislation discriminates against the religious rights of those who might make such a claim. It then violates even the lax religious freedom standards established in Smith, intentionally targeting some religious claims for different treatment than others. We believe, as do the members

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<sup>46</sup>410 U.S. at 173.

of the coalition, that all claimants deserve their day in court on an equal footing. That does not mean that all will succeed; simply that all should be evaluated according to the same standard.

According to the November 18, 1991 memorandum of the Congressional Research Service (CRS) on this issue, "it is improbable that enactment of [H.R. 2797] would lead to the successful presentation of an argument that a religious claim would trump state limitations upon abortion access."

H.R. 2797 Sets Up a Standard for Review and Does Not Pre-Judge Any Claims.

H.R. 2797 merely returns judicial decision-making in the religious freedom area to the compelling interest standard that the courts apply to all fundamental rights. It does not decide how those claims will be evaluated when the courts balance those interests against legitimate compelling state interests. The courts have had little difficulty in finding a compelling state interest to exist when the government has sought to protect health, safety, or even national security.

Indeed, in Smith, applying the compelling interest standard of review, Justice O'Connor reached the same result as the majority, finding that the state interest in discouraging drug use is sufficiently compelling to justify the denial of unemployment benefits to Native Americans who use peyote. The ACLU believes that is a wrong conclusion, which is why we are separately urging Congress to enact amendments to the American Indian Religious

Freedom Act to provide protection to that Native American religious practice and to the sacred sites of traditional Native American religions. It is only because of the unique constitutional status of Native Americans that such result-oriented legislation can be enacted. H.R. 2797, despite its origins in the Smith case, does not have anything to do with peyote use.

Thus, it should be clear to this Subcommittee that enactment of H.R. 2797 will not guarantee that claims of religious liberty will always prevail. We invest government with broad and important powers that sometimes override individual liberty. It should, however, not be easy for government to do so -- or official bodies will use that power with substantial frequency.

#### Conclusion

Unless Congress acts to protect religious liberty, the Court's ruling in the Smith case will have a devastating effect on the free exercise of religion throughout our nation. We urge quick and favorable action on H.R. 2797.

SECTION-BY-SECTION ANALYSIS.

Section 1. The bill is properly called a religious freedom restoration act because it restores the standard of review that applies to all fundamental rights, returning religious freedom to its rightful place in the hierarchy of constitutional values.

Section 2. The findings correctly acknowledge the importance of religious liberty, the devastating impact that the Smith decision has had and will continue to have, and the need to return to the compelling interest test that previously served liberty and justice so well.

Section 3. The bill properly reestablishes the compelling interest test as the Supreme Court had enunciated it and applied it prior to Smith.

Section 4. The bill allows a successful plaintiff to recover attorneys fees in the same manner that others are currently eligible for vindicating constitutional and civil rights.

Section 5. The definitions are not controversial.

Section 6. The applicability section states that the act will apply to all currently-in-force laws and future laws. It also clarifies that the authority it confirms for the government should not be construed to permit religious belief to be burdened.

Section 7. The legislation is aimed only at claims made under the Free Exercise Clause, not the Establishment Clause.

Mr. EDWARDS. We welcome you, Mr. Titus, and you may proceed.

**STATEMENT OF HERBERT W. TITUS, DEAN, REGENT UNIVERSITY  
SCHOOL OF LAW, VIRGINIA BEACH, VA**

Mr. TITUS. Mr. Chairman, thank you very much for the privilege of being here.

As you have indicated, I am the dean of the College of Law and Government at Regent University in Virginia Beach. I'm a graduate of the Harvard Law School and have taught constitutional law for 25 years. I'm not appearing on behalf of the Regent University or its close affiliate, the Christian Broadcasting Network, but I'm appearing as a constitutional lawyer, as a Christian, and as a citizen of the United States committed to free exercise of religion.

While I have limited my written statement to opposition to H.R. 2797, what I have to say in that written statement is equally applicable to H.R. 4040.

In my oral remarks, I wish to concentrate and elaborate upon my first point, that, as a matter of fact, H.R. 2797 or H.R. 4040, if enacted by this Congress, would actually debase the free exercise of religion as an unalienable right, not enhance it. H.R. 2797 purports to provide greater security for the protection of the constitutional guarantee of free exercise of religion. In fact, it undercuts that freedom.

The first amendment states that Congress shall make no law prohibiting the free exercise of religion. By this explicit language, the framers meant what they said; namely, that any law that burdened the free exercise of religion was absolutely forbidden. This absolute barrier to government intrusion into the realm of religion was first recognized and affirmed in article 1, section 16, of the 1776 Virginia Constitution, which reads in pertinent part as follows: "The religion, or the duty which we owe to our creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence. Therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience."

This provision of the Virginia Constitution allowed for no exceptions even if a specific practice of religion disturbed the public peace. Other State constitutions permitted such exceptions, but James Madison led Virginia away from the English legacy of religious toleration to a new principle of freedom of religion.

For nearly 200 years the Virginia legacy of absolute protection of the free exercise of religion was endorsed by Americans who cherished religious freedom. In the early 1960's, however, former Supreme Court Justice William J. Brennan transformed that absolute guarantee into one subject to regulation if the Government could demonstrate a compelling interest to do so.

This regime of religious toleration lasted less than 30 years when it came to an end in *Employment Division, Department of Human Resources v. Smith*. In that case, the Supreme Court, in an opinion by Justice Antonin Scalia, reaffirmed the free exercise clause as an absolute protection for belief and profession of belief and the performance of or abstention from certain physical acts, such as proselytizing, when those acts are, by nature, subject solely to one's conscience unencumbered by the threat of civil sanction.

Scalia's critics have, without exception, overlooked this portion of the *Smith II* opinion. In doing so, they have overlooked the fact that Scalia not only endorsed a free exercise jurisprudence that imposes a real constitutional barrier to government intrusion upon religion but restored a jurisprudential principle that predated by nearly 100 years the one endorsed by the compelling State interest test.

The Supreme Court introduced the compelling State interest test in 1962, as I have pointed out. Prior to that date, it had not applied such a test. Rather, it had applied a jurisdictional analysis to determine whether the duty commanded by the State was one owed to the State or one owed exclusively to the Creator. Under such a test, the Court upheld the laws prohibiting polygamy but protected the right of the church to govern its own doctrinal affairs free from interference by the State. The spheres of civil and ecclesiastical authority were constitutionally separate. The State could not intrude upon the church's domain, no matter what the State's interest and no matter how compelling.

This jurisdictional approach to the free exercise clause continued even after 1962 in two cases, *Turcaso and Watkins* and *McDaniel and Patey*. The Court upheld free exercise claims but did not rest their holdings upon the compelling State interest test, nor could they have and remained true to that test. In *Turcaso*, the Court struck down a Maryland law imposing a religious test upon a candidate for political office. In *McDaniel*, the Court ruled against a Tennessee law prohibiting a minister of the gospel from holding public office. In neither case could the claimant have demonstrated that he was commanded by his religious faith to run for political office. Hence, neither statute intruded upon either claimant's religious conscience.

Under the compelling State interest test, neither claimant had a free exercise claim, but under a jurisdictional test both did. In *Turcaso*, the State could not enforce its limit without testing the claimant's beliefs; whether he believed or did not believe belonged exclusively to his Creator. As a duty to the Creator, he had a right against the State. In *McDaniel*, the right of a minister to run for political office belonged to the church, not the State. It was a question of church government and discipline wholly outside the cognizance of the State.

The point here is that the Court had developed a free exercise jurisprudence well before Brennan had led the Court to apply the compelling State interest test, and that jurisprudence was never abandoned. It was to that jurisprudential tradition that Justice Scalia returned when he refused in *Smith II* to apply the compelling State interest test, and let me remind this distinguished panel that Justice Scalia affirmed that the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one believes and also affirmed that there were certain acts that were totally outside the jurisdiction of the State, notwithstanding any claim of compelling State interest.

Now let me illustrate by a couple of examples of how the jurisdictional test would work. You could have a statute prohibiting discrimination whether it is based upon race, sex, or sexual preference, for example. It would be general applicability, but would it



apply to the organizational and structural definition of a religious organization?

Under the Scalia approach in the *Smith* test, there would be no compelling State interest that could possibly allow the State to intrude in the organizational structure of the religious organization. If this bill were passed, it would affirm that if a State had a compelling State interest it could dictate to churches and other religious bodies how they ought to organize their churches. This is inconsistent with the majority opinion *Smith II*. It would be reintroduced under the compelling State interest test of the *Sherbert* case which this particular statute endorses.

Let me also turn attention to the fact that in the area of proselytizing we see across the country tort suits brought under general applicability provisions of emotional distress and so forth. Under the *Smith II*, such tort suits would not be allowed, but under the compelling State interest tests such tort lawsuits have been allowed in case after case across the country, intruding upon the free exercise of religion in the proselytizing area.

H.R. 2797 explicitly rejects the jurisdictional principle endorsed in the *Smith* case in favor of a toleration test of former Justice Brennan. If enacted, it would permit and, by permitting, encourage governments to burden a person's exercise of religion if that burden is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

No government interest, no matter how compelling it may be, is sufficient to justify a burden upon a person's free exercise of religion. One's duties to God are defined by the Creator, not by the State, and, if enforceable, only by reason or conviction as prescribed by the Creator, and such duties are unalienable rights toward men. If they are to remain unalienable, they must be completely and absolutely free from any government regulation, no matter how compelling the interest or necessary the regulation.

H.R. 2797 should be rejected then because it endorses a philosophy of free exercise of religion but does not enhance but actually undermines the absolute guarantee of free exercise of religion as provided by the first amendment.

I would also like to remind the subcommittee that it would probably be found unconstitutional as an exercise of congressional power according to footnote 10 of Justice William Brennan's opinion in *Katzenbach* and *Morgan*.

Thank you very much.

Mr. EDWARDS. Thank you, Mr. Titus.

[The prepared statement of Mr. Titus follows:]

PREPARED STATEMENT OF HERBERT W. TITUS, DEAN, REGENT UNIVERSITY  
SCHOOL OF LAW, VIRGINIA BEACH, VA

My name is Herbert W. Titus. I am Dean of the College of Law and Government, Regent University, Virginia Beach, Virginia. I am a graduate of the Harvard Law School and have taught constitutional law for twenty-five years. I appear today not on behalf of Regent University or its close affiliate, the Christian Broadcasting Network, but as a constitutional lawyer, as a Christian, and as a citizen committed to the free exercise of religion in American society.

While I have limited my statement to H.R. 2797, I wish to go on record as also opposing H.R. 4040. While H.R. 4040 provides for some laudable exceptions to the general standard contained in H.R. 2797, those exceptions do not satisfy the objections that I have to H.R. 2797.

I. H.R. 2797 Debases the Free Exercise of Religion as an Unalienable Right.

H.R. 2797 purports to provide greater security for the protection of the constitutional guarantee of the free exercise of religion; in fact, it undercuts that freedom.

The First Amendment states that "Congress shall make no law...prohibiting the free exercise" of religion. By this explicit language, the framers meant what they said, namely,

that any law that burdened the free exercise of religion was absolutely forbidden.

This absolute barrier to government intrusion into the realm of religion was first recognized and affirmed in Article I, Section 16 of the 1776 Virginia Constitution which reads, in pertinent part, as follows:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience...

This provision of the Virginia Constitution allowed for no exceptions even if a specific practice of religion "disturbed the public peace." While other state constitutions permitted such exceptions, James Madison led Virginia away from the English legacy of "religious toleration" to a new principle of freedom of religion.

For nearly 200 years, the Virginia legacy of absolute protection of the free exercise of religion was endorsed by Americans who cherished religious freedom. In the early 1960's, however, former Supreme Court Justice William J. Brennan transformed that absolute guarantee into one subject to regulation if the government could demonstrate "a compelling interest" to do so. Sherbert v. Verner, 374 U.S. 398 (1963).

This regime of religious toleration lasted less than thirty years when it came to an end in Employment Division.

Department of Human Resources v. Smith, \_\_\_ U.S. \_\_\_, 110 S. Ct. 1595 (1990). In that case, the Supreme Court, in an opinion by Justice Antonin Scalia, reaffirmed that the free exercise clause absolutely protected "belief and profession" of belief and "the performance of (or abstention from) [certain] physical acts" (such as proselytizing) when those acts are, by nature, subject solely to one's conscience unencumbered by the threat of civil sanction. Id. at 1599.

H.R. 2797 explicitly rejects this jurisdictional principle endorsed in the Smith case in favor of the toleration test of former Justice Brennan. If enacted, it would permit and, by permitting, encourage governments to "burden a person's exercise of religion" if that burden "is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."

No government interest, no matter how compelling it may be, is sufficient to justify a burden upon a person's free exercise of religion. One's duties to God are defined by the Creator, not by the State, and if enforceable only by reason or conviction as prescribed by the Creator, then such duties are unalienable rights towards men. If they are to remain unalienable, they must be completely and absolutely free from any governmental regulation no matter how compelling the interest or necessary the regulation.

H.R. 2797 should be rejected, then, because it endorses a philosophy of free exercise of religion that does not

enhance, but actually undermines, the absolute guarantee of free exercise of religion provided by the First Amendment.

II. H.R. 2797 Debases the Role of Congress and of the State Legislatures.

Throughout America's 216-year history, Congress and the state legislatures have provided exceptions to specific laws of general applicability in order to accommodate the claims of conscience asserted by a wide variety of religious groups. Most notably, Congress has consistently excepted certain religious conscientious objectors from mandatory military service. See, e.g., United States v. Seeger, 380 U.S. 163 (1965). And as Justice Scalia pointed out in the Smith opinion, a number of states have made an exception in their drug laws for the sacramental use of peyote. Employment Division, Oregon Department of Human Services v. Smith, supra, 110 S.Ct. at 1606.

H.R. 2797 would prevent Congress and the state legislatures from continuing this practice because it would impose a requirement of "compelling government interest" and "least restrictive means" in every situation. Even the United States Supreme Court did not apply the "compelling state interest" test in such a monolithic fashion. For example, the Court required evidence that the matter of conscience was a central tenet of a bona fide religious faith before it applied the compelling state interest test. See Wisconsin v. Yoder, 406 U.S. 205 (1972). Moreover, the

Court refused to apply the compelling interest test in those cases where the conscientious objector had failed to demonstrate a sufficiently serious threat to religious conscience. See, e.g., Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

H.R. 2797 allows for neither of these careful assessments. Any "exercise of religion," no matter how peripheral to a person's faith, triggers the statutory requirements of compelling interest and necessity of means. Any burden, no matter how slight, will bring upon the government the strict statutory requirements.

H.R. 2792 should, therefore, be rejected because its wholesale treatment of all religious conscience issues impugns the integrity of the traditional legislative process that treats each religious claim in the context of a specific legislative proposal. H.R. 2797 should also be rejected because it treats all religious conscience claims as equally meritorious deserving in every case the high standards of compelling interest and necessity of means. Such indiscriminate treatment of all appeals to religious conscience belittles those claims that have been proved genuine in the crucible of time and tradition.

### III. H.R. 2797 Debases the Role of the States and of the State Constitutions in the Federal System.

The standard of religious freedom embodied in H.R. 2797 is imposed not only upon the government of the United

States, but upon the States and its political subdivisions. Yet, there is no finding that the states have failed to provide the kind of protection for religious conscience as H.R. 2797 demands. To the contrary, there is evidence that such protection is available under state constitutional guarantees of religious toleration.

For example, following the Smith ruling, the Supreme Court of Minnesota, applying a compelling state interest test, struck down a Minnesota statute requiring the display of an orange safety triangle as applied to an Amish man operating his horse-drawn buggy. Minnesota v. Hershberger, 462 N.W. 2d 393 (1990) This ruling was based upon the Minnesota state constitution. As an independent state ground, unreviewable by the United States Supreme Court, this ruling is not threatened in anyway by the Smith precedent.

After Smith, litigants seeking protection for "religious conscientious objectors" have sought and will continue to seek state constitutional protection. In a federal system that alternative should be encouraged and allowed to run its course, not nipped in the bud as H.R. 2797 would do.

H.R. 2797, therefore, should be rejected as a premature and unwise intrusion upon the states and the role of state constitutions in the American federal system.

Mr. EDWARDS. The other gentleman does not have testimony. Is that correct?

Mr. PECK. No.

Mr. EDWARDS. Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Professor Titus then, if I follow your reasoning, do you believe in absolute freedom of religion?

Mr. TITUS. Yes, I do.

Mr. WASHINGTON. So you disagree with all the cases that have been decided on the question.

Mr. TITUS. I disagree with all the cases that have utilized the compelling State interest test since *Sherbert* and *Verner*, which was only 30 years ago.

Ms. STROSSEN. Could I comment on that, Congressman Washington?

As I understand the testimony—and I haven't had the benefit of reading the written version—but from the oral remarks, I gather that Dean Titus supports absolute freedom for a very narrow definition of religious activity—namely, belief—but when it gets to practice, he believes in the not complete, nonprotection that the Supreme Court has mandated in the Scalia opinion in the *Smith* case, and I think to talk about religious freedom as only the right to believe but not the right to practice your beliefs, among other things, is squarely inconsistent with the plain language of the religion clause which refers to free exercise of religion.

Mr. WASHINGTON. I don't think we need to reach that point. I mean I agree with you, but I—

Mr. TITUS. Do I have a privilege as a witness to correct her remarks?

Mr. WASHINGTON. Excuse me?

Mr. TITUS. Do I have a privilege as a witness to correct her remarks? She mischaracterized my position.

Mr. WASHINGTON. OK. Well, I will accept your assertion that she mischaracterized it, because I don't think it is necessary to the point where I'm taking you.

Mr. TITUS. Well, it is absolutely crucial, because I did not say that religion was confined to merely belief.

Mr. WASHINGTON. OK. I agree with you. If I get another round of time—

Mr. TITUS. And I think it is unfair to the witness to mischaracterize my remarks in response to a question that you directed to me.

Mr. WASHINGTON. I apologize for her mischaracterizing your remarks.

Let me get back to where I was trying to take you, because in my judgment I think that that will be sufficient to show the difference between where you are and where most other people are on the question, I think. So, therefore, the conclusion—if you don't agree on the premise, the conclusion doesn't matter, and I think that you and I—I have a problem with the premise that you have laid for us, and I think perhaps most other people, regardless of where they stand on the issue, do too.

But anyway, let me see if I can understand you, in fairness to you, Dean.



Mr. TITUS. Thank you.

Mr. WASHINGTON. So under the absolute freedom, then you would take literally the words that Congress shall make no law.

Mr. TITUS. That is what it says.

Mr. WASHINGTON. OK. And so what do we do when Congress does make a law and the Supreme Court does not rule that unconstitutional under that provision, "Congress shall make no law?"

Mr. TITUS. Well, I would hope, first of all, that Congress would not pass such a law. As a Congressman, you have a duty to uphold the Constitution. You certainly don't want to defer to the Supreme Court as to your constitutional duty.

Mr. WASHINGTON. OK. I think we are going to have to speak real world here, though, now, Dean.

Mr. TITUS. I am speaking the real world, I believe.

Mr. WASHINGTON. Well, you are not because you read Justice Scalia's—

Mr. TITUS. Do Members of Congress not pay attention to the Constitution?

Mr. WASHINGTON. Excuse me?

Mr. TITUS. Do Members of Congress not pay attention to the Constitution?

Mr. WASHINGTON. Well, let's save that argument for another day.

I'm troubled by—let's take what you have said to the logical conclusion, if there is one. Now then, you have read into *Employment Division v. Smith* something that, as far as I have been able to read—and I confess that I have not read widely on the subject, although I did practice constitutional law, I never taught it before I came to the Congress—you have read something into *Smith* that I didn't find.

I didn't find the decision to turn on Justice Scalia's opinion, that the State of Oregon had no right to—I mean let's start with the beginning. What brought the Court's attention to this was the fact situation and had to do with individuals who were members of an ethnic group that were here long before Columbus, and so this society, as we call it, came and imposed its will, if you will, on people who apparently were practicing their religion, as they define it—and I think that is what religion is, and I think you would agree with that—which included—you don't agree?

Mr. TITUS. No, I do not agree with that.

Mr. WASHINGTON. You don't agree that people have the right to define their religion for themselves?

Mr. TITUS. No, that is not the American tradition.

Mr. WASHINGTON. Wait 1 minute. Who defines the American tradition then, sir? You?

Mr. TITUS. No. I quoted to you from the Constitution of Virginia, and I think every legal scholar will indicate to you—

Mr. WASHINGTON. I beg to differ with you because—

Mr. TITUS [continuing]. That the first amendment rests upon the Virginia legacy.

Mr. WASHINGTON. Excuse me. Let me ask the questions.

I beg to differ with you. If that is where you are coming from, then maybe I will use my time on something else, because that is not what all legal scholars believe, and the expert is one more than 50 miles from home, and Virginia Beach is more than 50 miles

from here, but that doesn't make you an expert; that doesn't make you a constitutional scholar.

Mr. TITUS. I'm just telling you what the Virginia Constitution says.

Mr. WASHINGTON. If you are suggesting that the Virginia Constitution takes precedence over the U.S. Constitution, then I understand exactly where you are coming from.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. You see, Dean, if you don't give the answers that we want, why, we just dismiss you; we just roll over you, you see.

Mr. WASHINGTON. Would the gentleman yield?

Mr. HYDE. How did I know that I would be asked that question? Of course I yield to my friend from Texas.

Mr. WASHINGTON. You see, Dean, what my friend from Illinois fails to explain to you is that under the Constitution, at least as I think he and I both agree, in us is reposed the ultimate decision of voting. It doesn't matter whether you and I agree or not. It matters how I vote. No one has the right to take this vote from me; 500,000 people elected me to hold this office, and I will surrender to no one. It doesn't matter whether you and I agree. You are here; the burden of proof is out there to convince me on something that I exclusively have the right to vote on, and I will cast it, and if you assert matters and I'm trying to find a common ground with you and we can't, then you lose the battle and I vote the way I wish to vote.

I thank the gentleman for yielding.

Mr. HYDE. Not at all, and I wish to parenthetically comment that the gentleman said 500,000 elected him. He got a bigger count than I did.

Mr. WASHINGTON. I count them all.

Mr. HYDE. That's good, and they are all good Democrats.

Ms. Strossen, welcome here, and I look forward to you testifying in the future on other legislation having to do with political correctness where I know you are a great expert, and I look forward to that happy day.

Ms. STROSSEN. So do I, Mr. Congressman.

Mr. HYDE. Was he listening? I wasn't looking.

I read your statement yesterday, and I find it very interesting, very comprehensive—you and Mr. Peck.

So I just have a few peripheral questions to ask you, perhaps more in self-indulgence than in the search for truth here, but nonetheless, on your page 2 you say the American Civil Liberties Union is a nationwide, nonpartisan organization, nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and most particularly in the Bill of Rights. I like that.

And I wonder if you agree that our rights as enumerated so dramatically and resoundingly in the Declaration of Independence, do you support those rights as well?

Ms. STROSSEN. Absolutely. The ACLU has a philosophy, which I believe is the U.S. constitutional philosophy, that our rights were not granted to us by any document. The rights were preexisting. That is the whole philosophy that is stated so eloquently, as you indicated, in the Declaration of Independence. Therefore we did not

need a Bill of Rights to enumerate those rights, and therefore there are certain rights that we defend that are not enumerated in the Bill of Rights.

Mr. HYDE. Well, I am more than pleased to hear you say that because I think the statement in our Declaration that the source of our rights is the Creator—it is an endowment, not an achievement. And they are inalienable. And the purpose of government is to secure these rights, and we get our just powers from the consent of the governed. That encapsulates all the wisdom and philosophy of the ages, in my opinion, insofar as they pertain to our rights and governance.

Now, with that in mind I notice that you quote from William Penn. You have, “The latter’s very first article proclaimed religious freedom [b]ecause no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences,” et cetera. And then you say that this was the only portion of the charter that could not be amended, and you cite a source. It is the source that interests me: “Reprinted in ‘Sources of Our Liberties.’”

I have not read “Sources of Our Liberties,” but does that purport to say that it is this charter and these other parchments that are the sources of our liberties, or does the author of that agree with you and me that the sources of our liberties preceded the composition of these human documents?

Ms. STROSSEN. I will let Mr. Peck speak to the author.

Mr. PECK. “Sources of Our Liberties” is a book published by the American Bar Foundation, which does not purport to say that these are sources, so to speak, as much as part of our heritage in understanding our liberties. So it reprints the original documents from things that figured importantly in the history of what we now regard as constitutional liberty, including all the original constitutions of the States and the important acts of the colonies that they took in this regard, as well as the Constitution itself.

Mr. HYDE. Well, I understand that. I just assumed that when you say the “Sources of Our Liberties,” this was not a theological book. This was a book about documents and constitutions.

I just think it overstates the case to say our liberties are sourced in these documents.

Mr. PECK. True. But it was not my position to dispute the title given by the book.

Mr. HYDE. Oh, no. No. You are stuck with the title, as we all are. I understand that. I just wanted to try and make the point that our liberties precede documents. I think Hamilton said it very well: The sacred rights of mankind are not to be found rummaging among parchments and books written in the heart by the finger of divinity, et cetera I should commit that to memory.

All right. I am concerned about whether or not we have the power, the authority, the competence to establish a standard of review for the Supreme Court whether by statute. What we are telling the Court is you may no longer look at these cases by any standard other than a strict scrutiny, and whether we have the competence to do that.

Now, you have said at the outset of your testimony that Congress always has the power to enhance rights. And I just wonder if we

can do that even though it is contrary to an interpretation made by the competent interpreter of the Constitution; to wit, the Court.

Ms. STROSSEN. Congressman Hyde, your previous questions demonstrate precisely why Congress has not only that power but, in my view, that responsibility under our charter of government to protect our liberties, which is what is being done here, when the Court has failed to do so.

To use a metaphor that I often use when I teach my constitutional law students, we tend to be so fixated in recent years on the U.S. Supreme Court's interpretation of the Constitution that too often we assume that our liberties are completely coextensive with the Court's interpretation of the U.S. Constitution. For reasons you yourself have just described, that is contrary to our philosophy of government. All that the U.S. Supreme Court can do, and here is my metaphor, is to set a floor on our liberties. It tells other units of government this is the level below which you may not sink in protecting rights. It does not and it cannot set a ceiling. Congress is free to protect rights more than the Supreme Court does, and I would say in this instance Congress has a constitutional responsibility to do because it would simply restore the plain language and long accepted meaning of the first amendment of the Constitution.

Mr. HYDE. Of course, one person's enhancement is another person's diminishment—diminution. The notion that abortion rights, the right to an abortion is enhanced from my end of the kaleidoscope is a diminishment of the sacred right to life which is enshrined in our Declaration and in our 14th amendment and in our 5th amendment.

But I am not totally satisfied with the adequacy. I accept what you say, but I am not totally satisfied that we in Congress have the right to tell the Court what standard of review it shall use on first amendment cases or any other. And I just need to—we are going to hear more about that tomorrow.

Ms. STROSSEN. Congress, of course, does that all the time. When it passes statutes which are to be enforced by the courts, it is always imposing, indeed in many situations, much more detailed standards for judicial enforcement. Here the general compelling State interest test is simply constitutional law shorthand for telling the Court you have got to treat religious freedom as a fundamental right. What that translates into in actual adjudication is that any abridgment on such a right is subject to strict scrutiny. So, in fact, it is a rather modest specification of the judicial review approach.

And going to the abortion issue, Congressman Hyde, of course this legislation is completely neutral on the abortion issue. All it does is restore religious liberty, freedom of conscience, and I think that is a liberty that can enhance the rights and in many situations will enhance the rights of those who conscientiously and religiously are opposed to abortion.

As the law currently stands, Congress or State legislatures or municipal governments could compel doctors, nurses and others who have religious objections to abortion, could nonetheless be compelled as part of general legislation to perform those abortions. This law would give them a defense based on religious freedom.

Mr. HYDE. I quite agree with that part of your statement. I am unpersuaded, and I would like to be persuaded to your point of view, that a right to an abortion, which your very organization asserts as a religious right, would not be assertable under this statute which requires the only way to diffuse that or divest that of legal force is to find a compelling governmental interest in opposition to it. But there may be no compelling governmental interest in protecting unborn life. The courts may just go around that and dispose of *Roe v. Wade* as a liberty interest. And so this becomes awfully strong, awfully powerful, and a weapon that you recognize the force of it because you utilize it, your organization utilizes it. So that gives me pause.

Ms. STROSSEN. Congressman Hyde, this law, of course, would simply restore the law to where it was before 1990, and in no case before—

Mr. HYDE. Can I jump in there?

Ms. STROSSEN. Yes.

Mr. HYDE. Don't you recognize—or do you recognize that the compelling State interest wasn't all that compelling in many religious cases before *Smith*.

Ms. STROSSEN. But that actually cuts against the argument that you are making, because my next point was, even though we did where it was appropriate assert free exercise as a basis for having an abortion when there was in fact a religious belief that mandated abortion in a particular circumstance, that claim never prevailed even under the compelling State interest standard.

Mr. HYDE. Except once.

Ms. STROSSEN. I stand corrected.

Mr. HYDE. Well, I think in the *Harris v. McRae* case.

Ms. STROSSEN. No. With all due respect—

Mr. HYDE. On the district level, not the appellate.

Ms. STROSSEN. So the Supreme Court has never validated that approach. And, with respect to every assertion of religious freedom both before *Smith* and—

Mr. HYDE. Why do you keep asserting it then?

Ms. STROSSEN. We have to in order to—

Mr. HYDE. Sure.

Ms. STROSSEN [continuing]. Preserve the claim. Precisely because the Supreme Court has never definitively ruled on it.

But, as I was going to say, as with every claim of religious liberty, it is not necessarily appropriate in every abortion case. Only in those situations where under those particular facts and given a particular religious belief there is a belief, a specific good faith, sincere belief that would be violated absent an abortion. And that is not the case under every religion, and it is not the case with respect to every possible abortion.

Mr. HYDE. Well, I want to save those little babies too, even where someone claims a religious right to. But I hear you.

Dean Titus, what about LSD—the League for Spiritual Development? Timothy Leary—Bishop Timothy Leary or whatever he was. Didn't you think, or do you agree that there was a compelling State interest in prosecuting him for the proliferation of a hallucinogenic drug under the guise of religion?

Mr. TITUS. Well, I think that the issue is not so much whether the State has a compelling State interest as whether or not the State has authority to deal with drug abuse or drug use. I think that traditionally in America the assumption is that that is a matter for the civil ruler, and therefore if someone comes along with some subjective religious conscience claim it is really at the discretion of the legislature whether to accommodate that claim.

Mr. HYDE. Supposing it is objective rather than subjective? Supposing it has all the trappings of a temple and robes and the whole 9 yards—organs, the works, but claims the use of—as in *Smith*, as in *Smith*—the use of LSD is a spiritual development, religious thing?

Mr. TITUS. I don't think it makes a bit of difference whether it has all of the "trappings" of a religious order. As a matter of fact, there are many people who have claimed to take the lives of babies or taken the lives of young children or taken the lives of adults in the name of religion.

Mr. HYDE. Human sacrifice.

Mr. TITUS. Precisely. And that, of course, again, is not religion within the meaning of the first amendment, nor is it within the meaning of the great American tradition. But that is a matter that is subject to the jurisdiction of the civil authorities, and the civil authorities don't have to demonstrate in every case that they have a compelling State interest with regard to protecting innocent human life.

Ms. STROSSEN. Congressman Hyde, could I ask a question along that line?

Mr. HYDE. Sure.

Ms. STROSSEN. Would you have said, then, Dean Titus, that during prohibition that the Catholics were not entitled to a religiously based exemption for using wine?

Mr. TITUS. I did not say that.

Ms. STROSSEN. Well, isn't there civil authority to impose the prohibition laws?

Mr. TITUS. Yes, there is civil authority with regard to that.

Mr. WASHINGTON. The point is well taken.

Mr. HYDE. Never volunteer any information. Just answer the question.

Mr. TITUS. Well, what is important is to recognize the question of whether or not that is a duty owed to your Creator enforceable only by reason and conviction as contrasted to force or violence, or whether that is a matter of subjective religious conscience. The American tradition constitutionally has been to protect those objective duties that are owed to the Creator by reason and conviction. That is the constitutional tradition.

Mr. HYDE. But doesn't someone get to decide what is a truly conscientious religious belief, and can't there be differences of opinion on that?

Mr. TITUS. Of course, there can be differences of opinion about that. But the great American tradition—

Mr. HYDE. Polygamy was illegal.

Mr. TITUS [continuing]. Has been to accommodate some religious objections but not all of them. This is the second point that I make in my testimony. The danger with this bill is it is a monolithic so-

lution to what really ought to be addressed case by case, situation by situation. I think it is important for this subcommittee to know that after the *Smith* case came down the State of Oregon, its legislature, passed an exemption to those who were using peyote as is consistent with the tradition in America to accommodate certain subjective religious conscientious objections in particular cases, but not as a general wholesale view or a general wholesale act as this statute would do.

Mr. EDWARDS. Well, we are going to hear from the gentleman from Oregon now. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman. I think the gentleman from Illinois has done a great job today in questioning and in some of his statements. I think he is very politically correct today.

Mr. HYDE. I move that be stricken from the record, and the gentleman repudiate it.

[Laughter.]

Mr. KOPETSKI. I know that scares you, Henry.

I really think this has been a good hearing, very instructive for everybody involved here, and I appreciate the work of the ACLU. We don't always agree, but I think it is important that we have an organization such as yours whose first priority is our cherished rights. I appreciate your being here and involved in these issues.

Ms. STROSSEN. Thank you.

Mr. KOPETSKI. I want to get at this notion, though, where we have this language "Congress shall make no law prohibiting the free exercise of religion." But the reality is it is set in force under our system of government that we are going to have these collisions between religion and government. Do you agree with that, Ms. Strossen?

Ms. STROSSEN. Yes. In fact, that absolutist language in the first amendment also pertains to freedom of speech and freedom of the press. And, in fact, no Supreme Court Justice and no ACLU member has ever interpreted literally as being an absolute protection for religious freedom. That goes hand in hand with a relatively broad notion of the exercise of religion.

If one has a very narrow definition of religion, which was how I understood Dean Titus's testimony, but putting him aside, one could say, "Well, we will define religion as only the right to a belief"—and at one point in our history that is the narrow view the Supreme Court took—then you could protect it absolutely. But once you get into the sphere of actual practices, obviously one does have to have limits in an orderly society in which other people's rights are also valued.

Mr. KOPETSKI. So what we are sort of doing here in our Constitution is drawing a line in the dirt and saying, you know, don't cross this line, or if you are going to cross this line you better have a compelling reason to do so?

Ms. STROSSEN. You have a heavy burden of proof.

Mr. KOPETSKI. OK. Now do you think this is a real problem out here? I mean we have heard about the altar case, we heard about the scapulars and the rosaries for prisoners. I mean are city councils, are State legislatures not mindful of people's religious exercises? Is this a continuing problem or are we just here debating for the sake of debate?

Ms. STROSSEN. No. It is a continuing problem all over the country, and I am very grateful, I might say, with a great deal of participation by the ACLU in Oregon that Oregon's Legislature did pass an exemption. But that is the sort of protection that one cannot count on. And it is precisely the most unpopular religions practiced by the most marginalized and vulnerable people in our society where we cannot expect the legislative process to be attentive to their beliefs.

I might add to the examples that you have already mentioned prisoners, Muslim prisoners have been forced to eat pork or are being denied the option of a diet that would be consistent with their religious beliefs. Amish in Minnesota have been subject to certain traffic regulations that violate their religious beliefs.

I think it is not a coincidence that the Supreme Court decisions that have been unprotective of free exercise of religion three of them in the recent past have involved native Americans, and that is the history of our society. It is the minority religions, the unpopular religions, the new religions that are going to be discriminated against. In that sense I think Dean Titus's testimony is eloquent support for the necessity of this legislation. Because as I understand him, he invokes the American tradition that does protect Catholicism but doesn't protect native Americans, that does protect the use of wine but not the use of LSD. And I don't understand any distinction among those in principle. It is just a matter of the mainstream, the powerful versus the minority and the oppressed. And, of course, the whole purpose of the Bill of Rights, including the freedom of religion clause, is precisely to protect minority groups from the tyranny of the majority.

Mr. KOPETSKI. I want to explore finally this notion therefore that if you think, and you folks monitor events and government actions throughout the country and all different levels, from school boards on up to State legislatures, and even us, the Congress—that if this is going on, and it is not organized but it is insidious, and we have this piece of legislation that we are really trying to have as neutral in terms of the abortion issue, that this should be the compelling reason why not, because where you have the question of abortion versus the reality of erosions of religious rights in this country.

Would you comment on that—what we, the Congress, ought to do in those kinds of choices? Because I have got to convince an abortion legislator to vote for this legislation. What do I say to him or her?

Ms. STROSSEN. I think it is really a myopia, if I may say so, the fixation on the abortion issue and overlooking the overarching issue of religious freedom, which as even Congressman Hyde admitted in many situations is actually going to come to the aid of those who have conscientious or religiously grounded objections to abortion. I think it is tragic that in this obsession and the polarization over the abortion issue we are losing sight of such fundamental freedoms in this society.

If I might say so, even under the Supreme Court's decision in *Smith*, I think that the free exercise argument on behalf of certain abortions would still prevail even absent—or could still prevail even absent this statute, because the Court in *Smith* did say if you have hybrid constitutional rights, not just free exercise of religion,



but in combination with some other asserted right, then we will still subject any government intrusion or infringement to strict scrutiny. And here we would have a hybrid right because there is still some privacy right, even if it is of a reduced status. But there is a privacy interest coupled in some cases with the free exercise of religion interest even absent this statute.

So I would argue that the statute does not change whatever argument can be asserted based on free exercise of religion with respect to abortion.

Mr. KOPETSKI. Thank you. Thank you, Mr. Chairman.

Mr. WASHINGTON. Thank you for indulging me, Mr. Chairman.

Ms. Strossen, going back to minority religions and unpopular religions, oughtn't we be more comfortable with one standard that applies to all rather than letting the Government, whether it be the legislative branch, the executive or the judicial branch, pick and choose, if there are several standards, which religion gets the benefit of which standard?

Ms. STROSSEN. That is precisely the reason for passing this statute. It is different from the kind of legislative intervention that we saw in Oregon, for example, where a specific law was passed to exempt one religion's use of one particular criminal substance. I think precisely the advantage of this kind of neutrally written statute is you can't sort of calculate it in advance who is going to be benefited and whose ox is going to be gored. You are just standing for a neutral principle of fairness that no matter what your belief is, no matter who you are, no matter whether you are politically powerful or politically powerless, no matter whether your beliefs are widely accepted or controversial they will be subject to the same standard of review.

Mr. WASHINGTON. And when you take that standard and you take the evening gown off the standard that is floating around and in metaphysical constitutional terms is called compelling State interest it amounts to nothing more than a burden of proof.

Ms. STROSSEN. Exactly.

Mr. WASHINGTON. And it is a higher burden of proof than the Supreme Court in its wisdom, or for the lack of it, has found to use in certain cases involving religion. Right?

Ms. STROSSEN. Exactly. I mean the Supreme Court has essentially said that if religion is burdened unintentionally as a result of a generally applicable law then there is no protection. The only protection is if the legislature consciously singles out a minority religion. And, in fact, very few, if any, legislators are, if I may say so, so stupid or so careless as to intentionally target particular religions. Even if they wanted to, they would camouflage in a law of general applicability, and the Supreme Court has made that absolutely beyond the pale of free exercise of religion.

Mr. WASHINGTON. Do you think that Mr. Madison would find any solace in the fact and the wringing of hands and saying this is one of the problems you have when you live in a democratic society?

Ms. STROSSEN. James Madison was the person who used the phrase "tyranny of the majority." He recognized, and, of course, as the prime author of the Bill of Rights, that the reason why we needed a Bill of Rights in this society was precisely to protect indi-

viduals and minority groups from that democratically elected majority insofar as certain fundamental rights are concerned.

Mr. WASHINGTON. Right. And the only question is that—and Mr. Hyde, of course, I'm sorry that he has gone now—on the standard of review and whether the Congress has the authority to establish a burden of proof or standard of review, we do that routinely in almost every piece of legislation that is passed. We contemplate what is likely to be the tugs and balances and pulls and pushes on judicial interpretation and we direct the Court's attention, and rightfully so, to how we wish to have it interpreted. There are standard rules of statutory construction. There are rules that apply when the Constitution meets a statutory construction. And it is not only the right but the duty of the Congress to give guidance to the Court in that respect. Would you not agree?

Ms. STROSSEN. I completely agree, especially in light of the fact that all of you take an oath to uphold and defend the Constitution, and it is particularly important that you do so in a situation such as this when that is precisely what the Supreme Court, with all due respect, has failed to do. It really has taken all of the substantive meaning out of a very important provision in the Constitution.

Mr. PECK. Congressman, may I add something?

Mr. EDWARDS. The civil rights law, since 1964 or since I have been here we have been interpreting the Constitution and implementing certain sections of the Constitution. Is that correct?

Mr. PECK. That is correct.

But would like to point out one other fact that got lost in that discussion. And that is, if someone were going to court pleading simply the first amendment, they would be prosecuting that case under the *Smith* standard. If this legislation passes and they also plead this statute, that is the time when the Court would apply the compelling interest test. So therefore you are not abridging the Supreme Court's right to interpret the Constitution as it chooses to do, but you are simply adding new rights under a statute that they would have to interpret under the standard that you have set.

Mr. WASHINGTON. And finally, another point that was made by Mr. Hyde, isn't the reason—I am sure he understood and was just asking the question, as he sometimes does, to bring out the thought process in all of us. Isn't the very reason that you plead and attempt to prove an issue even though the courts have decided against you is so you will have an issue of justiciability? You need to get the court to decide against you in order to take it up on appeal. And, if we followed his logic to a logical conclusion, if we say, well, this is the law, the law would never change. If no one ever challenges the law by pleading an interpretation of whatever it is, a statute, a coloring book, or whatever, by making a court decide that this is not the correct interpretation, then you don't have a justiciable issue to take up to the court of appeals and ultimately to the Supreme Court.

Ms. STROSSEN. That is precisely right.

Mr. WASHINGTON. Isn't that the very foundation of the concept of audit liberty. That is the way we want to do it, at the courthouse rather than out in the streets; isn't it?

Ms. STROSSEN. That is precisely right. We make the pleading to preserve the claim.

Mr. WASHINGTON. Thank you. Thank you, Mr. Chairman.

Mr. EDWARDS. Well, we thank all the witnesses very much for very helpful testimony.

Ms. STROSSEN. Thank you.

Mr. EDWARDS. William Yang is a member of the plaintiff's family in the case entitled *Yang v. Sturner*. Mr. Yang is from Worcester, MA. Today, Mr. Yang is accompanied by Robert Peck of the American Civil Liberties Union. The ACLU provided counsel for the Yang family.

[Witness sworn.]

Mr. EDWARDS. Thank you, Mr. Yang.

Without objection, your full statement will be made a part of the record and you may proceed.

**STATEMENT OF WILLIAM YANG, WORCESTER, MA, ACCOMPANIED BY ROBERT PECK, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION**

Mr. YANG. Thank you, Mr. Chairman, and your committee.

I represent my family and my community, and not only that, I represent the Hmong community around the United States. My family immigrated to the United States in 1976. We continue to settle our future in America.

In 1984, I have a nephew, car crashed and he died at the accident. An autopsy was done after the accident. In 1985, another nephew died in his sleep, during the same period, same time. Another nephew died in 1986 at the same time. And then, in 1987, my nephew died on December 24. For 4 years we did not celebrate New Years or celebrate Christmas. We cannot celebrate without joy and we celebrate without peace and happiness.

At the time it happened on December 21, my nephew was not conscious—he just cannot breathe. And I live on the third floor. I went downstairs and took him to the hospital and I saved his life for 3 days. Then he died after 3 days.

We have more than 50 people gathering around a waiting room, waiting for a doctor to give some kind of announcement. Before that we met with the doctor and he gave an announcement. He said, "Your nephew's brain is dead. He is unconscious." So they told us they want to take away the life support, and we told him, we said OK. And we talked to the doctor for half hour, and he said, OK, after they take the life support we can continue and stay with him for 4 or 5 hours after. OK. Then 1 hour later they are pushing us to take the life support. As soon as they took the life support, we come back looking for the doctor who was in charge of that unit. He is gone. Can't find him. OK?

And we talked to the subunit person on that unit. We told him we don't want autopsy on that body because we have four persons already been done in the past. This is related to religion. Because my people, we worship parents and we worship spirits. Our religion is animism. If you do something wrong into your culture that thing is going to curse back into your family because it cannot be reborn. It cannot go to the next life. So, in order for him to go to the next

life he had to come back and claim one of your members before we can get the passport to go to another life.

Then, after that, we have no place to go. We have nobody we can depend on. The only person we can depend on is the American Civil Liberties Union, and we went to them and we take this case to the court. On January 15, 1990, the senior U.S. District Judge Raymond Pettine ruled in our favor. That the Federal Government and the State have violated our rights. And the whole community is happy. I am happy too. I don't know what—thanks to the judge at that time. And that ruling reflected the importance of religious freedom and of our individual rights in this country under the first amendment of the U.S. Constitution. And 6 months later he reversed the case. He turned our future, he turned our life, he turned our hope upside down. We have no place to go. This is the only way we can go right now, so we can go.

After the judge reversed this case I spoke to a lot of community members around this country. Everybody feels sad, like we were betrayed by the Federal Government. We are discriminated by the Government. We are excluded from the Constitution, excluded from the first amendment. We fought for this Government for 15 years. I carried a gun when I was 15 years old. And not only that, when the Communists fire a rocket explosion, I can see people die. I can see people cut open around my side and the other side. But we know that this is something some day in the future is going to happen to you. But we never expected in this country that anything you wanted never going to happen, but it happened.

So he has really, really damaged our future. We have no place to go. So the only way we can go is up to the chairman and up to your community—up to your committee. You turn the light on, our future is on, our hope is on. You turn the light off, our future is off, our hope is off.

So I urge you to pass this bill. Thank you.

Mr. EDWARDS. Well, thank you, Mr. Yang. That is very distressing testimony, and I am sure you know that all the members of the subcommittee sympathize with the very difficult situation that you ran into.

[The prepared statement of Mr. Yang follows.]

STATEMENT OF WILLIAM YANG (OF WORCESTER, MA)  
BEFORE THE SUBCOMMITTEE ON  
CIVIL AND CONSTITUTIONAL RIGHTS OF THE  
HOUSE JUDICIARY COMMITTEE

Wednesday, May 13, 1992

As family of the deceased, Neng Yang and as a member of the Hmong community, I would like to express my sadness and outrage concerning the handling of the illness and death of Neng Yang.

After being admitted to the Rhode Island Hospital on December 21, 1987, Neng spent seven days hospitalized for an unknown illness and died in a coma on December 28, 1987.

Our family asked that no autopsy be performed as it is against our religious beliefs. We were promised by the doctors and the administration that our religion and our rights would be honored. They were not. Following the death of Neng on December 28th, Doctor Richard Milman promised that he would only be transferred to the Medical Examiners Office and that no autopsy would take place.

When the body was transferred to the funeral home and the family went to do cultural dressing of the body, we were shocked and upset to find that

Neng had had an autopsy. We were upset because we had been promised that the autopsy was not necessary as the patient had been hospitalized for three days or more and we were also even more upset because we were totally unprepared for what we would see.

Under the U.S. Constitution's First Amendment we were promised freedom of religion--this was denied to Neng Yang and to the Hmong people as a community. On January 15, 1990, Judge Raymond Pettine ruled in our favor, but his decision was reversed and we feel betrayed.

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As hard-working, respectable people and citizens of the U.S. and Hmong ancestry, our rights to maintain the body completely intact in conformity with the rites practiced by our people for thousands of years is most important to both the deceased and their survivors. We believe that the deceased and the surviving family are cursed if they do not uphold the rites and traditions; therefore, the Religious Freedom Restoration Act is very, very important to us and our community.

Mr. EDWARDS. And I suppose, Mr. Peck, you are going to say that if this law had been in effect that we are considering today that the Yang family could have gone to court and stopped the autopsy from taking place. Is that correct?

Mr. PECK. They could not have stopped the autopsy because it occurred too quickly, without their knowledge. The medical examiner undertook it on his own without notifying them to do the autopsy. So they brought an action in Federal court in Rhode Island asking for declaratory relief against this kind of practice over sincere religious objections in the future, as well as damages under the *Bivens* doctrine.

What happened is that in December 1990 the judge ruled in their favor using a compelling interest test. The opinion itself was issued on January 12, 1991—I am sorry—January 12, 1990, and it clearly relied on the compelling interest test, said that there was no compelling interest on behalf of the State to do this autopsy.

Then while the damages portion of the trial was pending the *Smith* decision came down. That was April 17, 1990. As a result, the judge felt compelled to review his previous decision. And I would like to ask, Mr. Chairman, that his new decision, dated November 9, 1990, under *Smith* be made a part of the record.

Mr. EDWARDS. Without objection, so ordered.

[The opinion follows:]

You Yang YANG, Ia Kue  
Yang, Plaintiffs,

v.

William Q. STURNER, Individually and  
in his capacity as Chief Medical Examiner  
for the State of Rhode Island, Defendant.

Civ. A. No. 88-0242 P.

United States District Court,  
D. Rhode Island.

Nov. 9, 1990.

Hmong couple brought suit against Rhode Island's chief medical examiner based on performance of autopsy on their son's body without their consent. On cross motions for summary judgment, the District Court, 728 F.Supp. 845, held that medical examiner's actions were not justified by compelling state interest, and examiner was liable for damages. Thereafter the District Court, Pettine, Senior District Judge, withdrew the prior opinion and entered judgment which held that application of a Rhode Island law governing autopsies did not profoundly impair the religious freedom of the Hmongs.

Dismissed.

**Constitutional Law** ⇨84.5(1)  
**Coroners** ⇨14

Application of a Rhode Island law governing autopsies did not profoundly impair the religious freedom of Hmongs, who believed that autopsies were a mutilation of the body; the law was facially neutral and did not appear to have been enacted with animus toward any religious group, and thus its impairment of religious beliefs did not rise to a constitutional level. U.S.C.A. Const.Amend. 1.

Amato DeLuca, Providence, R.I., for plaintiffs.

Barbara Grady, Asst. Atty. Gen., State of R.I., Providence, R.I., for defendant.

#### ADDENDUM

PETTINE, Senior District Judge.

On January 12, 1990, this Court released an opinion granting summary judgment on the issue of liability to the plaintiffs, the Yangs, for the emotional distress they suffered as a result of the defendant's, Dr. Sturner's, violation of their First Amendment rights. The facts of the case are set out in this Court's opinion at 728 F.Supp. 845 (D.R.I.1990). In brief, Dr. Sturner, Rhode Island's Chief Medical Examiner, conducted an autopsy on the Yangs' son. This autopsy violated their deeply held religious beliefs. The Yangs are Hmongs, originally from Laos, and believe that autopsies are a mutilation of the body and that as a result "the spirit of Neng [their son] would not be free, therefore his spirit will come back and take another person in his family."

This Court was in the process of researching the case law regarding the damages portion of this opinion. In the course of research, I considered the recent Supreme Court decision of *Employment Division, Department of Human Resources of Oregon v. Smith*, — U.S. —, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), decided on April 17, 1990, several months after my initial opinion. It is with deep regret that I have determined that the *Employment Division* case mandates that I recall my prior opinion.

My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were to now grant damages in the face of the *Employment Division* decision. I



## YANG v. STURNER

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Cite as 750 F.Supp. 558 (D.R.I. 1990)

would note, however, that at the time of my January decision, I believe that I was on solid ground in ruling for the Yangs. As Justice Blackmun stated in his dissent, the majority's decision in *Employment Division*, "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 1616 (Blackmun, J. dissenting), see *id.* at 1607 (O'Connor, J. concurring in the judgment) (the Court gave "a strained reading of the First Amendment . . . [and] disregard[ed] our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.").

In *Employment Division*, the Supreme Court declined to apply the traditional balancing test used in First Amendment cases and held that the State can prohibit sacramental peyote use by Native Americans under its criminal laws and can thereby deny unemployment benefits to persons discharged for such use without violating the Free Exercise Clause. *Id.* at 1598-1606. It may seem that this holding could be limited to cases involving criminal law violations; however, the language throughout the opinion indicates that "[t]he Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions . . . and to state laws of general applicability. . . ." *Id.* at 1616 (Blackmun, J. dissenting) (emphasis added).

While the Supreme Court stressed that the compelling state interest test is still required in other constitutional contexts such as free speech or racial discrimination, it is no longer to be used when a generally applicable law affects religious conduct. *Id.* at 1604. "What it produces in those other fields—equality of treatment, and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Id.* In a footnote, the Court noted that "it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, or its

administration of welfare programs[.]" *Id.* at 1603-04 n. 2 (citations omitted).

The Supreme Court rejected the notion that the government should be hampered in its implementation of public policy by requiring sensitivity to all religious beliefs:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense. *Id.* at 1603 (citations omitted).

Of course, the Court did not go so far as to say that a State could not be sensitive to religious beliefs, however, the Court did make it clear such sensitivity, although desirable, is not mandated by the constitution. *Id.* at 1606. Moreover, the Court noted that it is not for the federal courts to determine when such sensitivity is appropriate. *Id.*

In sum, the *Employment Division* opinion stands for the proposition that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest. . . ." *Id.* at 1604 n. 3.

While I feel constrained to apply the majority's opinion to the instant case, I cannot do this without expressing my profound regret and my own agreement with Justice Blackmun's forceful dissent. Justice Blackmun points out that the majority distorted long-standing precedent to conclude that:

strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.' I do not be-

lieve the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance. *Id.* at 1616 (Blackmun, J. dissenting) (citations omitted).

Justice Blackmun feared the impact of the majority's opinion and hoped "that the Court [was] aware of the consequences, and that its result [was] not a product of overreaction to the serious problems the country's drug crisis has generated." *Id.* (Blackmun, J. dissenting).

One must wonder, as Justice O'Connor did in her concurrence, what is left of Free Exercise jurisprudence when one can attack only laws explicitly aimed at a religious group. "Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." *Id.* at 1608 (O'Connor, J. concurring in the judgment).

In the instant case, the Rhode Island statute governing autopsies is a generally applicable law. The law is facially neutral. There is no indication that the law was enacted with any animus toward any religious group. The law's application did profoundly impair the Yangs' religious freedom; however, under *Employment Division I* can no longer rule that this impairment rises to a constitutional level. Therefore, I do not see any basis for the Yang's first amendment, equal protection or due process claims. Therefore, the opinion published by this Court on January 12, 1990, 728 F.Supp. 845 (D.R.I.1990), cannot stand as precedent; the same is hereby withdrawn and the case is hereby dismissed with prejudice together with all state pendent claims.



Mr. PECK. In that decision he said: It is with great regret that I have decided that the *Employment Division* case mandates that I recall my prior opinion. He noted in that opinion, I was moved by—the community had gathered in the courtroom. I was moved by their cheerful outburst in the courtroom. I have seldom in 24 years on the bench seen such a sincere instance of emotion displayed.

The opinion reads as an indictment of the *Smith* case, but says that under his obligation as an inferior judge within the U.S. court system he has no choice but to follow it. It is clear the only difference between winning this case and losing it was the handing down of the *Smith* decision.

Mr. EDWARDS. Well, that is very impressive.

Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Mr. Yang, as I understand, when you were in Laos what you looked forward to when you came to this country was that you would be able to practice your religion freely. Is that right?

Mr. YANG. Yes.

Mr. WASHINGTON. And up until the time that this tragedy was visited upon you it was your understanding that the American dream would protect your religious freedom as well as that of every other person or citizen or believer or nonbeliever, as the case may be, in this country. Is that right?

[Mr. Yang nods yes.]

Mr. WASHINGTON. So then you feel that if the Government, whether it be the State government, the medical examiner, the Federal Government or anyone else, if they come to a person's home, if they come to a person's religion and they want to stop you from exercising it in the way in which you and others who practice that religion believe and feel that it ought to be practiced, that they at least ought to be required to show that their interest in doing whatever it is that they want to do that's different from what your religion teaches is more important? That is the least that they ought to be required to do, don't you think?

If there is some reason that the Government has that even though your religion says that a body should not have an autopsy performed on it in this case that if they have some compelling reason they can show, you or the family or court, where the court would weigh all of the reasons why your religion, not even explaining the reason, but a deeply felt religious belief that this should not be done, that the Government ought to at least be required to come and show that their reason for an autopsy upon the body of your loved one, which violates your religious convictions, is based upon something more than the whim or caprice or vicissitude of an individual? Don't you think that that is fair?

Mr. YANG. Yes.

Mr. WASHINGTON. That is what you were fighting for in Laos, isn't it?

Mr. YANG. Right.

Mr. WASHINGTON. Mr. Peck, I want to commend you on what I believe to be a unique application of *Bivens v. Six Unknown Federal Agents*. I have seen it used a lot of ways to get around section 1983, and I think that you have—I assume that you participated in litigation of this case.

Mr. PECK. No, I did not. But one of our ACLU volunteer lawyers in Rhode Island who has to be in court today and could not come was mostly responsible for that.

Mr. WASHINGTON. Will you pass along my suggestion and thoughts. That I thought it was a beautiful—and that is the beauty of the law, I think, when you find yourself to be at the end of a road and you find a wall in front of you that if you look and persevere that most often, more often than not you can find another way to get an issue before the Supreme Court, going all the way back to, as you know, the reason that *Bivens* is important is because before *Bivens* in the Supreme Court and the interpretation of section 1983, and I think *Monroe v. Pate* and then *Monnell v. New York*, that the city was not a person, or the instrumentality was not a person within the meaning of section 1983, which I fundamentally think was wrong to begin with. But I commend you on the use of it. I am sorry that we did not reach the result that I think would have been fair and proper under the interpretation that most people have of the Constitution, and I think a wrong has been done to Mr. Yang and his family. And it is a wrong for which there is no remedy, isn't it? There is no remedy for the wrong that was done to him.

Mr. YANG. It is only Rhode Island.

Mr. WASHINGTON. You will never be able to overcome what was done. You will have to forgive and remember it.

Mr. YANG. Yes.

Mr. WASHINGTON. Thank you, sir. But what you were doing in the declaratory judgment wasn't for you and your family. It was to serve as an example to this medical examiner who was following the law as he understood it, so that there would be a standard out there so that people throughout this country regardless of whether it is an autopsy or whatever it was where the Government came face to face with their religious beliefs, if the judge's judgment had stood up there would be a declaration, there would be a case on the books that says whenever that happens you must show, be willing and able to show a compelling State interest before you can walk over people's religious freedoms and rights. That is what you were going to court for, isn't it?

Mr. YANG. Yes.

Mr. WASHINGTON. I thank the gentleman for his testimony. And I thank the chairman for yielding.

Mr. EDWARDS. We all thank Mr. Yang and Mr. Peck for testimony that certainly gave us a new insight into the importance of this legislation.

That concludes the hearing for today. We will meet in this room at 10 a.m. tomorrow morning for additional hearings.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

# RELIGIOUS FREEDOM RESTORATION ACT OF 1991

THURSDAY, MAY 14, 1992

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Michael J. Kopetski, and Henry J. Hyde.

Also present: Melody Barnes, assistant counsel, and Kathryn Hazeem, minority counsel.

Mr. EDWARDS. The subcommittee will come to order. We are going to continue today hearings on H.R. 2797, the Religious Freedom Restoration Act. We have an interesting group of witnesses, and look forward to hearing from all of them.

First of all, we are honored to welcome our colleague from New York, Steve Solarz. He represents the 13th District of New York. He has been dedicated to public service for many years. He served in the New York State Assembly, on the board of governors of the American Jewish Congress, and as a trustee to Brandeis University. Mr. Solarz is the chief sponsor and author of the Religious Freedom Restoration Act. He is also a good friend of both Mr. Hyde and me.

We welcome you. Without objection, the full statement will be made a part of the record, and you may proceed.

## STATEMENT OF STEPHEN J. SOLARZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. SOLARZ. Thank you very much, Mr. Chairman. Let me say, first of all, that I deeply appreciate your willingness to hold 2 days of hearings on this bill. H.R. 2797 now has, as you may know, 187 cosponsors, Members from both sides of the aisle and of all ideological persuasions. And I am confident, if your subcommittee sees fit to report this bill out and if the full committee embraces it as well, we will have the votes to pass it by a substantial margin on the floor of the House of Representatives.

Let me offer you, if I might, a few thoughts about the need for this legislation, and then some observations about some of the concerns that have been expressed about it, particularly by my good friend from Illinois, Mr. Hyde.

The decision in the *Smith* case 2 years ago constituted, in my judgment, the most serious threat to religious freedom in America

in decades. To the extent there is any threat to one of our most fundamental freedoms in this country, the freedom of religion, it comes not from efforts on the part of the Federal or State or local governments to proscribe particular religions. I don't think that is a concern any of us need really fear. But it comes instead from laws of general applicability which have the intended or unintended consequence of prohibiting individuals from fulfilling their religious responsibilities or which require them to act in ways which violate their religious obligations.

And by ditching the compelling interest standard, which has existed for over three decades, the court in the *Smith* decision has created, I think, a very serious crisis in terms of the state of religious freedom in America.

In his opinion for the Court—an opinion, I might say, which I think will live in constitutional infamy—Mr. Justice Scalia accepted—took the position that, in our pluralistic society, accommodating the religious preferences of minority religions is a luxury which we cannot afford. It seems to me that religious liberty is, in fact, a fundamental American value, and that it is a necessity we cannot do without, rather than a luxury we cannot afford.

Indeed, Mr. Chairman, I would argue that the Bill of Rights itself was premised on the notion that there are certain fundamental freedoms which need to be insulated from the passions of the moment and the whims of a majority. And at the very top of the list of those fundamental freedoms which need to be protected from the will of the majority is the right to exercise one's religious beliefs.

The problems generated by the *Smith* decision are not hypothetical ones. Already, at courts throughout the country, laws and regulations are being upheld which previously might have been rejected had the *Smith* decision not been handed down.

I gather yesterday you heard the sad and moving story of the Hmong family, which had to accept an autopsy on one of their deceased family members, even though their religion proscribes it. And I am told, in jurisdictions all over the Nation, courts are now routinely rejecting claims that local laws or regulations are infringing on the religious freedoms of the individuals involved on the grounds that, in the wake of the *Smith* decision, that is no longer a tenable claim with respect to a law of general applicability that is otherwise constitutional.

So I think that this legislation, which simply restores the constitutional status quo—it reestablishes the compelling interest test which existed prior to the *Smith* decision, and would enable the courts to determine whether in any particular case an individual, who believes their religious freedoms are being violated, should be relieved from the obligation of adhering to the law, and then puts the burden of proof on the State or government jurisdiction involved to establish a fact that they had a compelling interest in requiring compliance, and that they had chosen the least restrictive method of doing so.

I would suggest, Mr. Chairman, that what I have said so far is fairly unexceptional, and I think virtually every Member of Congress would be sympathetic to the arguments. I gather, however, there are a number of our colleagues who have expressed concerns that somehow or other, intentionally or unintentionally, this legis-

lation would create the possibility, in the event the Supreme Court repeals or rescinds *Roe v. Wade*, that individuals could come into court, if the Religious Freedom Restoration Act becomes the law of the land, and claim that any subsequent State law restricting their right to an abortion is a violation of their religious freedoms, and that somehow or other efforts on the part of State governments to restrict abortion could be undone by the rights that would be afforded litigants under this legislation.

Let me suggest to you, Mr. Chairman, that this is a concern which is utterly unfounded. I don't doubt its sincerity for a moment, but I think it is utterly unfounded.

To begin with, I would point out that there are many groups supporting this legislation who are also strongly opposed to abortion. The National Association of Evangelicals, the Agudath Israel of America, Paul Weyrich's Coalitions for America, the Christian Life Commission, the Southern Baptist Convention, the American Association of Christian Schools, the Christian Legal Society—all of whom are adamantly opposed to abortion, all of whom, I believe, will support efforts, if *Roe v. Wade* is enacted, to persuade legislators around the country to pass laws restricting the right of a woman to have an abortion—nevertheless support this legislation because they do not believe it in any way whatsoever would jeopardize the ability of States, or the Federal Government, for that matter, to restrict the right of women to have an abortion.

Indeed, Mr. Chairman, I would argue that if, in fact, the Supreme Court does rescind or repeal *Roe v. Wade*, it is virtually inconceivable that the very same Court would then turn around and, on free exercise grounds, reinstate the right to have an abortion, in spite of State laws restricting it, on the grounds that a woman who claims she has a religious right to an abortion can claim that her constitutional rights have been violated.

So far as I have been able to determine, there is no known religion in the country which requires a woman to have an abortion, with one exception, and that happens to be an exception which is applicable to many of my constituents given the extent to which I represent the largest Orthodox Jewish community in the entire country. Orthodox Jews are, in general, opposed to abortion. In fact, they believe the Jewish law prohibits abortion under most circumstances.

But they also believe the Jewish law requires an abortion when the life of the mother is at stake and where a choice has to be made between preserving the life of the mother and the fetus.

One of the reasons I am so concerned about the bill introduced by our friend from New Jersey, Mr. Smith, which would eliminate as a potential—eliminate abortion as an issue which could be considered by the courts, even if the compelling interest standard is reinstated, is that in the name of establishing religious freedom in America, he would restrict the religious freedom of one segment of the American population, Orthodox Jews, who believe that where the life of the mother is at stake, an abortion is required by their religion. And if Mr. Smith's bill were adopted by the subcommittee, say, as a substitute for the Religious Freedom Restoration Act, we would be in a situation where individuals could present to the courts virtually any religious claim they wanted to, except a claim

that if their life was at stake, they are entitled to an abortion on religious grounds, because Mr. Smith's bill would preclude such an argument.

Let me say lastly on this point, Mr. Chairman, that the mere fact that a religion permits abortion is very different from a religion requiring abortion. And I do not believe it would be a credible argument before a court, if the Religious Freedom Restoration Act were adopted and a State legislature subsequently passed a law prohibiting abortion, for a woman to come in and say that this violates my religious right to an abortion because my religion does not prohibit abortion. The fact that her religion doesn't prohibit it doesn't mean that it requires it. And, therefore, I believe it is an argument which would not be given much weight by the court.

I know that claims have been presented to the courts in the past that there is a religious right to an abortion. But surely the subcommittee has the capacity to distinguish between claims presented and claims accepted and embraced by the court. Throughout the constitutional history of this Nation, a lot of ludicrous propositions have been put before the courts, and generally speaking, the courts are fully capable of distinguishing arguments which have weight from arguments which lack substance. And, in this instance, I think these arguments are totally without substance.

Finally, Mr. Chairman, let me just say in conclusion that, in my view, religious freedom goes to the heart of what this country is all about. My ancestors, possibly yours, came here because they wanted the right to worship the god of their choice freely, and to this day, millions of people seek to come to our shores because they know that here their religious freedom will be protected.

That is what this legislation is all about, and I very much hope, Mr. Chairman, that you will be willing to expeditiously consider it and report it out to the full committee.

Mr. EDWARDS. Thank you, Mr. Solarz.

[The prepared statement and other submissions of Mr. Solarz follow:]



STEPHEN J. SOLARZ  
13th District, New York

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**TESTIMONY OF CONGRESSMAN STEPHEN J. SOLARZ**  
**CONCERNING THE RELIGIOUS FREEDOM RESTORATION ACT**  
**BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS**  
**MAY 14, 1992**

Mr. Chairman: I want to thank you for holding two days of hearings on my legislation, H.R. 2797, the Religious Freedom Restoration Act, and for your continued support. I especially want to commend you for the personal interest you have taken in the crisis our first freedom has suffered as a result of the Supreme Court's April 1990 decision, Employment Division, Oregon Department of Human Resources v. Smith.<sup>1</sup>

As the members of this Committee are all too aware, on April 17, 1990, the Court discarded decades of free exercise jurisprudence by holding that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).'"<sup>2</sup>

Consequently, where such neutral laws of general applicability might interfere with the free exercise of religion, government no longer has to demonstrate that it has used "the least restrictive means of achieving a compelling state interest."<sup>3</sup>

The Religious Freedom Restoration Act would simply restore the compelling interest test in these cases. It would not create an absolute right to free exercise any more than the First Amendment ever did. Rather, it would confine infringements of that most precious liberty to an appropriately narrow set of circumstances defined, on a case by case basis, by the courts. It would grant a fair and equal day in court to all Americans,

<sup>1</sup> 494 U.S. 872 (1990).

<sup>2</sup> Smith, at 879.

<sup>3</sup> Thomas v. Review Board, Indiana Employment Security Commission, 450 U.S. 707, 718 (1981).

regardless of the nature of their religions, on the basis of an longstanding and familiar legal standard.

The Court's suggestion in Smith that the Free Exercise Clause only protects against laws directed at religion reduces one of our most fundamental freedoms to a constitutional curiosity. Nobody in this day and age can honestly believe that the main threat to religious liberty is through laws directed at religion. There is little reason to believe that Congress will, for example, outlaw communion or Sunday worship services.<sup>4</sup>

The real threat to our religious practices comes precisely from those generally applicable laws which, as applied in certain circumstances, make it impossible for individuals to carry out the requirements of their faiths.

The Smith decision is already having an impact across the country:

-- No member of this Committee can be unmoved by the sad case of the Yang family and an autopsy performed in violation of the family's religious beliefs. As Mr. Yang explained yesterday, the religion of the Hmong people prohibits autopsies. This case is important because the court first decided for the aggrieved family and then reversed itself citing Smith.<sup>5</sup> A similar tragedy befell a Jewish family in Michigan.<sup>6</sup>

-- Municipalities are using zoning regulations to exclude houses of worship from certain areas.<sup>7</sup>

-- In Boston, a city agency landmarked a Catholic Church interior, threatening to interfere with the manner of worship. The Massachusetts Supreme Judicial Court ultimately protected the Church, relying solely on state constitutional grounds.<sup>8</sup>

-- The Occupational Safety and Health Administration reacted to Smith by rescinding an exemption for Old Order Amish and Sikhs

<sup>4</sup> There is pending before the U.S. Supreme Court a challenge to a Florida ordinance which apparently does single out a particular religious practice. Thankfully, such laws are not common.

<sup>5</sup> You Van Yang v. Sturner, 750 F.Supp. 845 (D.R.I. 1990).

<sup>6</sup> Montgomery v. County of Clinton, Michigan, 743 F.Supp. 1253 (W.D. Mich. 1990).

<sup>7</sup> Cornerstone Bible Church v. City of Hastings, Minn., 948 F.2d 464 (8th Cir. 1991).

<sup>8</sup> Society of Jesus v. Boston Landmarks Commission, 409 Mass. 38, 564 N.E. 2d 571 (1990).

from the hard hat rule. Sustained outcry in the religious community helped reverse this decision, but it clearly illustrates the threat religion faces from the bureaucratic impulse to fulfill its mission.<sup>9</sup>

There have been dozens of other cases involving different religions and different governmental regulations. The bottom line for all of them remains clear: after Smith, the Free Exercise Clause provides little substantive protection for our religious liberties.

As a result of the Smith decision, the Courts have virtually relinquished their role as the protectors of the fundamental right to the free exercise of religion. Rather, Americans must now petition the political branches of government when seeking to have their religious practices protected.

This Committee should have no illusions about the radical transformation of our system of government brought about by the Smith decision.

The Court now tells all Americans that their religious practices are a fit subject for roll call votes in the Congress, in the state legislatures, in the city councils, and administrative boards across the country.

We now face the grim prospect of popular referenda to determine which religious practices will be protected and which will not. Religion will be subject to the standard interest-group politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading.

If we as experienced legislators are tempted to doubt the magnitude of this change, then listen to the words of Justice Scalia, writing for the majority in Smith,

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in ....<sup>10</sup>

Justice Scalia accepts this plainly foreseeable tyranny of the majority as the "unavoidable consequence of democratic government."<sup>11</sup> He dismisses our nation's proud heritage of

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<sup>9</sup> OSHA Notice CPL 2. (Nov. 5, 1990), withdrawn, July 24, 1991.

<sup>10</sup> Smith, at 890.

<sup>11</sup> *id.*

religious freedom as a mere "luxury" which we "cannot afford."<sup>12</sup>

If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeed in codifying rather than reversing Smith. Under those circumstances, it would probably be better to do nothing and hope that subsequent Administrations will appoint more enlightened Justices.

The Framers of our Bill of Rights clearly understood the danger of subjecting fundamental rights to a popular vote. As Mr. Justice Jackson explained in West Virginia State Board of Education v. Barnette,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.<sup>13</sup>

The injection of the abortion issue into the debate over this legislation clearly illustrates just how dangerous a Pandora's box the Court has opened.

Surely there can be no more difficult and divisive issue gripping our nation today than the abortion question. As the Court continues to weaken, and possibly overturn, Roe v. Wade, that debate will grow ever more heated. As the courts defer to the legislatures in a growing number of abortion related areas, we will be faced with ever more legislative opportunities to argue over abortion. We may be approaching the day when it will be impossible for Congress to take any action without an abortion fight being part of the legislative process. I hope not, but I fear so.

In the case of H.R. 2797, it has been suggested that this legislation goes beyond merely overturning the Smith decision by creating a free exercise right to abortion and abortion funding that the Courts never would have recognized using the Sherbert test. It has been further suggested that the Supreme Court's earlier interpretations of the Free Exercise Clause lend themselves to the establishment of a broad right to abortion in the event that Roe is overturned. For these reasons, some have

<sup>12</sup> id., at 888.

<sup>13</sup> 319 U.S. 624, 638 (1943).

urged that language specifically excluding these sorts of claims from the coverage of this bill be included. Such an exclusion is contained in H.R. 4040, the Religious Freedom Act, introduced by our colleague Chris Smith of New Jersey.

Although the claim has been advanced for many years, the Supreme Court has never considered directly the question whether there is a free exercise right to have an abortion or to obtain abortion funding.

If, however, the opponents of RFRA fear that a fair interpretation of the Free Exercise Clause pre-Smith included some sort of abortion right, then their quarrel is not with this legislation but with the Bill of Rights itself. This position is tantamount to suggesting that the First Amendment should not have been ratified without some clear anti-abortion language. That is not how the Framers wrote it and that is not how the states ratified it.

The charge that RFRA actually writes new law in the abortion arena is plainly groundless.

RFRA, by using the same standard of review for all free exercise claims, is true to the religion-neutral form of the First Amendment. RFRA does not prescribe a special standard of review for claims involving abortion or any other potential free exercise claim. That novel idea finds its first expression not in the First Amendment, nor in the decisions of the Supreme Court, but in H.R. 4040. Perhaps that is why the word "restoration" was dropped from its title. RFRA is drafted, as was the First Amendment, to be scrupulously neutral with respect to any religious practice. To do otherwise would take Congress down the perilous road of voting on potential free exercise claims -- a precise codification of Smith.

This Committee has received testimony from scholars and activists with vastly different views on the abortion question. Members of this Committee who are concerned should be able to judge for themselves whether the Court is likely to overturn Roe v. Wade and then use a religious freedom statute that incorporates the Sherbert test and does not mention abortion to restore all the rights established in Roe.

Prominent opponents of legalized abortion have joined with their pro-choice foes in support of this legislation because it appropriately takes the position of strict neutrality on the abortion question as it does on every potential claim.

The National Association of Evangelicals, the Agudath Israel of America, the Concerned Women for America, Paul Weyrich's Coalitions for America, the Christian Action Council, the Christian Life Commission of the Southern Baptist Convention, the Traditional Values Coalition, the Home School Legal Defense Association, the American Association of Christian Schools, the

Christian Legal Society, to name a few, see no contradiction between their staunch opposition to legalized abortion and this legislation.

In fact, more than a few of these organizations have argued that their opposition to legalized abortion stems directly from their fundamental religious beliefs -- a fact that makes RFRA a top legislative priority for them.

Of course, the foregoing begs the question: why shouldn't concerned abortion opponents play it safe and include the proposed exclusion? Why has this language drawn such intense opposition from so many people on both sides of the abortion issue?

This is an important question and it goes to the very core of the intent behind my legislation.

Were Congress to include specific abortion language, or even if we expressed some less specific Congressional intent one way or another, we would, in effect, be selecting among potential free exercise claims and choosing a higher level of protection for the ones a majority of Congress approves, and a lower level of protection for the less popular ones.

I can assure the members of this Committee that there will be no shortage of such amendments once Congress gets in the business of voting on them. The Smith decision was an open invitation from the Court for Congress to begin this dangerous enterprise. I do not think history will judge the 102nd Congress very well if the intense emotional appeal of the abortion issue drove us to accept the Justices' offer.

If Congress attempts to sort through potential free exercise claims, and apply to them different standards of review, we would also be in violation of the Free Exercise and Establishment Clauses of the First Amendment. The Free Exercise clause would be violated by an amendment that targets a specific practice prescribed by a sincerely held religious belief for different adverse treatment. The Establishment Clause would be violated because Congress would be favoring one religion over another by providing different levels of protection to different religious beliefs.

This is far from a hypothetical issue.

As the representative of the largest Orthodox Jewish community in the country, a religious community which has consistently opposed legalized abortion in the courts and the legislatures, I can report that my Orthodox Jewish constituents have a sincerely held religious belief that a woman whose life is endangered by a pregnancy has a religious obligation to end that pregnancy.

The effect of language excluding abortion claims would be to

deny that dying Jewish woman her day in court on the same basis as all other religious claimants whether they wish to give minors wine in religious ceremonies or the right to throw people in volcanos. Legislation of this sort would not only be in plain violation of the Free Exercise and Establishment Clauses of the First Amendment, it would also be an affront to the religious beliefs of millions of American Jews. Calling such legislation a "Religious Freedom Act" only adds insult to injury.

The intent of H.R. 2797 is clear. It is the independent judiciary, not the political branches of government, that should inquire into the sincerity of an individual's religious beliefs. It is the independent judiciary, not the Congress, that should strike the delicate balance between religion and the will of the majority. It is the application of the same protective standard to everyone's religion, no matter how unusual or unpopular, that should decide these difficult conflicts.

The abortion question provides this Committee with a clear example of how the passions associated with a highly charged political issue can lead Congress to attack, however inadvertently, the ancient faith of a deeply religious people.

Religious freedom is the foundation of our way of life. This nation has always provided a haven for refugees from religious persecution. We are Americans because those who came before us voted for freedom with their feet. My family, like many of yours, came here to worship freely. Even today, Jews from Syria, Buddhists from Southeast Asia, Catholics from Northern Ireland, Bahais from Iran, and many more, willingly renounce their homelands and risk their lives for the so-called "luxury" of religious freedom.

If religious freedom has any meaning at all, it is that everyone's exercise of religion must be protected equally -- free from the threat that popular passions will interfere with the enforcement of so fundamental a liberty. It must mean that our religious practices must be protected from governmental interference in all but the most compelling circumstances. Unless the right to the free exercise of religion is protected in the very hard cases, then our first freedom will really be reduced to a hollow shell, fit only to be paraded down Main Street every July 4.

Respect for diversity, and particularly religious diversity, was one of the fundamental principles that guided the framers of the Constitution. The Constitution's guarantee of religious freedom is as much a practical guide for good government and social stability as it is a moral imperative. By restoring the workable constitutional standard that protected the free exercise of religion for nearly 30 years, the Congress will celebrate the 200th birthday of the Bill of Rights in a most appropriate manner.

STEPHEN J. SOLARZ  
13TH DISTRICT NEW YORK

## COMMITTEES

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**Congress of the United States**  
**House of Representatives**  
**Washington, DC**

June 22, 1992

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Honorable Don Edwards  
Chairman  
Subcommittee on Civil and  
Constitutional Rights  
H1-A806 O'Neill HOB  
Washington, D.C. 20515-6220

Dear Don:

I want to express to you once again my sincerest appreciation for the support you have given H.R. 2797, the Religious Freedom Restoration Act. I am especially grateful for the two days of hearings you held on May 13 and 14, 1992, to consider my legislation and the important issues raised by the U.S. Supreme Court's disastrous 1990 decision in Employment Division v. Smith.

I would also appreciate the opportunity to clarify further the scope of H.R. 2797 for the record. I regret that floor votes cut short our discussion of this important question, and I hope that this letter can be added to the record so that the legislative history can be as clear as possible.

There was some discussion during the hearing concerning the relationship between particular practices which a court might protect as an "exercise of religion" and the underlying sincerely held religious belief which would support such a claim. Specifically, the question was asked whether H.R. 2797 would protect only those acts "compelled" by a sincerely held religious belief, or whether it would also protect acts "motivated" by such a belief.

As you may know, although the word "motivated" does appear in H.R. 4040, introduced by our colleague Chris Smith, neither "motivated" nor "compelled" appears anywhere in H.R. 2797. In fact, long after I deleted it from an earlier draft of the bill, the word "motivated" continues to generate far more heat than light. After careful consideration I concluded that the term "free exercise of religion," used by the drafters of the First Amendment, most accurately described what I hoped to protect through passage of RFRA.

Although a devout individual might identify some religious aspect to many everyday actions, it would, as a general rule, not be accurate to describe everything that person does as an "exercise of religion." The challenge in drafting this legislation was to indicate to the courts Congress' intent to



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distinguish between practices which may have some religious content but which are essentially secular in nature, and those practices which are clearly exercises of religion.

In a letter to Rep. Paul Henry and me, dated February 21, 1991, Professors Michael W. McConnell, at the University of Chicago Law School, and Douglas Laycock, at the University of Texas at Austin Law School, and Valpariso Law School Dean Edward McGlynn Gaffney, explained this drafting problem with great clarity:

It is difficult to capture the idea of the dictates of conscience in statutory language because different theological traditions conceptualize the force of [G-d's] moral order in different ways. Some treat it as a binding moral law; others view it as an expression of [G-d's] will, which believers will freely conform to out of love and devotion to [G-d]... it would be a mistake to tighten the language of the Act by confining it to conduct "compelled by" religious belief. By the same token, the Act should not refer to conduct "consistent with" religious belief, since this would go beyond the dictates of conscience.

The drafters of the First Amendment, in choosing the term "exercise of religion," rightly left the judiciary enough flexibility to protect the exercises of different religions on an equal, case-by-case basis. As the attached memorandum prepared by the Congressional Research Service illustrates, the Court has "not been limited to any particular verbal formula in describing what constitutes a religious exercise for First Amendment purposes." The approach of the Framers and of the Court reflects the complex realities of this critical question.

Were Congress to go beyond the phrasing chosen by the drafters of the First Amendment by specifically confining the scope of this legislation to those practices compelled or proscribed by a sincerely held religious belief in all circumstances, we would run the risk of excluding practices which are generally believed to be exercises of religion worthy of protection. For example, many religions do not require their adherents to pray at specific times of the day, yet most members of Congress would consider prayer to be an unmistakable exercise of religion.

To say that the "exercise of religion" might include acts not necessarily compelled by a sincerely held religious belief is not to say that any act merely consistent with, or not proscribed

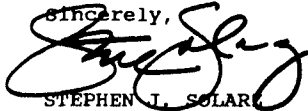
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one's religion would be an exercise of religion. As I pointed out in my testimony, it would not be reasonable to argue, for example, that a person whose religion did not proscribe the possession of a machine gun had a free exercise right to own one notwithstanding applicable federal laws.

The Religious Freedom Restoration Act avoids codifying either extreme by protecting the "exercise of religion," a term sufficiently familiar to the courts to provide a useful framework for application of the Act. RFRA follows the sensible approach of the First Amendment by leaving to the courts the job of determining, on a case-by-case basis, whether or not a particular practice is indeed an exercise of religion.

I do not believe that this Congress can do any better than the Framers of the Bill of Rights when they chose to protect the "free exercise of religion" and leave its definition to the independent judiciary on a case-by-case basis. It would be tragic if the effort to overturn Smith resulted in Congressional inquisitions into, and determinations of, the content of religious law, or a narrow statutory definition of what is a "religion" or a religious "exercise." The political branches of government have never been suited to such tasks. Even the independent judiciary has been careful to inquire only into the nature and sincerity of an individual's religious belief on a case-by-case basis, avoiding broader inquiries into a particular denomination's doctrine, or the nature of religion generally. It is a wisdom I hope will guide this Congress in its consideration of the Religious Freedom Restoration Act.

Thank you as always for your continued support for this legislation. I look forward to working with you to restore our first freedom.

Sincerely,  
  
STEPHEN J. SOLARZ  
Member of Congress

cc: Subcommittee Members

SJS:d1

Enclosure



Congressional Research Service • The Library of Congress • Washington, D.C. 20540

June 11, 1992

TO : Honorable Stephen J. Solarz  
Attention: David Lachmann

FROM : American Law Division

SUBJECT : Supreme Court Descriptions of Conduct Constituting the  
Exercise of Religion

This is in response to your inquiry regarding the language the Supreme Court has used in describing conduct that it has deemed to constitute the exercise of religion. The underlying issue concerns whether the exercise of religion has been deemed by the Court to be limited to actions that are compelled by religious beliefs or has been more inclusive.

The cases indicate that the Court, although frequently finding the religious practice in question to have been compelled or commanded by religious belief, has not been limited to any particular verbal formula in describing what constitutes a religious exercise for First Amendment purposes. In *Prince v. Massachusetts*, 321 U.S. 158, 163 (1944), the Court upheld a State prohibition on children participating in street evangelizing while accepting the child's characterization of her proselytizing as a "religious duty." In *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943), the Court struck down a licensing tax imposed on religious colporteurs while describing the Jehovah's Witnesses' practice of house-to-house evangelism in terms of "obeying a commandment of God." In *Cleveland v. United States*, 329 U.S. 14, 20 (1946), the Court upheld the conviction of a Mormon for violating the Mann Act even though it found his practice of polygamy to be "motivated by a religious belief." In *Braunfeld v. Brown*, 366 U.S. 599, 601-602 (1961), the Court found a Sunday closing law not to violate the free exercise rights of Jewish Orthodox merchants, although it said the "Orthodox Jewish faith...requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday" and further described that Sabbath observance to be "a basic tenet of the Orthodox Jewish faith." More generally, the Court in *Braunfeld*, at 603, described the exercise of religion to be "action...in accord with one's religious convictions."

Again, in *Sherbert v. Verner*, 374 U.S. 398, 404, 410 (1963), the Court held a Seventh Day Adventist to be eligible for unemployment benefits despite being unavailable for work on Saturday and described her observance of a Saturday Sabbath to be "following the precepts of her religion" and as involving "religious convictions respecting the day of rest." In *Wisconsin v. Yoder*, 406 U.S. 205, 215

(1972), the Court held the Amish to be constitutionally exempt from the last two years of a State's compulsory education requirement and said, generally, that to be within the protection of the religion clauses, claims "must be rooted in religious belief." Of the Amish way of life, the Court said it was "not merely a matter of personal preference, but one of deep religious conviction..., stem[ming] from their faith..., (a) response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world.'" This injunction, the Court said, was a "command...fundamental to the Amish faith." In *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707, 715 (1981), the Court found a Jehovah's Witness to have terminated his employment "for religious reasons" although his refusal to work on an armaments production line stemmed from an interpretation of the Bible not shared by other Jehovah's Witnesses. In the context of that case the Court observed that "[o]ne can...imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here...."

In *United States v. Lee*, 455 U.S. 252, 257 (1981), the Court found participation in the Social Security system to be "forbidden by the Amish faith" but nonetheless upheld the imposition of Social Security taxes on Amish employers. In *Bob Jones University v. United States*, 461 U.S. 574, 602 (1983), the Court upheld IRS' imposition of a racial nondiscrimination condition on the tax exemption afforded private schools while finding the University's policies of racial discrimination to be "based on a genuine belief that the Bible forbids interracial dating and marriage." In *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986), the Court upheld a military dress code that had the effect of forbidding a Jewish rabbi from wearing a yarmulke while on duty, describing the wearing of a yarmulke to be a practice "required by his religious beliefs."

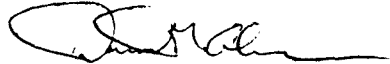
*Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 137, 141 (1987) again involved the denial of unemployment benefits to a Seventh Day Adventist who was unemployed because she observed a Saturday Sabbath, the Court describing her Sabbath observance as being based on "sincerely held religious convictions" and as involving "fidelity to religious belief." In *O'Love v. Estate of Sheltz*, 482 U.S. 342, 345 (1987), the Court upheld prison regulations that had the effect of denying some Muslim inmates the opportunity to participate in a weekly worship service called Jumu'ah despite finding the Jumu'ah to be "commanded by the Koran." In *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439, 451 (1988), the Court found no constitutional violation in the construction of a road through public lands used by several Indian tribes for various religious practices, stating simply that the practices were "traditional." In *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 834 (1989), the Court once again found the denial of unemployment benefits to a person who refused to accept a job involving work on his Sabbath to be unconstitutional, saying his refusal in this instance "was based on sincerely held religious belief."

Finally, in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the Court found no constitutional violation in

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Oregon's denial of unemployment benefits to drug counselors who had been fired for participating in an Indian ceremony involving the ingestion of peyote, describing their participation as involving "religious motivation" (at 878). More generally, the Court spoke of the exercise of religion in terms of "acts or abstentions...engaged in for religious reasons, or...because of the religious belief that they display" (at 877), "an act that his religious belief forbids (or requires)" (at 878), "religiously motivated action" (at 881), "conduct...accompanied by religious convictions" (at 882), and "actions thought to be religiously commanded" (at 888). The four dissenters in the case spoke of the exercise of religion as including "conduct motivated by sincere religious belief" (at 893 and 897), "conduct mandated by an individual's religious beliefs" (at 893), "religiously motivated conduct" (at 893, 894, and 898), and "religious duties" (at 901).

I hope the above is responsive to your request. If we may be of additional assistance, please call on us.



David M. Ackerman  
Legislative Attorney

Mr. EDWARDS. Let me just ask you one question.

In Orthodox Jewry, did you say that an abortion is required under certain circumstances, where the life of the mother is threatened?

Mr. SOLARZ. As I understand it, Mr. Chairman, Orthodox Jews believe that when the life of the mother is at stake and where a choice has to be made between preserving the life of the mother or aborting the fetus, she is obligated under her religion to have an abortion.

Now, there are, of course, technical questions about whether her life is really in danger, and that is a judgment which has to be made. But if it is believed that her life is at stake, she is under an affirmative religious obligation to have an abortion. That is the only circumstance under which Orthodox Judaism requires an abortion. Any one of a hundred other reasons for having an abortion—it might jeopardize the mental health of the mother, they might not have the money to bring the child up, it might prevent her from holding a job, it might threaten her marriage, it might disturb her mental health—whatever the other reasons may be, to Orthodox Jews those other reasons are not acceptable and do not justify an abortion; and, indeed, under every circumstance but the life of the mother, an abortion, to Orthodox Jews, is forbidden.

Now, for Reform and Conservative Jews, among Reform and Conservative Jews there is an agreement that when the life of the mother is at stake, an abortion is required. But Conservative and Reform Jews differ from Orthodox Jews in the sense that they believe that even when the life of the mother is not at stake, an abortion is permissible, it is not prohibited. They don't argue that for other reasons than the life of the mother, abortion is required, but they do argue that for other reasons abortion should be permitted.

Mr. EDWARDS. Suppose she doesn't want to do it?

Mr. SOLARZ. And her life is at stake?

Mr. EDWARDS. Yes.

Mr. SOLARZ. And she—

Mr. EDWARDS. They can't make her have an abortion.

Mr. SOLARZ. No, of course not, any more than under Jewish law she is obligated not to eat unkosher food. But if she wants to eat unkosher food—she is not supposed to work on the Sabbath, but if she wants to, nobody can stop her. She is simply violating her religious obligations.

But in a free country, hopefully, we not only have the right to follow our religious obligations, we also have the right, if we choose, to ignore them.

Mr. EDWARDS. Thank you.

Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

First of all—and we could argue about this for years—you talk about where the life of the mother is at stake, an abortion is mandated by Orthodox Jewish law. I don't know of any State in the Union—I certainly have never objected to abortion where the life of the mother is at stake. But the claim to life is equal. It isn't a life for inconvenience or because I have five children, because the child will be born with spina bifida or Down's syndrome. All of those are lesser considerations. But a life for a life is an equal con-

sideration. So I don't know where—anywhere where an abortion to save the life of the mother is not permitted.

But not to put too fine a point on it, I have thought long and hard about this issue. Every time a woman's—pregnant woman's life is at stake and an abortion is going to save that life, it usually is not an abortion, as such; it is an ectopic pregnancy where the pregnancy is occurring in the fallopian tube and into the—in the uterus, and if it continues, she will hemorrhage and die. So it is the removal of an ectopic pregnancy. The abortion, which by definition is the removal from the body of the woman of the fetus, occurs incidentally, incidental to the main operation.

Cancerous uterus—if a pregnant woman has cancer of the uterus, you have to remove that uterus or it will metastasize. That is an abortion, but secondary to the primary surgery of removing the cancerous uterus, traumatized uterus.

So all of those don't resolve themselves down to an abortion to save the life of the mother. The abortion is secondary.

So I don't think you need to fear that some woman whose religion mandates an abortion because her life is at stake if she doesn't have an abortion—that is not really, I don't think, going to occur. That is just my view, anyway.

I think we can agree that there are religious groups other than the Orthodox Jewish that believe and assert fervently and passionately that there is a free exercise right to an abortion. I need only cite the Religious Coalition for Abortion Rights, the American Jewish Congress, the Presbyterian Church (U.S.A.), United Methodist Church, Episcopal Women's Caucus, United Church of Christ—all joined in an amicus curiae brief in *Webster v. Health Services*, and they all joined in asserting that even though the Missouri law regulating abortion makes no mention of religion, it violates the free exercise clause of the first amendment.

So I think we can predict—and I won't bore you or burden you with other cases that are pending, where the ACLU, as well as the Religious Coalition, has made the same claim—there is an religious right to an abortion. I am glad we agree.

Mr. SOLARZ. We don't really agree.

Mr. HYDE. We agree those claims are being made.

Mr. SOLARZ. I agree with you that the brief you read or the excerpt you read from the brief contains language which was in the brief.

Mr. HYDE. Asserts that there is a religious—

Mr. SOLARZ. I am making a somewhat different point, and that is that I do not believe—at least I am not aware of any major religion in this country—indeed, any established religion which takes the position that, other than in a situation where the life of the mother is at stake, if a woman becomes pregnant, that there are circumstances where her religion requires her to have an abortion.

I do agree with you, Mr. Hyde, that there are many religions which believe that women should have the right to have an abortion; but there is a big difference between arguing that a woman should have the right to an abortion and arguing that her religion requires her to have an abortion. And if the religion doesn't require her to have an abortion, and if a State prohibits abortion, then I don't believe that she has a basis on which to convince the court

that the State does not have a compelling interest in requiring her to have an abortion because it would violate her religious obligations.

Mr. HYDE. Well, does your bill, H.R. 2797, protect conduct compelled by religious belief, or conduct motivated by religious belief?

Mr. SOLARZ. I think that fine distinction is something that I would prefer to leave to the courts.

Mr. HYDE. We are drawing a statute now, and legislative intent is important. As the chief sponsor, your views on this are critical; and therefore, I would like to know your view rather than just pass the ball to the court.

Mr. KOPETSKI. Will the gentleman yield? Would you restate the question?

Mr. HYDE. Surely.

Does H.R. 2797 protect conduct compelled by religious belief or conduct motivated by religious belief? You can see the difference.

Mr. SOLARZ. It is a very fine point.

Mr. HYDE. A very important point.

Mr. SOLARZ. I would be reluctant to limit it to actions—I would be reluctant to limit it to actions compelled by religion, as distinguished from actions which are motivated by a sincere belief.

However—

Mr. HYDE. Now we are getting to it. All of this stuff about being compelled is really beside the point. It is, someone who says my religion nudges me toward—I think it is compatible with my religion to have an abortion. That is motivated. And that is protected by your bill.

Mr. SOLARZ. No, it isn't.

Mr. HYDE. What is it, then?

Mr. SOLARZ. As you stated it, if a person said that religion is— an abortion is compatible with my religion, therefore, I should be entitled to have one, is not a persuasive argument. I will tell you why.

Let me give you another example. Let's say Congress or a State were to pass legislation prohibiting the possession of handguns. Somebody came in and said, there is nothing in my religion which prohibits the possession of handguns. For me to have a handgun is compatible with my religion; therefore, they can't restrict my right to have a handgun because it violates my religious freedom. I think that would not be a particularly persuasive argument.

The question—

Mr. HYDE. Now, please.

Mr. SOLARZ. The question is not what is permitted by the religion, but what is required by the religion.

Mr. HYDE. No, that is not the question. The question is my decision to have an abortion is motivated by God talking to me and telling me, I have got four kids, I can't devote the time to a fifth one, it would be immoral for me to have to raise another one, we don't have the money, I have got a career on the line, the religious thing to do, the godly thing to do, and my religion—you know, God spoke to me last night and said, have an abortion. That is what I want to know.



Let me read to you from a lawsuit, Jane Liberty—this is in Utah, and it is going on right now, is it not? Let me quote to you from the plaintiff in that case.

“I am a practicing Christian and have talked to my minister about how to handle this unintended pregnancy. He helped me come to the conclusion that terminating this pregnancy was a choice consistent with my faith. It would be wrong for me to have another baby at this point, wrong for my children, wrong for me, and wrong for the baby to which I would give birth. With an infant, I would have to give up my goal of independence for myself and my children.”

Well, that is motivated it would seem to me, by religious belief, and it seems to me from your answer that your bill protects that motivation. That is what I am worried about.

Mr. SOLARZ. All that my bill does in that regard is permit someone to make the argument. It certainly doesn't compel the court to accept it. And I believe the way you have put it, it would not be accepted.

I find it inconceivable—inconceivable that a Supreme Court which will repeal *Roe v. Wade* will then turn around and, in effect, create a situation in which any woman who comes into the Court and says, my religion tells me I should have an abortion, is now going to establish the right of such a woman to have an abortion.

Mr. HYDE. Now, Mr. Solarz, the Supreme Court, if it does—and I wouldn't bet the ranch on it—reverse *Roe v. Wade*, need not find a compelling interest in the preservation of preborn life. It can, and probably will, reverse *Roe*; if it does on the grounds that there is a liberty interest found in the right to privacy, found in the emanation of a penumbra or something like that. But this fundamental right need not be reduced or diminished by finding a compelling State interest.

Now, please—now, no compelling State interest has neutralized *Roe v. Wade*. A woman wants an abortion, and her religion tells her she should get an abortion. This bill that you are offering provides her a statutory basis because there is no restriction that can negate her right to this abortion, this restoration of the fundamental right to an abortion, unless it is to further a compelling governmental interest, and it is essential to further a compelling governmental interest.

Mr. SOLARZ. Let me try to answer this from what I would hope would be the perspective you bring to it, by saying, Mr. Hyde, that the reality of the *Smith* decision, in terms of its implications for the freedom of religion in our country, is a very disturbing one.

Mr. HYDE. I agree.

Mr. SOLARZ. We already see the consequences of it. That is a fact, and I am glad we agree on it.

I think you have to balance against that what strikes me as the exceedingly remote and unlikely contingency, even if the Religious Freedom Restoration Act is adopted, and even if subsequent to its enactment and the adoption of State laws restricting the right of women to have an abortion, a litigant comes into court making the argument that you have just made—and I certainly think it is possible people will make those arguments; as you know, all sorts of arguments are advanced, and when people are trying to achieve a

result, they will present any argument they can think of that conceivably might help them.

Under those circumstances, it seems to me the chances that a court will find in favor of the litigant are exceedingly slim—I happen to think nonexistent—but I will be prepared to concede for the purposes of discussion that there is a remote possibility. But that is the point. I think it is very remote.

So the dangers which concern you—which I have to say, frankly, are not dangers which particularly concern me, because we have, as you know, a difference of opinion on the underlying question of the permissibility of abortion—but the dangers which concern you are extremely remote, whereas the dangers of the *Smith* decision are palpably real.

Mr. HYDE. If they are so remote, why won't you agree, as we ultimately did in *Grove City*, to provide statutory language that neutralizes this remote possibility? And I would click my heels and applaud. I would beg the President to sign the bill.

Mr. SOLARZ. For a number of reasons. First of all, as I suggested previously, the exemption which Mr. Smith seeks in his bill would have the effect of restricting the religious freedom of one group of Americans, Orthodox Jews—

Mr. HYDE. The life of the mother is fine. Let's put that in the bill.

Mr. SOLARZ. Second, if it were put in the bill—and I would certainly say if it were it would be an improvement—I would still find it unacceptable for a number of other reasons. First, I don't think it should be the job of the Congress to pick and choose among which religious rights are legitimately a subject of presentation to the courts.

Second, I think if that were included, it would probably fatally compromise the prospects for the passage of the legislation; and in order to gain the benefit of dealing with what, from your perspective, is a very remote possibility, we would run a much greater risk of losing the coalition which—many of the people in the coalition have been assembled behind this bill.

The bill itself wouldn't pass, and the underlying threat to religious freedom which has been posed by the *Smith* decision would have not been dealt with. And that is really why. And I think therefore it is an unacceptable tradeoff.

Now, I know you can say to me, since I think the chances that such a claim of a religious right to an abortion where the life of mother isn't at stake would not be adopted anyway, what is there to lose by including a provision that could be used by someone raising the claim? And if that was all that was involved, we might be able to work something out.

But we are not the only ones involved. And I think as a practical matter, the bill would sink; and then the objective that you and I both share—and I know at one time you very seriously considered supporting this, and I know you are sympathetic to the underlying thrust of what we want, and that is one of the reasons I would hope, Mr. Hyde, that as you consider how to deal with this. If and when you decide or someone decides to offer an amendment to this dealing with the abortion problem that you believe the bill creates, that if that is not accepted and it comes down to a choice between

this bill or nothing at all, that having made your effort in good faith and in good conscience to deal with this contingency, you will support the bill in its final passage.

Mr. HYDE. If you will indulge me for one more moment—and you have been awfully patient, and so have you, Mr. Kopetski—the reality is, the Supreme Court has not applied a compelling State interest.

You are saying you are restoring the law pre-*Smith*. It isn't so. There are lists; 75 cases are listed by Judge Noonan where religious freedom has been adjudicated not consonant with the compelling State interest that was pre-*Smith*.

Mr. SOLARZ. What do you mean by "not consistent?" The compelling interest standard, as you know, doesn't automatically result in a position in favor of the assertion of religious freedom.

Mr. HYDE. It was applied, but they lost. It wasn't successful.

Mr. SOLARZ. That is the whole point. I am not taking the position, nor does the bill take the position, that an assertion of religious right or obligation should transcend every other claim advanced by the State, any more than you and I know, in the case of free speech, the right to get up in a crowded theater and shout fire is superseded by the right of society to protection from the panic induced under those circumstances.

So this is simply a balancing test. And while I deeply believe in religious freedom, I am not prepared to say that somebody who devises a religion which requires child sacrifices should be entitled to grab children off the streets and slaughter them because their religion requires one child sacrifice a day.

Mr. HYDE. Well, we have to vote. Thank you very much. Sorry.

Mr. EDWARDS. Mr. Kopetski, we have to go vote. Do you want to release the witness?

Thank you very much, Mr. Solarz. We appreciate your testimony.

Immediately upon our return we will hear from our colleague, Christopher Smith.

[Recess.]

Mr. EDWARDS. The subcommittee will come to order. We welcome now our colleague, Christopher Smith. Chris represents the people of the Fourth District of New Jersey. Mr. Smith has actively participated in the antiabortion movement by serving both as the executive director of the New Jersey Right to Life Committee and as cochairman of the Congressional Pro-life Caucus.

Mr. Smith is the chief sponsor of H.R. 4040, the Religious Freedom Act. We welcome you, Mr. Smith. Without objection, your full statement will be made a part of the record. You may proceed, and see if you can keep it within a limited time, because we have a lot more witnesses.

**STATEMENT OF HON. CHRISTOPHER M. SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY**

Mr. SMITH. I understand. I will do my very best.

Thank you, Mr. Chairman and Mr. Hyde. I appreciate the opportunity to testify before the subcommittee today on legislation designed to overcome the adverse impact on religious freedom in this country resulting from the Supreme Court's 1990 decision in *Employment Division v. Smith*.

The practical result of the *Smith* case is that individuals or organizations whose religious practices are burdened by a particular law, regulation or administrative action are placed at a great procedural disadvantage when pursuing relief from the sometimes capricious government intrusion. Under the *Smith* approach, almost any reason advanced by government will justify restraining religious practices so long as the particular governmental action does not single out religion for adverse treatment.

From the founding of our Nation, Mr. Chairman, religion has enjoyed a very special position. The *Smith* decision places that special status in jeopardy. The ability of individuals or organizations to practice their religion without unnecessary governmental interference is guaranteed by the first amendment. Governments should be held to a strict standard before they are allowed to interfere with or burden the practice of religion.

Last year my good friend and colleague, Steve Solarz, the previous witness, introduced H.R. 2797, the Religious Freedom Restoration Act. While I believe this legislation was introduced with the best of intentions, some very notable legal scholars, religious organizations, and prolife groups have expressed serious reservations about its potential impact in the area of abortion policy. A concern has been raised about H.R. 2797's possible effect on the tax exempt status of religious organizations and their capacity to participate in government-sponsored social service programs.

Some supporters of H.R. 2797 have confirmed, consistent with the plain language of the bill, that its provisions could be used to challenge State and Federal statutes and regulations designed to protect the unborn. Free-exercise-of-religion claims to abortion have been made in the past and in current litigation. In many instances, those claims have been supported and advanced by some who actively support H.R. 2797. I point this out not to impugn the motives of any groups or individuals, but rather to simply acknowledge the reality that H.R. 2797 can and will be used to advance the cause of abortion.

As one who has labored long and hard to protect the innocent unborn from destruction by abortion, I cannot support legislation that puts human life in jeopardy. During my years in Congress, I have spent a great deal of time, as well, fighting for religious freedom, both here and abroad. I believe that this cause and the protection of innocent human life are compatible. It is for this reason that I sponsored H.R. 4040.

As you pointed out, the Religious Freedom Act—where applicable, it would require the Government to demonstrate that a policy or practice that burdens religious practice is essential to further a compelling governmental interest and is the least restrictive means of furthering that interest. In this sense, it is very similar to Mr. Solarz's bill, but differs in that it could not be used as a new statutory basis to pursue abortion rights.

I read, Mr. Chairman, with interest the testimony of Nadine Strossen, the president of the ACLU, which was presented before this subcommittee yesterday. Ms. Strossen pointed out that Jewish law requires an abortion when the mother's life is in danger. Congressman Solarz and some representatives of national organizations have also raised this concern.

Ms. Strossen took note that, and I quote, "now Chief Justice Rehnquist recognizes that preventing an abortion to save a woman's life was beyond the State's power," in his *Roe* dissent. She also offered the legal opinion of the ACLU that a claim with such a restriction would not be upheld without H.R. 2797.

I would like to further reassure Congressman Solarz and whoever shares this concern about the life-of-the-mother exception. I believe that the chance of any State legislature enacting a law that does not contain a life-of-the-mother exception is absolutely nil. Beyond the political and policy considerations which would argue against such a proposal, it would be extremely imprudent for any State to enact a statute that the Chief Justice of the U.S. Supreme Court has so explicitly deemed to be unconstitutional.

I would also point out at this point, there was an interesting exchange during Mr. Solarz's dialog with the committee, in which he said it was a ludicrous proposal, when he was talking about whether or not other reasons, other than life of the mother, would be promoted as a—for abortion rights under his act.

In the Utah complaint that has been filed by Janet Benchoff of the ACLU against the Utah restrictive statute, the prolife statute in that State—as part of that complaint on point number 50—states, and I would quote for the record, "that Conservative, Reform, and Reconstructionist branches of Judaism permit abortion in most circumstances"—and I say this, but this is a direct quote—"and require it in the event that the pregnancy threatens the life or health of the mother, of the woman." Health and life are together in this statement. We have seen this before.

Here again, perhaps my good colleague, Mr. Solarz, was unaware that this was being advanced by the ACLU and others, using a religious tenet, religious free exercise means, or rationale in arguing that a restrictive statute ought to be struck down.

Health, as we all know, was the same word that was used and employed by the U.S. Supreme Court in *Roe v. Wade*, and health as broadly described in both your legislation, Mr. Chairman, and in the original *Roe* legislation, means the emotional well-being, the familial status of the woman—the World Health Organization definition of health, it is so broad as to be abortion on demand.

Mr. Chairman, religious freedom deserves protection. Appropriate legislation in response to the *Smith* decision is one way to accomplish this. The Congress need not and should not, in my opinion, enact legislation that would contribute to the destruction of human life, nor should it enact legislation that could needlessly enmesh religious organizations in unnecessary litigation over their tax status or their ability to participate along with others in government-sponsored social service programs.

The laws of the United States, Mr. Chairman, have often reflected the values associated with our Judeo-Christian heritage, laws that proscribe stealing, perjury, rape, and homicide are a few examples. The fact that these laws are consistent with religious principles, however, does not mean they constitute an imposition of a particular religious belief on society.

The purpose of laws which protect the unborn is to safeguard the lives of society's smallest and most vulnerable members. Admittedly, such laws are the subject of vigorous debate throughout the

country. I respect those who disagree with my position on the protection of unborn human life, and I share the view that abortion should not be entangled in a debate about religious freedom.

A simple abortion-neutral exception, such as the one contained in H.R. 4040, will enable to us resolve that issue and move forward on behalf of religious freedom.

In summary, Mr. Chairman, I cannot support H.R. 2797 as drafted, because I value religious freedom highly. I stand ready to work with your subcommittee, Mr. Solarz, and others to correct what I consider to be a defect in the bill.

I look forward to your questions.

Mr. EDWARDS. Thank you very much, Mr. Smith.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF CHRISTOPHER H. SMITH, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, I appreciate the opportunity to testify before the Subcommittee today on legislation to overcome the adverse impact on religious freedom in this country resulting from the Supreme Court's 1990 decision in *Employment Division v. Smith*.

The practical result of the *Smith* case is that individuals or organizations whose religious practices are burdened by a particular law, regulation, or administrative action are placed at a great procedural disadvantage when pursuing relief from these sometimes capricious government intrusions. Under the *Smith* approach, almost any reason advanced by government will justify restraining religious practices so long as the particular governmental action does not single out religion for adverse treatment.

From the founding of our Nation, religion has enjoyed a special position. The *Smith* decision places that special status in jeopardy. The ability of individuals or organizations to practice their religion without unnecessary governmental interference is guaranteed by the First Amendment. Governments should be held to strict standards before they are allowed to interfere with or burden the practice of religion.

Last year, my good friend Steve Solarz introduced H.R. 2797, the Religious Freedom Restoration Act. While I believe this legislation was introduced with the best of intentions, some very notable legal scholars, religious organizations, and pro-life groups have expressed serious reservations about its potential impact in the area of abortion policy. A concern has been raised about H.R. 2797's possible effect on the tax-exempt status of religious organizations and their capacity to participate in government-sponsored social service programs.

Supporters of H.R. 2797 have confirmed, consistent with the plain language of the bill, that its provisions could be used to challenge state and federal statutes and regulations designed to protect the unborn. Free exercise of religion claims to abortion have been made in past and current litigation. In many instances those claims have been supported and advanced by some who actively support H.R. 2797. I point this out, not to impugn the motives of any groups or individuals, but rather simply to acknowledge the reality that H.R. 2797 can and will be used to advance the cause of abortion.

As one who has labored long and hard to protect the innocent unborn from destruction by abortion, I cannot support legislation that puts human life in jeopardy. During my years in Congress I have spent a great deal of time fighting for religious freedom. I believe that this cause and the protection of innocent human life are compatible. It was for this reason that I sponsored H.R. 4040, the Religious Freedom Act, which was introduced last year. Where applicable, it would require the government to demonstrate that a policy or practice that burdens religious practice is essential to further a compelling governmental interest, and is the least restrictive means of furthering that compelling interest. In this sense, it is similar to Mr. Solarz's bill, but differs in that it could not be used as a new statutory basis to pursue abortion rights.

I read with interest the testimony of Nadine Strossen, President of the American Civil Liberties Union (ACLU), which was presented before the Subcommittee yesterday. Ms. Strossen pointed out that Jewish law requires an abortion when the mother's life is in danger.



Congressman Solarz and representatives of some national organizations have also raised this concern.

Ms. Strossen took note of the fact that "now-Chief Justice Rehnquist recognized that preventing an abortion to save a woman's life was beyond the State's power," in his *Roe* dissent. She also offered the legal opinion of the ACLU that a claim against such a restriction would be upheld without H.R. 2797.

I would like to further reassure Congressman Solarz and others who share this concern about the life of the mother exception. I believe that the chance of any State legislature enacting a law that does not contain a life of the mother exception is absolutely nil. Beyond the political and policy considerations which would argue against such a proposal, it would be extremely imprudent for any State to enact a statute that the Chief Justice of the United States has so explicitly deemed to be unconstitutional.

Mr. Chairman, religious freedom deserves, indeed, demands protection. Appropriate legislation in response to the *Smith* decision is one way to accomplish this. Yet, Congress need not and should not enact legislation that could contribute to the destruction of human life. Nor should it enact legislation that could needlessly enmesh religious organizations in unnecessary litigation over their tax exempt status, or their ability to participate along with others in government-sponsored social service programs, as I fear H.R. 2797 would.

The laws of the United States have often reflected the values associated with our Judeo-Christian heritage. Laws that proscribe stealing, perjury and homicide are a few examples. The fact that these laws are consistent with religious principles, however, does not mean that they constitute an imposition of particular religious beliefs on society.

The purpose of laws which protect the unborn is to safeguard the lives of society's smallest and most vulnerable members. Admittedly, such laws are the subject of vigorous debate throughout our country. I respect the views of those who disagree with my position on the protection of unborn human life and I share the view that abortion should not be entangled in a debate about religious freedom. A simple "abortion neutral" exception, such as the one contained in H.R. 4040, will enable us to resolve that issue and move forward on behalf of religious freedom.

In summary, Mr. Chairman, I cannot support H.R. 2797 as now drafted. Because I value religious freedom highly, I stand ready to work with your Subcommittee, Mr. Solarz and interested groups to attempt to fashion legislation without the potential problems inherent in H.R. 2797.

Again, I thank you for the opportunity to testify here this morning.

Mr. EDWARDS. Why did you put in your bill the tax status of religious institutions? Do you see a real threat there?

Mr. SMITH. I think there is a threat that, rather than the free exercise—which I think we are all intending to protect in these two pieces of legislation, to protect against those who would try to preclude certain religiously based organizations or churches from engaging in government-sponsored programs, whether it be Head Start or some other program—could be put in jeopardy, it has been argued, and I think—I know that is why we have included this in the bill.

Mr. EDWARDS. Even this conservative Supreme Court has said that taxpayers in such a suit wouldn't have standing. So isn't that something that there is no danger of?

Mr. SMITH. There is, as was argued earlier on the abortion question, if there is no danger, it certainly would reassure those who feel that there is a danger. So it ought to be a noncontroversial inclusion.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. I just want to congratulate Mr. Smith for his usual fine job.

Mr. EDWARDS. Very good job. Thank you very much, Mr. Smith.

Mr. SMITH. Thank you.

Mr. EDWARDS. Will the members of panel 2 please approach? Mr. Hyde, would you introduce the members, please?

Mr. HYDE. Edward Gaffney is currently dean of the Valparaiso University School of Law. Dean Gaffney has published extensively in the area of religion and the first amendment.

James Bopp is an attorney and general counsel to the National Right to Life Committee. Mr. Bopp is a partner with Brames, Bopp, Abel & Oldham, is an editor of *Issues in Law and Medicine*, and is also a member of the President's Committee on Mental Retardation.

Robert Destro is a professor of law at Columbus School of Law, Catholic University of America, a graduate of the Boalt Hall School of Law, University of California at Berkeley. Mr. Destro has published extensively in the area of constitutional law.

Mr. EDWARDS. Thank you, Mr. Hyde. Will the members of the panel raise your right hand?

[Witnesses sworn.]

Mr. EDWARDS. Thank you. Without objection, all of your statements will be made a part of the record.

We are going to hear from Mr. Gaffney first. Mr. Gaffney is a friend of mine, and I have known his family for quite a number of years.

We welcome all of you. Mr. Gaffney, you may proceed. We are going to use the 5-minute rule, and when you see the red light, that means you should start to wind up your testimony.

**STATEMENT OF EDWARD GAFFNEY, DEAN AND PROFESSOR OF LAW, VALPARAISO UNIVERSITY SCHOOL OF LAW, VALPARAISO, IN**

Mr. GAFFNEY. Thank you very much, Mr. Chairman, Mr. Hyde, Mr. Kopetski. It is a pleasure to be here today. I request consent, in addition to my statement, to enter three other documents into the record. The first is the Williamsburg Charter, a document

signed by many Members of Congress and by religious leaders, civil rights leaders, and people from all over the country, scholars—including my colleague, Bob Destro, and myself—in Williamsburg, VA, on the occasion of the 200th anniversary of the historic call of Virginia for a Bill of Rights.

Mr. EDWARDS. Without objection.

Mr. GAFFNEY. The second document is an article by my colleague at the University of Chicago, Michael McConnell, about the *Smith* decision. I have provided copies for the committee.

Mr. EDWARDS. Without objection.

Mr. GAFFNEY. The third document is an amicus brief that my colleague, Douglas Laycock, at the University of Texas and I prepared on behalf of a very broad coalition of religious organizations: the National Council of Churches of Christ in the U.S.A., the American Jewish Congress, the General Assembly of the Presbyterian Church (U.S.A.), the Baptist Joint Committee on Public Affairs, the Catholic League for Religious and Civil Rights, the Church of Jesus Christ of Latter-day Saints, the Lutheran Church-Missouri Synod, the National Association of Evangelicals, the Synagogue Council of America, and the Worldwide Church of God.

It is very significant that both the rabbinate and the lay membership of all three branches of Judaism in America filed a brief before the State court, dealing with the issue to which you just made reference, Mr. Edwards, the problem of standing to attack the exempt status of a religious organization. That relates to some of the provisions in my statement. So if I can have that entered in, as well.

Mr. EDWARDS. Without objection, so ordered.

Mr. GAFFNEY. Thank you. I would like to make a couple of statements of a general character and then turn to the legislation before the committee.

The free exercise clause in the first amendment is, in my view, far more than a specialized equal protection clause for the relatively unusual cases in which the Government might actively discriminate against an unpopular religious minority religion or religion in general.

In Professor Laycock's testimony, he details at great length the sad and tragic history of religious bigotry in America, so we ought not be naive or unfamiliar with that sad page in our history; that, in fact, many religious groups have been the targets of intentional discrimination. But free exercise protects far more than that.

The devastating impact of the diminution of what free exercise protects—and we see at a glance by a series of cases in the lower courts, local governments often have little or no respect for sincere convictions at odds with the sensibilities or preferences of the majority. An antidiscrimination principle, therefore, is not sufficient to shield the vivid and full exercise of religious faith and conscience in our society from the intolerance of majorities or the inflexibility of bureaucrats. I cite several of those cases in my statement.

Let me just offer briefly now a couple of examples. They go to some of the concerns that Congressman Hyde has raised and that you just heard your colleague, Congressman Smith, address.

In the case of *St. Agnes Hospital v. Riddick*, the only issue as to which the Supreme Court was unanimous on the day that it de-

cided the *Roe v. Wade* case was that the conscience clause in the Georgia statute about the Court in the companion case of *Doe v. Bolton* should be sustained. The Court split, as you know, 7 to 2, in that case, in *Roe* against *Wade*, but it left standing the provision of the Georgia statute that those who were conscientiously required—and here I will leave to Professor Laycock a fuller explanation of why the language of “motivated” and “compelled” has entered into these proceedings, but I would be glad to answer any question that the committee has about that—but in any event, whether a person was compelled by a religious belief or motivated to do so by virtue of their respect for the right to life. The Georgia statute said clearly we are going to let a doctor, a nurse, an attending physician or whatever in a Georgia hospital decline to participate in a procedure that violated their conscience.

After *Smith*, however, in the case that I cited, *St. Agnes Hospital*, we are told by the district court that an outrageous invasion of conscience was in the service of a compelling governmental interest. In short, it didn't even seem to know that *Smith* had gotten rid of the compelling governmental interest standard.

Even on a belief so deeply and widely held as conscientious objection to the performance of an abortion, State officials ignored the court's suggestion that it is desirable for the political branch to provide free exercise exemptions. And the courts, after *Smith*, thought it perilous to supply a remedy.

In a little publicized case, the city of New York recently invoked handicap access regulations to close down a shelter for the homeless that was operated by Mother Theresa's religious order. The problem was that the shelter was on the second floor of a walkup and that the facility didn't have an elevator.

The city should have taken the prize for the most frivolous governmental interest asserted in the history of the Republic, the view that it is better for the homeless to sleep on the street rather than in a building without an elevator. After *Smith*, this generally applicable if not very serious norm was thought to be enough to shut down the religious mission. The bureaucracy won and the nuns and the homeless lost.

There are several other examples in my testimony. And the point really that I want to come to quickly is that, after *Smith*, the Roman Catholic children will no longer have a right of excusal from sex education classes in public schools that are contrary to their parents' religious training. No longer will churches have a right of exemption from employment laws forbidding discrimination against homosexuals when their choice of an occupation is religious ministry or music director at a Presbyterian parish. The precedent that went for the Presbyterians in San Francisco has been eroded.

No longer will there be confidentiality if a prosecutor calls a priest as a witness in court. No longer will Jewish prisoners be entitled to kosher meals, or Muslim prisoners, in accordance with their dietary laws. Jehova's Witnesses will not be able to avoid jury duty. Jewish college students will be required to take examinations on their Sabbath.

All of these minorities will be relegated to their political remedies despite the manifest tendency of the political process—which will have triumphed not simply by the act of the Court in *Smith*,

but by the inaction of this Congress, unless it can find a compromise to produce legislation that the President can sign and that we can use to support religious freedom.

The problem, in short, with a pseudo neutrality standard that limits the free exercise clause to nondiscrimination is that the close connection between majoritarian customs and religious norms is not one that is apparent in the political process. The requirement that a law be, "generally applicable," is not and cannot be a guarantee of real neutrality. It only guarantees formal neutrality.

It is a guarantee that the laws will conform to mainstream belief, except in those instances in which a legislature—and you all know how busy you are as Members of the Congress—can be made aware of and can be persuaded to be willing to accommodate an express religion, the divergent practices of the great pluralism that exists in our Republic in the face of deep and abiding differences over fundamentals. There is no coherent concept, moreover, as Professor Laycock has argued in an article in the *DePaul Law Review*, about what neutrality really means with respect to religion. The only hope for a regime of genuine religious freedom, which was the historic purpose of the religion clause in the first amendment, is a policy of unabashed commitment to pluralism, to generous accommodation of one another's beliefs and practices, and mutual forbearance. That, I think, is one of the great contributions of the document that I have entered into the record known as the Williamsburg Charter.

To be sure, the judiciary cannot police the manifold conflicts between majority will and minority faith in every conceivable instance. All the courts need do, however, is to articulate the constitutional standard that holds high the exercise of religion so that then the legislatures and the bureaucrats will understand that their power to interfere with religion is constrained in our constitutional order. And I think that point is being lost on a lot of the argument back and forth about this version of the bill or that version of the bill.

The constitutional litigation is the tip of the iceberg with respect to religious freedom. The rare moments in which one appears before the Supreme Court of the United States to decide a case of importance to that court is just that, it is rare. The real power of that court is to set the terms of the engagement in our Republic, and the real impact of *Smith* was not simply on those two native Americans or on one or two individuals; but rather on communities, on churches, synagogues, mosques, on people who will lose time after time now in conflicts with city hall and who have lost under *Smith* their ability to rest their claim for even decent consideration on the grounds of the Constitution.

It is for that reason that I urge upon the committee every effort to smoke out the red herrings or the issues about which there is not substantive disagreement. For me, the tax-exempt status of religious organizations is one of them. Take one look at the cover of the brief that Laycock and I filed in the Supreme Court, and you will see the broad group of religious organizations that came to the assistance of the U.S. Catholic Conference, not because that litigation posed a threat exclusively to that religious community, but because it threatens the ability of all religious communities to articu-

late their religious vision in our Republic without being subjected to long, expensive, harassing litigation.

And I think you have to be aware of that practical reality, Mr. Edwards, when you say, hasn't the law of standing been well settled. It may indeed be well settled in the minds of those of us who teach constitutional law, but for those who have to defend lawsuits and protect litigation, the cost of defending such suits ought to be taken into account.

It represents a significant diversion of funds that are earmarked for charitable works by the religious organization. Religious bodies do not normally construe the Biblical command to feed the hungry to mean they should refer it to their lawyers. At the very least, such diversion of funds cannot be justified on the basis of protecting litigants whose tax liability is not at issue in the claim and will not be affected by the outcome of the litigation.

I obviously do not speak for the Government. They are capable of sending their witnesses up here. But I can't imagine that if that provision from the Smith bill were incorporated into a committee markup, that either the Attorney General or the Secretary of the Treasury, the Commissioner of Internal Revenue, would be unhappy. To the contrary, I think they would be delighted if the Congress clarified its intent to delegate to the Commissioner exclusively the power of revocation over religious organizations.

In conclusion, James Madison got it right back in his famous conflict with Gov. Patrick Henry of Virginia when he wrote his "Memorial and Remonstrance" that "The time to take alarm at the first experiment with our liberties is whenever it occurs."

Mr. Edwards and members of the committee, I am truly alarmed at the consequences for religious liberty that are real, they are palpable, they have already begun to flow from the *Smith* case, and I hope that this Congress acts promptly and with strong resolve to repudiate the tragic experiment with religious liberty that the *Smith* case represents.

If you agree with me—and I know that some on the panel do not—that the Court has erred in *Smith*, I hope that you will not wait until a perfect instrument for change is discovered. That was not the case with the Hyde amendment. Congressman Hyde went forward with one version, then another, because of the depth of his conviction about the importance of protecting fetal life. Indeed, it is often the case that Congress enacts instruments of change that are not perfect in the first instance. I need not tell you, who are more familiar than I with the process of amendment, that goes on session after session.

But I do come before you as a member of the Republic, urging that you do something and that you do something now. We cannot wait another session without sending some signal, not simply to the Federal judiciary branch of the Government, but to zoning boards, city commissions, local officials all over the land, that when we, the people, encourage you, our representatives, to safeguard the first of our civil liberties, religious freedom, we are doing the very thing that the bicentennial season requires of us, securing the blessings of liberty for ourselves and our posterity and promoting that more perfect union that our Constitution was ordained to establish.

Thank you, Mr. Chairman.  
 Mr. EDWARDS. Thank you, Mr. Gaffney. That is very powerful testimony and we appreciate it.  
 [The prepared statement of Mr. Gaffney follows:]

Testimony of Edward McGlynn Gaffney, Jr.  
 on H.R. 2797 and 4040  
 Before the Subcommittee on Civil and Constitutional Rights  
 of the House Judiciary Committee

May 14, 1992

### Introduction

Mr. Chairman and Members of the Committee, I am the Dean and Professor of Law at Valparaiso University School of Law. I appear today not in an official capacity representing my university or the church with which it is affiliated, but to share with you my own convictions about the legislation that the Committee is considering. Like those of Professor Laycock, my own convictions on these matters have arisen out of many years of reflection as a scholar exploring church-state matters in the United States. For example, I was an academic consultant to the foundation that produced the Williamsburg Charter, a bicentennial document celebrating religious freedom. This document was signed in Williamsburg on June 25, 1988, the 200th anniversary of Virginia's historic call for a Bill of Rights. I ask permission that this document, which was published along with extensive commentary in volume 8 of the Journal of Law and Religion, be entered into the record of these proceedings. I also call to the attention of the Committee the excellent articles by Professor Laycock, "The Remnants of Free Exercise," 1990 Sup. Ct. Rev. 1, by Professor James Gordon, "Free Exercise on the Mountaintop," 79 Cal. L. Rev. 91 (1991), and by Professor Michael W. McConnell, "Free Exercise Revisionism and the Smith Decision," 57 U. Chi. L. Rev. 1109 (1990). Since Professor McConnell's article explains thoroughly why the Smith case was wrongly decided, I ask permission that it be entered into the record as well.

As a member of the Christian Legal Society, moreover, I have been actively involved in many cases relating to religious freedom. For example, shortly after the Supreme Court decided Employment Division v. Smith, 494 U.S. 872 (1990), I invited over fifty of my colleagues throughout the country, including some of the most distinguished scholars in the field of constitutional law, to join in the petition for rehearing which the Supreme Court denied. 110 S.Ct. 2605. Another case in which I was involved that relates directly to these proceedings is the Abortion Rights Mobilization case, also known as the ARM case. In this case private parties sought to revoke the exempt status of a major religious organization, the Roman Catholic Church, because of a variety of its pastoral activities relating to the abortion issue. As Professor Laycock mentioned in his testimony, he and I prepared a brief amicus curiae in the Court of Appeals and in the Supreme Court on behalf of a very broad coalition of religious organizations. Because it bears directly on one of the proposals before this Committee, I also ask permission to enter this document into the record.

The serious controversy over the two pieces of legislation now before this Committee, H.R. 2797 and 4040, is not over whether the Supreme Court erred -- and erred grievously -- when it ruled on April 17, 1990 in Employment Division v. Smith. On the contrary, there is broad consensus among scholars, religious organizations, and Members of Congress about this, but some sharp disagreement about the best means of overcoming the negative effects of Smith. Nevertheless, for the sake of assisting the Committee in preparing a full record for the discussions about the legislation, I begin my testimony with a discussion of the development of the standards governing free exercise of religion before Smith, then discuss the aberration that Smith represents, and the pernicious consequences of its policy determination that the Free Exercise Clause only protects against invidious discrimination against religion. I conclude by suggesting a compromise that might combine the energies of all on this Committee and, I trust, a powerful majority of your colleagues in the House and in the other body, to enact legislation during this session of Congress that will restore effective protection to religious freedom in this country.



### I. The Free Exercise Standards Before Smith

In the first period of the republic, the Bill of Rights had no application to the several States, but governed the regulatory reach only of the national government. Barron v. Mayor & City of Baltimore, 32 U.S. 243 (1833). And the Free Exercise Clause proved but a parchment barrier to congressional legislation that codified massive hostility directed against the Mormons. In a series of three cases in the late nineteenth century the Supreme Court reinforced with judicial authority the hostility to the Mormons manifested in the congressional legislation that singled them out in an invidious manner. See Gustavus Myers, History of Bigotry in the United States 158-62 (1940). In the first case, Reynolds v. United States, 98 U.S. 145 (1878), the Court ruled that Congress could impose criminal sanctions against the Mormon practice of plural marriages; the Court noted, however, that religious beliefs were beyond the regulatory reach of the government. In the second case, Davis v. Beason, 133 U.S. 333 (1890), the belief-conduct distinction the Court had touted in Reynolds was exposed as a sham, for Mormons were deprived of the franchise because of their beliefs in plural marriages. In the third case, aptly styled Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890), the Court went still further, divesting the Mormon church of its property until it changed its view on plural marriages. This is the sort of dictatorial rule that one associates with Henry VIII's dissolution of the monasteries in sixteenth century England, 27 Henry VIII, c. 27 (1536), 31 Henry VIII, c. 13 (1539), not with the spirit of the First Amendment. It is important to note that the Smith Court expressly relied on the Reynolds case, and implicitly on its progeny, which had ruled that the Free Exercise Clause imposed no serious obstacle to congressional legislation targeted at a vulnerable and unpopular religious minority. It is entirely appropriate that this Committee has invited my good friend, Dallin Oaks, an outstanding jurist and scholar, to come before you in these hearings as the first Mormon leader to testify before a Congressional committee on matters of religious freedom.

In the early part of this century, the Supreme Court began the process of incorporation of various guarantees of the Bill of Rights against the several States through the Due Process Clause of the fourteenth amendment. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925) (Free Speech Clause applicable to the States); Near v. Minnesota, (1931) (Free Press Clause applicable to the States). By 1940 the Court thought it desirable to extend the reach of the Free Exercise Clause to the States as well. Cantwell v. Connecticut, 310 U.S. 296 (1940). Cantwell marked a breakthrough made possible by the persistence of the Jehovah's Witnesses, who brought to the attention of the Court a series of cases illustrating the brutality of political power intolerant of a small, unpopular minority group. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105 (1943). In this respect, the cases involving the Witnesses were a harbinger of the stance that the Court was later to take in the Brown case against racial discrimination. Not only religious minorities, but also racial minorities could take comfort from Justice Jackson's assurance in the second flag salute case that "freedom of worship ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no election." West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 638 (1943). This was a solid commitment of an independent judiciary that it would enforce the limits placed on our government by the founders in the Bill of Rights.

In an unbroken line of unemployment compensation cases that are directly relevant to the unemployment compensation claim presented in Smith, the Supreme Court had repeatedly adhered to the doctrine that the Free Exercise Clause requires that the government may not enforce a law or policy that burdened the exercise of a sincere religious belief unless it was the least restrictive means of attaining a particularly important secular objective. Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); Thomas v. Review Bd. of the Indiana Employment Security Division, 450 U.S. 707 (1981); and Sherbert v. Verner, 374 U.S. 398 (1963).

Sherbert marked an important departure from a series of cases involving Sunday closing laws that had been decided adversely to Jews only two years before Sherbert. See, e.g., Braunfeld v. Brown, 366 U.S. 599 (1961). In Sherbert Justice Brennan tried to give religious freedom more effective protection than it had previously enjoyed. To achieve this end, he imported from equal protection analysis in cases involving racial discrimination the standard requiring the government to show that its interest in a racial classification was truly "compelling." After the breakthrough decision in Brown v. Board of Education, 347 U.S. 483 (1954), in case after case in the race area, the Court had repeatedly told the government that no interest that it might articulate on behalf of apartheid (or its American cousin, Jim Crow) could match this strict standard of review. See e.g., Loving v. Virginia, 388 U.S. 1 (1967).

In addition, Justice Brennan reached out to Commerce Clause cases such as Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) to require further that the government must use the "least restrictive alternative" to achieve its "compelling interest." In Dean Milk the Court had ruled that the City of Madison had a powerful interest in the purity of milk sold to its inhabitants, but that this goal could be achieved by requiring pasteurization of milk in Illinois as easily as requiring that the milk be transported in raw state up to Wisconsin for pasteurization and inspection, then be transported back down to Illinois for packaging, and then be transported up to Wisconsin for sale. The Court correctly intuited that the imposition of additional transportation costs on the out-of-State farmers was a none too subtle way of discriminating against them in favor of local merchants.

By combining these two standards -- compelling state interest and least restrictive alternative -- into one new test for the adjudication of claims arising under the Free Exercise Clause, the Sherbert court sent a signal to lower courts that religious freedom was to be given the favored status accorded to the national commitment of racial equality and to the elimination of tariff barriers in a national common market. This new standard may not have been perfect. What test that involves balancing is perfect? But the test proved to be very effective in the lower courts as a way of safeguarding religious freedom in an environment that has become pervasively regulated.

The new test, moreover, was not limited to the facts of the unemployment compensation claim sought by Mrs. Verner, but was invoked by the Court as a general principle in virtually all the free exercise cases it decided in the past two decades. See, e.g., Hernandez v. Commissioner, 490 U.S. 680 (1989); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); Bob Jones University v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972); and Gillette v. United States and Negre v. Larsen, 401 U.S. 437 (1971).

Of all these cases, however, the only one won by a religious adherent was the Yoder case, involving the religious claim of Amish parents that their religious practices and communal life would be injured by the application of a facially neutral, generally applicable norm requiring compulsory school attendance by their children after the eighth grade. Professor McConnell characterizes the cases lost by religious claimants as follows: "Orthodox Jews have been expelled from the military for wearing yarmulkes; a religious community in which all members worked for the church and believed that acceptance of wages would be an affront to God has been forced to yield to the minimum wage; religious colleges have been denied tax exemptions for enforcing what they regard to be religiously compelled moral regulations; Amish farmers who refuse Social Security benefits have been forced to pay Social Security taxes; and Muslim prisoners have been denied the right to challenge prison regulations that conflict with their worship schedule." Michael W. McConnell, "Why 'Separation' Is Not the Key to Church-State Relations," 107 The Christian Century 43, 46 (Jan. 18, 1989). Although purporting to surround free exercise of religion with a lot of protection, the Court either trivialized the burden on religion represented by the demands of the modern regulatory state or rejected the validity of an exemption based on religious grounds.

In his article on Smith, Professor McConnell described free exercise doctrine before Smith as a sort of Potemkin village, in which visitors could see with their own eyes Soviets who were grateful to Josef Stalin for an abundance of ice cream and for other delights of their collectivized lives. Only the most gullible tourist could have believed the rosy picture created by the Potemkin village, and only a naive observer of religious liberty in this country would have said that everything is well in order either before or after Smith. At least on paper, however, the compelling state interest and least restrictive alternative standard appeared to be operative in a unanimous decision as recently as a few months before Smith. Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 110 S.Ct. 688, 693 (1990).

## II. Employment Division v. Smith

By abandoning the compelling state interest and least restrictive alternative test, Smith clearly marked a major shift in free exercise doctrine. In doing so, the Smith Court completely undercut its own precedents. And it did so without any notice or warning that it was considering a significant shift in doctrine. No one, not even the parties, had an opportunity to brief the Court in Smith on the importance of a constitutional standard that would afford appropriate protection to religious exercise. No one in the religious communities thought that the pre-Smith standard was at risk in Smith, given the question presented for review and the nature of the arguments presented in the case.

The test articulated in Sherbert for free exercise claims had been thought secure because of the series of unemployment compensation cases to which I made reference above. These cases ruled that the government may not burden religious freedom unless the burden is justified because it reflects no ordinary public interest, but a supreme public necessity, and that no less restrictive alternative to the burden exists. Under these cases, no one made the claim that religious faith and conduct were absolutely protected, but it was at least clear that the government may not penalize a person for exercising religious faith.

The Smith case involved the sacramental use of peyote in a ceremony of the Native American Church. The reverence that Native Americans have for the buds of this cactus plant is tied to the centuries-old belief that it contains the presence of the deity and has healing power. Recognizing these realities, Congress and nearly half of the state legislatures expressly exclude the sacramental use of peyote from their prohibition of illicit drugs. Even though Oregon did not have an exemption of this sort on the books at the time (it now does), the Oregon Supreme Court ruled that the First Amendment prohibits the State from denying unemployment benefits to the two Native Americans who were fired when they acknowledged participating in the rituals of their church. The United States Supreme Court reversed the state court, abandoning the solid line of unemployment compensation cases I mentioned above, including a unanimous decision the year before Smith.

If Smith is viewed as another drug case, the result was unsurprising. In today's climate of drug wars, the mere presence of a non-scheduled drug in a case can distract some pretty fine minds from the fact that the Smith case was a case about punishing people for their centuries-old form of religious worship. I do not agree with Justice Sandra Day O'Connor's reading of the case, but I can understand that reasonable persons -- including Dean Jesse Choper, an eminent First Amendment scholar who was of counsel to the Attorney General of Oregon in Smith -- could agree that the government has a compelling interest in the regulation of the use of illegal drugs. Although Justice O'Connor reached this result, she refused to sign the opinion of Justice Scalia, who would leave the protection of religious conscience to the tender mercies of the legislatures. Justice O'Connor found this policy "incompatible with our nation's fundamental commitment to individual religious liberty." For her, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." Thus one might be less troubled by the formal holding of the case -- that unemployment compensation benefits are unavailable to a person who is fired for sacramental use of peyote -- than by the abandonment of the requirement that the government demonstrate a compelling secular justification for overriding claims of religious conscience.

In the spirit of Justice O'Connor's concurring opinion in *Smith*, I would like to conclude this portion of my testimony by offering two historical reasons for rejecting the Court's decision in *Smith*. First, the compelling governmental interest standard conforms more closely to the historical situation at the time of the framing of the First Amendment. Before *Smith* there was little scholarly exploration of the historical justification for religious exemptions. Shortly after *Smith* was decided, however, an article by a leading commentator gathered extensive evidence that the original meaning of the Free Exercise Clause allowed judges to craft exemptions from laws of general applicability. Michael McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 Harv. L. Rev. 1409 (1990). For example, under nine of the original state constitutions -- Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and South Carolina -- free exercise of religion expressly prevailed, to use the phrase of James Madison, "where it [did] not trespass on private rights or the public peace." These provisions regarding free exercise of religion appear to be an early equivalent of the compelling state interest requirement. For example, article 61 of the Georgia State Constitution of 1777 provides: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." Ben Poore ed., 1 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 383 (1878). If free exercise guarantees may not be read to exempt believers from "otherwise valid" laws, what would be the purpose of the "peace and safety" proviso? According to the same commentator, "[t]hese provisions were the likely model for the federal free exercise guarantee, and their evident acknowledgement of free exercise exemptions is the strongest evidence that the framers expected the First Amendment to enjoy a similarly broad interpretation." Michael McConnell, "Free Exercise Revisionism and the *Smith* Decision," 57 U. Chi. L. Rev. 1109, 1118 (1990).

The majority in *Smith* is composed of judges who often complain that judges should not exceed their limited task of construing the constitutional text in line with the intentions of the framers. Their judge-made policy to restrict the protection of the Religion Clause to overt, intentional discrimination against religion ignores the evidence that the framers of the Free Exercise Clause intended to assert the primacy of religious conscience over secular laws by protecting the right actively to fulfill religious duties without state interference. McConnell illustrates this point graphically with examples of exemptions of religion from generally applicable laws that date from the beginning of the republic.

The *Smith* Court showed not the slightest regard for this history. Instead, it said that laws of general applicability are now to be presumed valid even if they seriously interfere with someone's religious beliefs or practices. According to Justice Scalia, the only laws that the free exercise clause prohibits are those intended to stifle a particular religion. All of you on this Committee have had enough experience in politics to know that no legislature would be crude enough to admit that the purpose of its legislation is to harm a vulnerable religious organization. Since, in Scalia's view, the nation cannot "afford the luxury" of striking down laws because they violate religious belief, individuals must rely on the political process for legislative protection of their beliefs and practices. Justice Harry Blackmun wrote in a sharp dissent: "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty." That is the frame within which these hearings should proceed.

Second, requiring a government attorney to demonstrate the relative significance of the government's interest before it may prevail over a sincere religious claim may be more necessary in our period of the republic than in the founding period precisely because government at all levels is now far more intrusive than it was at the time of the founding. As one commentator has noted, "The style and scope of twentieth century government has led to its involvement with ends and values of varying importance." Donald Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee," 80 Harv. L. Rev. 1381, 1388 (1967). As Professor McConnell has argued, religious exemptions are more necessary after the New Deal than in the founding period since "the growth of the modern welfare-regulatory state has vastly increased the occasions for conflict between government and religion." Michael McConnell, "Accommodation of Religion," 1985 Sup. Ct. Rev. 1, 23.

### III. Developments after Smith

The consequences for religious liberty that have ensued since Smith have been disastrous. The cases discussed in this part of my testimony illustrate graphically why the judiciary must not abandon its measure of responsibility to enforce the limits placed on our government by the Bill of Rights. The Smith Court suggested that any exemption for religious conduct from generally applicable laws must come from the legislatures, not from the courts. The Court acknowledged that "leaving accommodation [of religion] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." That understates the problem by a long shot. The real consequence of Smith is that sincerely held religiously based conduct is not to be afforded significant protection from majoritarian control. Sending unpopular religious minorities to city councils and State legislatures for relief is like sending the Jehovah's Witnesses to the very legislative bodies in the 1930s that were doing their level best to get rid of them. See, e.g., John Noonan, The Believer and the Powers that Are 233-55 (1987); David Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962); Richard Danzig, "How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion," 1977 Sup. Ct. Rev. 257.

After Smith, governmental agencies have recklessly disregarded the protections that the Constitution affords to religious conscience, belying the promise in Smith that the political branches of government can safely be entrusted with the exclusive duty of protecting the first of our civil liberties. For example, at the level of local government, zoning laws have been invoked both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. See, e.g., Bethel Evangelical Lutheran Church v. Village of Morton, 201 Ill. App. 3d 858, 559 N.E. 2d 533, app. denied, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990) (post-Smith cap on enrollment of students in parochial school); and see R. Gustav Niebuhr, "Here Is The Church," Wall Street J., Nov. 20, 1991, at A1, col. 4. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's membership is the clearest example imaginable of an instance of governmental overreaching. At the federal level, we even had regulations purporting to tell the Amish what to wear when they raise a barn. See e.g., OSHA Notice CPL 2 (Nov. 5, 1990) (post-Smith revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites). In part because of the intervention of the principal co-sponsor of RFRA, Congressman Stephen Solarz, OSHA has withdrawn this regulation. The important thing to heed is that Smith sent to administrative agencies the message that they could -- or, worse yet, they should -- write regulations with no care whatever for their impact on religious freedom.

It is not just that the political branches will find it hard to comprehend the need for properly drafted religious exemptions from generally applicable rules. An even more scandalous consequence of Smith is that federal judges have shown signs of callous disregard for the first of our civil liberties. The judicial record after Smith betrays a remarkable insensitivity to religious liberty that requires remedial legislation by Congress. For example, in St. Agnes Hospital v. Riddick, 748 F. Supp. 319 (D. Md. 1990), the district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions. The lower court was apparently unaware of the diminution of the compelling interest requirement in Smith. What is most striking about the case is that even on a belief so deeply and widely held as conscientious objection to performing abortions, state officials ignored the suggestion of the Supreme Court that "it is desirable" for the political branches to provide free exercise exemptions. See Doe v. Bolton, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

In Salvation Army v. Dep't of Community Affairs, 919 F. 2d 183 (3d Cir. 1990), the court decided that Smith required it to reject the church's free exercise claim to an exemption from disclosure requirements in the state's Room and Boarding Act. On remand, the government may yet be required by the court to demonstrate a serious need to know the identity of the down and outers aided by the Salvation Army. Under Smith, however, the church must now claim its exemption from the state's reporting requirements -- which the court acknowledged would dissuade people in need of help from participating in

the church's rehabilitation program -- by pressing a free speech right or a right deriving from associational freedom, not one grounded in the religious character of the church's ministry.

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order on the second floor of a walk-up because the facility did not have an elevator. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its neutral, generally enforceable rules. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity -- the view that it is better for the homeless to sleep in the street than in a building without an elevator. Under Smith analysis, however, a "generally applicable," if not very serious, rule was enough to shut down a religious mission. The bureaucracy won, and the nuns and the homeless lost. See Sam Roberts, "Fight City Hall? Nope, Not Even Mother Teresa," New York Times Sept. 17, 1990, at B1, col 1.

In Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring autopsies was applied to an Orthodox Jew, for whom the mutilation of the body is a sacrilege, and for whom burial must take place before sundown on the day of the death. Since the man had died in an auto accident, that should have satisfied whatever interest the government might have in ascertaining the cause of death of its citizens. Yet once again, a mechanical approach to "generally applicable" norms was allowed to trump a sincerely held religious tenet, in a manner that was manifestly not the least restrictive alternative means of effectuating the government's interests.

This Committee has heard moving testimony in these hearings from one of the plaintiffs in You Yang Yang v. Sturmer, 728 F. Supp. 845 (D.R.I. 1990), reconsidered and dismissed, 750 F. Supp. 558 (D.R.I. 1990), where another district court "regretfully" dismissed on the basis of Smith its earlier determination that the government was required to accommodate the religious objection of Vietnamese Hmong to autopsies.

In Hunafa v. Murphy, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork. The court noted, however, that Smith "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." Id. at 48.

This political and judicial overkill is akin to the reaction against the Jehovah's Witnesses in the wake of the first flag salute case, Minersville School District v. Gobitis, 310 U.S. 586 (1940), including licensing of the Witnesses in order to drive them out of a State, and waves of violent attacks on the Witnesses both by the police and by vigilante mobs. See, e.g., Peter Irons, The Courage of Their Convictions 22-23 (1988). The majority opinion in Smith betrays massive insensitivity not only to the history surrounding the adoption of the Free Exercise Clause by the First Congress, but also to the history surrounding its own precedents in this century. The Court cited Gobitis approvingly three times in Smith, without even mentioning that it had been overruled in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

The circumstances of Barnette are themselves instructive for our times. The second flag salute case came to the Court in the middle of the Second World War. By then the Justices were fully aware of the brutal oppression of minorities by totalitarian governments in Germany and Italy. It was against the background of the Nürnberg rallies with their massed flags and swastikas that the Court reexamined the view that the national interest required the Jehovah's Witnesses to face criminal sanctions rather than saluting an object they sincerely regard as a "graven image" which the second commandment forbids them from worshipping (Ex. 20:4; Deut. 5:8). In this setting the Court clearly adopted a standard that protected religious freedom and freedom of speech generally far more broadly than the suggestion in Smith that these freedoms are adequately secured merely by commanding the government to refrain from discrimination. Justice Roberts proclaimed a far broader vision of freedom in these ringing terms: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Id. at 642 (emphasis added).

It would be unfair to suggest that the Court could have intended all of the far-reaching and outrageous results discussed above, whether against the Witnesses in the 1940s or against religion generally in the 1990s. But the damage to religious freedom since Smith has been real, whether intended or not, just as the damage to religious freedom after Gobitis was palpable and real, whether or not Justice Frankfurter and his colleagues could fairly be said to have intended those harmful results.

#### IV. Proposed Legislation to Respond to Smith

Rightly understood, the Free Exercise Clause should be breathing life into the rest of the provisions of the Bill of Rights. Religious liberty is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. If the power of government to coerce in matters of conscience is denied, that government is limited indeed. It follows, for example, that it may not curb free expression of political ideas any more than it may disturb religious belief and conduct. In the words of the Williamsburg Charter, "religious freedom is a basic civil liberty ineradicable from the long tradition of rights and liberties from which the American Revolution sprang."

It is imperative that the Congress act now to restore this kind of thinking about our first civil liberty. I agree with Professor Laycock that H.R. 2797 is worthy of your support, and I have joined with him and Professors Durham and McConnell on many occasions in urging this result publicly. See "An Open Letter on Religious Freedom," First Things Number 11 (March 1991), 44-46; "For the Religious Freedom Restoration Act," Number 21 (March 1992), 42-44; and Number 22 (April 1992) 48-51. But I am willing to go beyond those statements if that is what is necessary to get RFRA enacted. Although I am a scholar, not a lobbyist, I understand that the business we are about in these hearings is the vital task of enacting legislation, not the scoring of points in an academic debate.

In the remainder of this statement, I am articulating my own views, not those of Professors Durham, Laycock, and McConnell, but I have discussed this idea with them and with several leaders of religious communities throughout America. I would like to offer a suggestion that those who support H.R. 2797 reach out in these hearings to the sponsors of the alternative legislation, H.R. 4040. Whether or not my you find my suggestion acceptable, I come before you today with no hidden agenda, but only with an urgent plea that you enact legislation this session that the President can sign, so that we can begin to use in the cases affecting religious freedom at this very moment.

The compromise that I propose is that the Committee report out H.R. 2797, but that the Committee either amend H.R. 2797 to include the provision in H.R. 4040 referring to the standing of third parties attempting to use the federal courts to revoke the exempt status of religious organizations, or that the Committee agree in principle to report out similar language in separate legislation. The reason why I suggest these two alternatives is that the Committee may wish to codify the result in the Abortion Rights Mobilization case for religious organizations, in which case the matter is properly before this Committee. In the alternative, you may wish to clarify the intent of Congress that the power to revoke the exempt of any exempt organization is delegated exclusively to the Secretary of the Treasury and his or her agents, in which case the proposal would probably also lie within the province of the Ways and Means Committee. I am not attempting to lecture any Member of Congress about the jurisdiction of the committees. I am trying to communicate as clearly as I know how that it is imperative that both sides of this debate undertake every feasible step to enact legislation we need now. I obviously do not speak for the government, but I am confident that this proposal would meet with favor in both the Justice Department and the Treasury Department. I hope that the Committee can agree to consider the problem identified by Mr. Chopko not as one with any special advantage for his religious community, but as one that affects the convictions of nearly every religious community that seeks to relate its religious message to the world in which we live. It is important, I think, to remove all needless obstacles to legislation on religious freedom.

I offer five reasons for urging this compromise. First, there is the practical consideration that I mentioned above. Most of you in Congress already agree that something has to be done to respond to the Smith case, but there is sharp disagreement about which vehicle is appropriate to this end, H.R. 2797 or H.R. 4040. For example, some Members of Congress who would otherwise have been willing to co-sponsor H.R. 2797 have now withdrawn their support for this legislation, fearing that it will provide a statutory basis for promoting the policy of abortion on demand. I do not share that fear myself, finding it probable that the Supreme Court will reverse Roe v. Wade, and thinking it utterly implausible that the same judges who would accomplish that result would undo its effect by relying on a statute that is silent on abortion. Perhaps neutral language can be found to resolve the differences that exist over the vexing issue of abortion. For example, a compromise version might read: "Nothing in this statute shall be construed either to advance or to inhibit a claim relating to the termination of a pregnancy." Whether or not that language is acceptable, I do not think that the language in H.R. 4040 is abortion-neutral. I understand further that the disagreement over abortion implicates a debate on matters of high principle, as you heard in the testimony offered yesterday before this Committee. So I have no illusion that my suggestion will break up the log-jam that seems to have occurred in the legislative process. Nonetheless, I urge you most strongly to work towards a compromise that will unite this Committee and send a strong message to all your colleagues in the Congress that we must have legislation on this matter as soon as is humanly possible.

Second, I mentioned above that the Abortion Rights Mobilization case<sup>1</sup> has a direct bearing on one of the proposals in H.R. 4040. In this case private parties sought to revoke the exempt status of a major religious organization, the Roman Catholic Church, because of a variety of its pastoral activities relating to the abortion issue. The plaintiffs maintained that these activities violated the ban in § 501(c)(3) of the Internal Revenue Code on political activity by exempt religious organizations, and they urged that the court revoke the church's exempt status. The case tested whether the revocation power is confided to the executive branch, or whether private parties opposed to the message of a religious group may use the federal courts to enforce the restraints placed by the tax code on the political activities of religious organizations. After a decade of costly litigation -- including one indecisive trip to the Supreme Court -- the suit was dismissed by a divided panel of a federal Court of Appeals. The Supreme Court declined to review this judgment, leaving the issue raised by the plaintiffs to be decided later by another court, and probably against a weaker church.

Many religious organizations were willing to join in the brief that Professor Laycock and I authored in the Abortion Rights Mobilization case. Those who supported the Catholic church in the ARM case included Jews and Christians who agree with the Catholic church's official teaching on abortion, as well as Jews and Christians who emphatically do not agree with that teaching.<sup>2</sup> Although I do not speak for any religious organization, the fact that so many groups of very different views on the abortion issue joined our

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<sup>1</sup> Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982); Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y. 1982); Abortion Rights Mobilization, Inc. v. Regan, 603 F. Supp. 970 (S.D.N.Y. 1985); Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986); In re United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987), rev'd, United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988); on remand, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 110 S.Ct. 1946 (1990).

<sup>2</sup> For example, in joining the amicus brief I mentioned above, the Stated Clerk of the Presbyterian Church (U.S.A.) noted: "The policies established by the General Assembly of the Presbyterian Church (U.S.A.) are not in agreement with the views of the petitioners [United States Catholic Conference] with regard to matters of abortion rights and pro-life issues, but are in substantial agreement with the views on constitutional rights and religious liberty expressed in this brief." Brief Amicus Curiae of National Council of Churches, et al., No. 87-416, at App. 2.



brief leads me to conclude that they would also endorse my proposal to enact a provision that would commit to the IRS the delicate task of revocation of the exempt status of a religious organization arising out of pastoral activities that relate to politics. It is especially problematic that judges have been asked to revoke the exempt status of religious organizations at the behest of their opponents.<sup>3</sup>

Third, the compromise that I suggest here would be a practical means of protecting the free exercise rights of religious organizations to engage in pastoral activities relating to matters of public concern. If the Court of Appeals had not repudiated the standing rule adopted by Judge Carter in the ARM case, it could easily have opened up the floodgates to litigation against churches by those hostile to their mission or ideas.<sup>4</sup> The potential for mischief of this sort, moreover, is compounded by the suggestion in Bob Jones University v. United States, 461 U.S. 574 (1983), that a religious organization may lose its exempt status by failing to conform with "public policy," *id.* at 586, or by failing to "be in harmony with the public interest." *Id.* at 592. But see *id.* at 606-612 (Powell, J., concurring) (rejecting suggestion that "primary function of exempt organizations is to act on behalf of the Government in carrying out governmentally approved policies"). The district court's approach to standing in ARM, moreover, is not limited to religious not-for-profit organizations, but could readily affect exempt charitable organizations that are secular in character. For example, a member of the Ku Klux Klan who is a registered voter could sue the Secretary of the Treasury to revoke the exempt status of the NAACP if the civil rights education fund were to participate in voter education deemed impermissible under the restrictive regulations on voter education. Similarly, opponents and proponents of gun control could use the courts, rather than the halls of Congress and other legislative chambers to carry on their debates. Even if their suits were ultimately dismissed on the merits, they would have at least succeeded in obtaining valuable information about their opponents that would otherwise be unavailable to them.

Fourth, even if lawsuits such as the ARM case are eventually decided on the merits in favor of the religious body attacked by private parties in the court, significant harm to religious freedom may result, as the ARM case itself illustrates, from subjecting the religious body to inquiries which violate the legitimate autonomy of the religious body. The cost of defending such suits, moreover, represents a significant diversion of funds earmarked for charitable works. Religious bodies do not normally construe the biblical command to feed the hungry (Isaiah 58:7; Mt. 25:35) to refer primarily to lawyers. At the very least, such diversion of funds cannot be justified on the basis of protecting litigants whose tax liability is not at issue, and will not be affected by the outcome of the litigation.

Fifth, the inclusion of a provision in H.R. 2797 that would protect the right of religious organizations to participate freely in pastoral activities relating to politics would send to these groups a message from Congress that our elected representatives appreciate the rich and diverse contribution that

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<sup>3</sup> I do not deny that there is some room for meaningful judicial review of agency determinations. For example, a different case would be presented if the IRS had wrongfully denied exempt status to a religious organization because of the administration of the statute with "an evil eye and an unequal hand." Yick Wo v. Hopkins, 118 U.S. 356 (1886); see also Larson v. Valente, 456 U.S. 228 (1982) (invalidating state charitable solicitation statute that was purposefully designed to treat an unpopular religious group unequally), and Employment Division v. Smith, 110 S.Ct. at 1599 (statute would violate free exercise if it sought to ban acts only engaged in for religious purposes or if it were "targeted" at a particular religious group).

<sup>4</sup> See, e.g., Khalaf v. Regan, 85-1 U.S. Tax Cas. (CCH) ¶ 9269 (D.D.C. 1985), *aff'd*, No. 85-5274 (D.C. Cir. Sept. 19, 1986) (dismissing on standing principles effort of anti-Zionist organization to revoke exempt status of Jewish charitable organizations because of their support of Israel); American Society of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (dismissing on standing principles attack on exempt status of American Jewish Congress by business competitors).

religion has made to American public life. In the words of Professor Tribe: "American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, gambling, drinking, prostitution, marriage, and education. To view such religious activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression--and might not even succeed in keeping religious controversy out of public life, given the 'political ruptures caused by the alienation of segments of the religious community.'<sup>5</sup>

In the succinct statement of the Williamsburg Charter Summary of Principles, "[t]he No Establishment clause separates Church from State but not religion from politics or public life." 8 J. Law & Relig. 213 (1990). As Chief Justice Burger wrote in the *Walz* case: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including ... vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). Or as Judge Dooling wrote in the Hyde Amendment case: "[I]t is clear that the healthy working of our political order cannot safely forego the political action of the churches, or discourage it. The reliance, as always, must be on giving an alert and critical hearing to every informed voice, and the spokesmen of religious institutions must not be discouraged nor inhibited by the fear that their support of legislation, or explicit lobbying for such legislation, will result in its being constitutionally suspect." *McRae v. Califano*, 491 F.Supp. 630, 741 (E.D.N.Y. 1980), rev'd on other grounds, sub nom. *Harris v. McRae*, 448 U.S. 294 (1980).

### Conclusion

For these reasons I recommend that the Committee promptly report out a bill that would restore the requirement that when a law burdens a sincerely held religious belief or practice, the government may prevail over the religious adherent only if it demonstrates both that its interest in the law is truly compelling or of paramount significance and that the means chosen to effectuate the governmental interest is the least restrictive alternative. I also recommend that the bill include a provision clarifying congressional intent to leave the process of revocation of the exempt status of religious organizations to the executive branch.

Congress has acted in the past to protect rights more generously than the judiciary has chosen to do. For example, in 1986 the Supreme Court ruled that Jews were subject to dishonorable discharge from the military for wearing yarmulkes. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Congress responded promptly with legislation that reversed this oppressive result. 10 U.S.C. § 774 (1988). No one has seriously suggested that Congress lacked the power to enact this provision. Indeed, Justice Rehnquist's opinion fairly invited legislation by referring to the federal power to regulate the armed forces, a provision expressly given to Congress in Article I, § 8 of the Constitution. And I know of no commentator who has suggested that this legislation is invalid under the Establishment Clause. For example, the Court unanimously sustained a provision in Title VII exempting religious bodies from the general ban on employment discrimination on the basis of religion. *Corp. of Presiding Bishop v. Amos*, 487 U.S. 237 (1987).

The *Smith* Court did not reflect judicial restraint appropriate in a democracy, but abdicated the proper judicial function of assuring that unpopular minorities will also have the benefit of First Amendment

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<sup>5</sup> Laurence Tribe, *American Constitutional Law* 866-867 (1st ed. 1978), citing 77 Harv. L. Rev. 1357 (1964). In the second edition to his treatise, at 1282, Tribe modestly includes only the truncated form of this passage that Justice Brennan cited in *McDaniel v. Paty*, 435 U.S. 618, 641 n.25 (1978). For my part, I would have preferred it if Tribe had kept the last sentence in his second edition, but had eliminated the tentative character of the auxiliary verb, "might," from both clauses.

protections when legislatures turn a deaf ear to these minorities. To return to the parties most directly affected by the Smith case, we need to walk with the Native Americans down the long trail of broken promises that they have travelled in this country. There is no group in our history whose religious beliefs and practices have been subjected to greater abuse or more systematic violation.

In order to apply the Golden Rule to this case, we have but to ask whether Jews would be willing to have the government ban the Seder because a new prohibition law failed to provide an exception for liturgical use of wine, or whether Christians would be willing to let the state exclude teenagers from participating in the celebration of Mass or the Lord's Supper because it cannot be proven in court that a law of general applicability (the legal age for drinking) was, in Scalia's words, "intended to stifle a particular religion."

The sacramental use of peyote, based on the view that the deity is present within the cactus plant from which peyote is derived, may strike most of us as bizarre. That fact, which used to be constitutionally irrelevant, has now become politically relevant. To return to the Golden Rule, we need to think about some aspect of our faith and practice that we would not want the government to suppress because a majority of outsiders found it strange. Then we need to think back to the point in the history of our own religious organization when it was small and vulnerable (all of us were in that position at one time or another). Would we want our religious convictions to be governed by the will of a hostile majority at that moment?

The Williamsburg Charter answers these questions eloquently: "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities."

James Madison was right when he wrote in his famous Memorial and Remonstrance that the time to take alarm is at "first experiment with our liberties." Because I am truly alarmed at the disastrous consequences for religious liberty that have already flowed from the Smith case, I hope that this Congress acts promptly and with a strong resolve to repudiate the tragic experiment with religious liberty that the Smith case represents.

If you agree with me that the Court has erred in Smith, I hope that you will not wait until a perfect instrument for change is discovered, but that you will enact the Religious Freedom Restoration Act this session. When the Judiciary gives a minimalist interpretation of the importance of religious liberty, it is time for the political branches of government to extend greater protection through legislation grounded in the values secured by the Bill of Rights. And when we, the People, encourage you, our representatives, to safeguard the first of our civil liberties, religious freedom, we are doing the very thing that this bicentennial season demands of us: securing "the Blessings of Liberty for ourselves and our Posterity" and promoting that "more perfect Union" that our constitution was ordained to establish.

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Free Exercise Revisionism and  
the *Smith* Decision

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## Free Exercise Revisionism and the *Smith* Decision

Michael W. McConnell†

For decades, the Free Exercise Clause of the First Amendment was largely uncontroversial. The great debates over the relation of religion to government in our pluralistic republic—over school prayer, aid to parochial schools, publicly sponsored religious symbols, and religiously inspired legislation—almost without exception were issues of establishment. Government support for religion, not government interference with religion, was the issue.

Not that there was any shortage of free exercise cases or closely divided Supreme Court decisions. And not that there was any dearth of academic critics of the Court's doctrine.<sup>1</sup> But free exercise doctrine in the courts was stable, the noisy pressure groups from the ACLU to the religious right were in basic agreement, and most academic commentators were content to work out the implications of the doctrine rather than to challenge it at its roots.

There was, however, a peculiar quality to the consensus, which may or may not have contributed to its stability: the free exercise doctrine was more talk than substance. In its language, it was

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<sup>1</sup> Philip Kurland is the dean of the critics. See Philip B. Kurland, *Religion and the Law* (Aldine, 1962); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill L. Rev. 3 (1978). Walter Berns and Michael Malbin are the leading critics on originalist grounds. See Walter Berns, *The First Amendment and the Future of American Democracy* (Basic, 1976); Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (American Enterprise Institute, 1978). More recently, Mark Tushnet and William Marshall have produced the most penetrating analytical critiques of free exercise exemptions from generally applicable laws. See Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 S Ct Rev 373; Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 Georgetown L. J 1691 (1988); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W Res L. Rev 357 (1989-90); and William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn L Rev 545 (1983).

highly protective of religious liberty. The government could not make or enforce any law or policy that burdened the exercise of a sincere religious belief unless it was the least restrictive means of attaining a particularly important ("compelling") secular objective. In practice, however, the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. The Court generally found either that the free exercise right was not burdened or that the government interest was compelling. In fact, after the last major free exercise victory in 1972,<sup>8</sup> the Court rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent. This did not mean that the compelling interest test was dead, however. There were many more applications of the doctrine in the state and lower federal courts, and legislatures and executive bodies frequently conformed their decisions to its dictates. But at the Supreme Court level, the free exercise compelling interest test was a Potemkin doctrine.

With last April's Supreme Court decision in *Employment Division v Smith*,<sup>9</sup> all that has changed. By a 5-4 vote (Justice O'Connor concurring on different grounds), the Supreme Court abandoned the compelling interest test, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>10</sup> In other words, "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>11</sup> The Court acknowledged that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."<sup>12</sup> Calling this the "unavoidable consequence of democratic government," the Court stated that it "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."<sup>13</sup>

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<sup>8</sup> *Wisconsin v Yoder*, 406 US 206 (1972).

<sup>9</sup> 110 S Ct 1595 (1990).

<sup>10</sup> *Id.* at 1600, quoting *United States v Lee*, 456 US 252, 263 n 3 (1982) (Stevens concurring).

<sup>11</sup> 110 S Ct at 1600.

<sup>12</sup> *Id.* at 1606.

<sup>13</sup> *Id.*

The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades. Already it has stimulated a petition for rehearing joined by an unusually broad-based coalition of religious and civil liberties groups from right to left and over a hundred constitutional law scholars, among them myself, which proved futile,<sup>8</sup> as well as a drive for legislative correction, which is presently under consideration in Congress.<sup>9</sup> Free exercise is no longer wanting for controversy.

The *Smith* decision has pushed to the forefront the central issue of interpretation of the Free Exercise Clause. Should it be given a narrow interpretation, under which it would prohibit only deliberate discrimination against religion? Or should it be given a broad interpretation, under which it would provide maximum freedom for religious practice consistent with demands of public order?

There are many ways in which to criticize the *Smith* decision. Here, I wish to focus on two: the opinion's use of legal sources—text, history, and precedent—and its theoretical argument. Problems of the first sort are of lesser interest, for they might have been overcome (or at least mitigated) by writing the opinion in a different way. Problems of the second sort are more fundamental and suggest that *Smith* is contrary to the deep logic of the First Amendment. Before turning to the sources and argument, however, we must take a look at the *Smith* case itself.

### I. THE *SMITH* LITIGATION

Like many important cases, *Smith* was an unlikely vehicle for reconsideration of fundamental doctrine. The case arose when two employees at a drug rehabilitation clinic, Alfred Smith and Galen Black, applied for unemployment compensation after they had been fired for ingesting peyote for sacramental purposes at a ceremony of the Native American Church. The Employment Division of the Oregon Department of Human Resources denied their claim on the ground they had been dismissed for work-related "misconduct," but the state appellate and supreme courts reversed on the ground that the state may not constitutionally treat the exercise of religious practices as "misconduct" warranting a denial of otherwise available benefits. This holding appeared to be an unexcep-

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<sup>8</sup> The Supreme Court denied the petition for rehearing, 110 S Ct 2606 (June 4, 1990).

<sup>9</sup> Religious Freedom Restoration Act of 1990, HR 5377, 101st Cong, 2d Sess, in 136 Cong Rec H5695 (July 26, 1990).

tional application of settled precedent from the United States Supreme Court.<sup>10</sup>

On certiorari, however, the Supreme Court vacated the judgment and remanded to the Oregon court to decide whether the religious use of peyote is lawful in the state, reasoning that if a practice can be punished under the criminal law it may also be the basis for the lesser penalty of denial of unemployment benefits.<sup>11</sup> This disposition was odder than it might appear, since the Oregon Supreme Court had already held that the criminality of peyote use is "immaterial" to eligibility for unemployment benefits as a matter of state law.<sup>12</sup> Under Oregon law, being fired for the use of peyote was like being fired for not working on Saturday: both are work-related derelictions which, if religiously motivated, could not be treated as misconduct under the First Amendment.

On remand, the Oregon Supreme Court reiterated that the criminality of the sacramental use of peyote is irrelevant under both state and federal law, and reaffirmed its decision. The court went on to say that Oregon drug law "makes no exception for the sacramental use."<sup>13</sup> And although Oregon apparently does not now enforce the law against sacramental peyote use, the court concluded that enforcement, should it ever occur, would violate the Free Exercise Clause.<sup>14</sup>

The United States Supreme Court again granted certiorari, this time to decide whether a criminal law against peyote use is constitutional. *Smith* thus involved a question that was entirely hypothetical and, according to the highest court of Oregon, irrelevant to the outcome as a matter of state law. Looking ahead to the result, it remains a mystery why *Smith* and *Black* were not entitled to unemployment benefits even assuming the Supreme Court was correct on the merits. Granted, the state *could*, consistent with the Free Exercise Clause, deny benefits for any activity that violates the criminal law. But according to the Oregon Supreme Court's

<sup>10</sup> The unemployment compensation cases are discussed below. See text at notes 56-66.

<sup>11</sup> *Employment Division v Smith (Smith I)*, 485 US 660, 670 (1988). Justice Stevens wrote the majority opinion. Curiously, in *Idaho Department of Employment v Smith*, 434 US 100, 104 (1977) (Stevens dissenting in part), in which the Court reversed a state court decision holding that a denial of unemployment benefits violates the Equal Protection Clause, Stevens took the position that when a state supreme court grants its citizens "more protection than the Federal Constitution requires, I do not believe that error in a sufficient justification for the exercise of this Court's discretionary jurisdiction." One can only speculate as to why Justice Stevens took a different view in the Oregon *Smith* case.

<sup>12</sup> *Smith v Employment Division*, 301 Or 209, 721 P2d 445, 449-50 (1986).

<sup>13</sup> *Smith v Employment Division*, 307 Or 68, 763 P2d 146, 148 (1988).

<sup>14</sup> 763 P2d at 148.



construction of state law, Oregon had not availed itself of that opportunity. Until it does, there would seem to be no basis in state or federal law for denying benefits to Smith and Black.<sup>16</sup> And if that is true, then the entire discussion of free exercise exemptions was beyond the Court's jurisdiction.

The briefs and arguments in the Supreme Court focused entirely on whether the state has a sufficiently compelling interest in controlling drug use to overcome the free exercise rights of Native American Church members. This may be considered a close question. Drug laws are undoubtedly important, and it is intuitively plausible that even closely cabined exemptions would seriously erode enforcement of the law. Justice O'Connor concurred in the result on this ground.<sup>16</sup> On the other hand, peyotism is an ancient religious practice and peyote use does not, according to the weight of expert opinion, cause any of the problems associated with drug abuse. Moreover, the drug is unpleasant to use and not part of drug trafficking. In fact, twenty-three states specifically exempt the religious use of peyote from their drug laws, the federal government not only exempts peyote but licenses its production and importation, and Oregon itself apparently does not enforce its law with regard to peyote use.<sup>17</sup> This suggests that the government's interest was not strong. Had the case been decided either way on this ground, it would have had little doctrinal importance.

The most important thing to know about the briefs in *Smith* is what they did not contain: neither of the parties asked the Court to reconsider its free exercise doctrine. The State expressly conceded the compelling interest test in its brief and the parties did not discuss the doctrinal issue at oral argument.<sup>18</sup> The Court's disposition thus stands in marked contrast to its usual practice of requesting additional briefing and reargument in cases in which it decides to reconsider established precedent.<sup>19</sup> Justice Stevens, a member of the *Smith* majority, has in other contexts criticized the Court for ordering reargument on issues not raised by the parties. "As I have said before, 'the adversary process functions most effec-

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<sup>16</sup> The Supreme Court did not overrule the unemployment compensation cases on which the Oregon court had relied, see *Smith*, 110 S Ct at 1602-03, so the federal constitutional basis for the lower court's holding remained intact but for the criminality of peyote use.

<sup>17</sup> *Id* at 1613-15 (O'Connor concurring).

<sup>18</sup> See *id* at 1617, 1618 n 5 (Blackmun dissenting), and sources cited therein.

<sup>19</sup> *Id*; Brief for Respondent at 11-12.

<sup>20</sup> See, for example, *Patterson v McLean Credit Union*, 485 US 617 (1988); *San Antonio Metropolitan Transit Authority v Garcia*, 469 US 528 (1985).

tively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.'"<sup>20</sup> It is presumably even more inappropriate for the Court to decide the case on a basis other than the issues presented *without* asking for briefing or argument.

The most important decision interpreting the Free Exercise Clause in recent history, then, was rendered in a case in which the question presented was entirely hypothetical, irrelevant to the disposition of the case as a matter of state law, and neither briefed nor argued by the parties.

## II. THE OPINION'S USE OF LEGAL SOURCES

### A. Text

The *Smith* opinion begins, quite properly, with a consideration of the constitutional text: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>21</sup> The opinion notes, also quite properly, that "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."<sup>22</sup> The conclusion that the clause protects conduct as well as speech or belief would seem to follow from its very words: "exercise" means conduct.<sup>23</sup> The point is corroborated by extensive evidence from the period of the Founding<sup>24</sup> and is important because the Supreme Court originally held the opposite, in reliance on a misleading statement by Thomas Jefferson.<sup>25</sup>

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<sup>20</sup> *Patterson*, 485 US at 623 (Stevens dissenting), quoting *New Jersey v TLO*, 468 US 1214, 1216 (1984) (Stevens dissenting from order directing reargument).

<sup>21</sup> US Const, Amend I, quoted in 110 S Ct at 1599 (emphasis omitted).

<sup>22</sup> 110 S Ct at 1599.

<sup>23</sup> The American edition of Samuel Johnson's *A Dictionary of the English Language*, published in Philadelphia in 1806, used the following terms to define "exercise": "Labour of the body," "Use; actual application of any thing," "Task; that which one is appointed to perform," and "Act of divine worship whether publick or private." Noah Webster's *A Dictionary of the English Language*, published in New Haven in 1807, defined "exercise" as "practice [or] employment." James Buchanan's 1757 *Linguae Britannicae Vera Pronunciatio*, published in London, gave the definition "To use or practice."

<sup>24</sup> See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1451-52, 1488-90 (1990).

<sup>25</sup> *Reynolds v United States*, 98 US 145, 164 (1879). Jefferson had written that "the legislative powers of government reach actions only, and not opinions. . . . [M]an . . . has no natural right in opposition to his social duties." *Letter from Thomas Jefferson to a Commit-*

Having repudiated the belief-conduct distinction, the Court went on to note that the language of the Free Exercise Clause does not conclusively resolve whether the provision requires exemptions from generally applicable laws. The opinion is careful not to overstate its point. It merely holds that “[a]s a textual matter, we do not think the words *must* be given that meaning.”<sup>96</sup> Moreover, “[i]t is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”<sup>97</sup> The Court does not deny that the broader reading, which would require exemptions, is likewise a “permissible” reading. Indeed, the Court does not even deny that it is the *more obvious and literal* meaning. It is sufficient, according to the Court, that the words are not ironclad. Having determined that the words are not dispositive, the opinion then turns to the Court’s precedents and the text plays no further role in the decision.

This is a strange and unconvincing way to deal with the text of the Constitution, or of any law. A court should not disregard the text merely because it contains some degree of ambiguity. Rather, a court should determine the reading of the text that is most probable and should give that reading presumptive weight unless there is good evidence based on extratextual sources that it is wrong.

A plausible argument available to the Court was that the verb “prohibiting” means the deliberate targeting of the prohibited activity, so that the exercise of religion is not “prohibited” if the exercise merely happens to fall within a broad class of proscribed activities. However, the more natural reading of the term is that it prevents the government from making a religious practice illegal. If a zoning ordinance limits a particular area to residential use, we would naturally say that it “prohibits” an ice cream store within the zone—even though no one on the zoning commission had any particular intention with respect to ice cream. While we cannot rule out the possibility that the term “prohibiting” might implicitly be limited to laws that prohibit the exercise of religion in a particular way—that is, in a discriminatory fashion—we should at

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*tee of the Danbury Baptist Association* (Jan 1820), in Andrew Adgate Liscomb, ed, 16 *The Writings of Thomas Jefferson* 281, 281-82 (Thomas Jefferson Memorial Ass’n, 1903).

<sup>96</sup> *Smith*, 110 S Ct at 1599 (emphasis added).

<sup>97</sup> *Id* at 1600.

least begin with the presumption that the words carry as broad a meaning as their natural usage.<sup>28</sup>

Further, it is significant that the provision is expressed in absolute terms. Unlike the Fourth Amendment, the First Amendment does not limit itself to prohibitions that are "unreasonable." Unlike the Fifth Amendment, the First Amendment does not authorize deprivations of liberty with due process of law. Any limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from necessity, since it is not implied by the text. And while I do not deny that there must be implied limitations, it is more faithful to the text to confine any implied limitations to those that are indisputably necessary. It is odd, given this text, to allow the limitations to swallow up so strongly worded a rule.<sup>29</sup>

This does not mean that the text of the Free Exercise Clause is sufficiently unambiguous that the *Smith* decision can be rejected on textual grounds alone. But it does suggest that the Court gave insufficient weight to the text. Discovery of a degree of ambiguity is not a license to move on to other sources of enlightenment. A Court that is serious about interpreting a written Constitution should be more anxious to ensure that its reading is the most persuasive from among the "permissible" readings of the clause.

## B. History

Having established to its satisfaction that both the exemptions and no-exemptions readings of the Free Exercise Clause are "permissible reading[s] of the text," the Supreme Court then noted that "[o]ur decisions reveal that the latter reading is the correct one."<sup>30</sup> Interestingly, the Court did not pause to consider whether the historical context surrounding the adoption of the Free Exercise Clause might have a bearing on the two permissible readings

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<sup>28</sup> The harder question is whether government actions that inhibit but do not forbid religious exercise are covered by the clause. Elsewhere, I have argued that the historical context makes it doubtful that the term "prohibiting" was intended or understood to be strictly limited in this sense. McConnell, 103 Harv L. Rev at 1486-88 (cited in note 24). Paradoxically, *Smith* appears to assume that a strict prohibition through criminal sanctions is less likely to violate the Free Exercise Clause than a denial of benefits. See 110 S Ct at 1603.

<sup>29</sup> See Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 Notre Dame J L, Ethics & Pub Pol 683, 688 (1990). On the other hand, my colleague, Dean Geoffrey Stone, made the excellent point in a conversation with me that if the protection accorded free exercise is close to absolute, this is an argument that the domain of the Clause should be read narrowly.

<sup>30</sup> 110 S Ct at 1600.

of the text. This is particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning.<sup>31</sup>

This is not the occasion to revisit the originalism debate. Suffice it to say that even those Justices and commentators who believe that the historical meaning is not dispositive ordinarily agree that it is a relevant consideration.<sup>32</sup> It is remarkable that the Court would take so important a step here without so much as referring to the history of the Free Exercise Clause.

Had the Court looked to the history of the Free Exercise Clause, it would have found some significant evidence supporting its conclusion that the clause was not expected or intended to allow judges to craft exemptions from laws of general applicability. Certainly, that was John Locke's position—and Locke was a major intellectual influence on the idea of religious toleration in colonial America.<sup>33</sup> It appears also to have been Jefferson's position. Indeed, Jefferson's position was in many respects more restrictive than Locke's.<sup>34</sup> Moreover, although couched in qualifying language that seems to point the other way, passages in the writings of such evangelical advocates of religious freedom as William Penn and John Leland can be interpreted as rejecting free exercise exemptions.<sup>35</sup> And the highest courts of two states, Pennsylvania and South Carolina, interpreted their state constitutional guarantees in the early nineteenth century as not requiring exemptions.<sup>36</sup>

On the other hand, the history would have revealed other evidence—more substantial, in my judgment—in favor of the broader exemptions position. For example, one can look to the various state constitutional provisions regarding free exercise of religion, eight of which expressly and one of which impliedly contained language that appears to be an early equivalent of the "compelling interest" test.<sup>37</sup> Article 61 of the Georgia Constitution of 1777 is typical: "All persons whatever shall have the free exercise of their

<sup>31</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989).

<sup>32</sup> For a recent example, in which all nine Justices, in both the majority and dissent, relied heavily on the historical understanding of the Excessive Fines Clause of the Eighth Amendment, see *Browning-Ferris Industries v Kelco Disposal, Inc.*, 109 S Ct 2908, 2914-19 (1989); see also *id* at 2926-31 (O'Connor dissenting).

<sup>33</sup> See McConnell, 103 Harv L Rev at 1430-35, 1443-49 (cited in note 24).

<sup>34</sup> *Id* at 1451-52.

<sup>35</sup> *Id* at 1447-48.

<sup>36</sup> *Id* at 1506-11.

<sup>37</sup> See *id* at 1457 n 242.

religion; provided it be not repugnant to the peace and safety of the State."<sup>38</sup> It is difficult to reconcile these provisions with the narrow reading of free exercise. If the free exercise guarantees could not be read to exempt believers from "otherwise valid" laws, what could have been the purpose of the "peace and safety" proviso? These provisions were the likely model for the federal free exercise guarantee, and their evident acknowledgment of free exercise exemptions is the strongest evidence that the framers expected the First Amendment to enjoy a similarly broad interpretation.

The idea of exemptions had deep roots in early colonial charters. As early as 1665, the second Charter of Carolina, in recognition of the fact that "it may happen that some of the people and inhabitants of the said province cannot, in their private opinions, conform" to the Church of England, authorized the proprietors "to give and grant unto such person and persons . . . such indulgences and dispensations, in that behalf [as they] shall, in their discretion, think fit and reasonable."<sup>39</sup> "Indulgences" and "dispensations" were technical legal terms of the day, referring to the King's asserted power to exempt citizens from the enforcement of a law enacted by Parliament.<sup>40</sup> It is noteworthy that from the beginning it was thought that the solution to the problem of religious minorities was to grant exemptions from generally applicable laws.

The practice of the colonies and early states bore this out. Most of the colonies and states (beginning with those with strong free exercise provisions in their organic laws) exempted religious objectors from military conscription and from oath requirements expressly in order to avoid infringements of their religious conscience.<sup>41</sup> To be sure, the need for exemptions did not often arise. Because the vast majority of the inhabitants were Protestant Christians and the laws tended to reflect the Protestant viewpoint, clashes between conscience and law were rare. It is significant, however, that exemptions were seen as a solution to the conflict when it occurred.

We should not be too quick to assume that this practice supports the broad reading of the Free Exercise Clause, however. The exemptions in the pre-Constitutional period were made by legisla-

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<sup>38</sup> Ben Perley Poore, ed, *1 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 383 (GPO, 2d ed 1878) ("Poore's").

<sup>39</sup> 2 Poore's at 1397 (cited in note 38).

<sup>40</sup> See Frederick Pollack and Frederic William Maitland, *2 The History of English Law* 389 (Cambridge, 2d ed 1909).

<sup>41</sup> For these and other examples, see McConnell, 103 Harv L Rev at 1466-73 (cited in note 24).

tures and therefore do not prove that religious objectors were entitled to exemptions by right. Indeed, these exemptions are fully consistent with the position in *Smith*, because *Smith* allows legislatures (although not courts) to make exemptions from laws of general applicability. This type of evidence is therefore necessarily ambiguous.

On the other hand, we must not forget that in the period before judicial review it was the legislatures that had the sole responsibility for upholding constitutional norms. If legislatures conceived of exemptions as an appropriate response to conflicts between law and conscience, there is every reason to suppose that the framers and ratifiers of the federal Constitution would expect judicially enforceable constitutional protections for religious conscience to be interpreted in much the same manner. In this, the Free Exercise Clause is no different from other constitutional provisions. To a large extent, the rights enshrined in our Constitution are simply rights that had come to be recognized under statute or common law prior to 1789. The best interpretive assumption is that only the institutional mode of protection—but not the substantive content—was changed when these rights gained constitutional status.

It is also worth mentioning that James Madison, principal author and floor leader of the First Amendment, advocated free exercise exemptions, at least in some contexts, and proposed language for the Virginia free exercise clause that was even more protective than the "peace and safety" provisos of most states.<sup>43</sup> To the extent that the opinions of individual framers are significant, his espousal of exemptions should carry more weight than Jefferson's opposition.

Whatever one might conclude from this history, the Supreme Court should not have rendered a major reinterpretation of the Free Exercise Clause without even glancing in its direction. Had the Court made even a cursory inquiry into the history of the clause, it would have been impossible for it to toss off the remark that the compelling interest test "contradicts both constitutional tradition and common sense."<sup>44</sup> At most, the Court could have said that there are two constitutional traditions, both with impressive pedigrees, and that persons of common sense and good will have come down on both sides of the question.

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<sup>43</sup> See *id.* at 1452-55, 1462-64, 1500. Madison also would have constitutionalized the religious exemption from conscription. *Id.* at 1500.

<sup>44</sup> 110 S Ct at 1603.

### C. Precedent

Having dismissed the text as ambiguous and ignored the history, the Court in *Smith* purported to base its decision on precedent. But its use of precedent is troubling, bordering on the shocking. A detailed examination of both those precedents on which the Court relied and those that it distinguished is necessary to reveal the full extent of the liberties the Court took with its earlier decisions.

#### 1. Never say never.

The *Smith* opinion states baldly: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>44</sup> In *Wisconsin v Yoder*, however, the Court had stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."<sup>45</sup> Indeed, the *Yoder* Court stated that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."<sup>46</sup> In *Yoder*, the Court called a generally applicable compulsory school attendance law, as applied to Amish children above the eighth grade, "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."<sup>47</sup> The compelling interest test has been applied numerous times since *Yoder*. The Court reiterated the compelling interest test no fewer than three times in the year preceding *Smith*, including in two unanimous opinions.<sup>48</sup>

Prior to *Smith*, some Justices *disagreed* with the precedents holding that the Free Exercise Clause requires exemptions from generally-applicable laws, but none denied the *existence* of those precedents. Chief Justice Rehnquist and Justice Stevens had authored several separate concurrences and dissents in previous cases taking the Court to task for doing precisely what the *Smith* opin-

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<sup>44</sup> *Id.* at 1600.

<sup>45</sup> 408 US 205, 220 (1972).

<sup>46</sup> *Id.* at 215.

<sup>47</sup> *Id.* at 218.

<sup>48</sup> *Jimmy Swaggart Ministries v Board of Equalization*, 110 S Ct 688, 693 (1990); *Hernandez v Commissioner*, 109 S Ct 2136, 2148 (1989); *Frazee v Illinois Department of Employment Security*, 489 US 829 (1989).



ion now denies the Court had ever done.<sup>40</sup> Even Justice Scalia, fourteen months before writing the *Smith* opinion, stated in a dissenting opinion in an Establishment Clause case that the Court had "held that the Free Exercise Clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws,"<sup>41</sup> listing four illustrative cases, including *Yoder*.<sup>42</sup> Three of the five Justices in the *Smith* majority signed their names to this statement. What happened in the ensuing fourteen months to change their minds?

## 2. Precedents distinguished.

a) *Yoder*. According to the Court in *Smith*, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."<sup>43</sup> *Yoder* is explained as involving "the rights of parents to direct the religious upbringing of their children."<sup>44</sup> But the opinion in *Yoder* expressly stated that parents do *not* have the right to violate the compulsory education laws for nonreligious reasons.<sup>45</sup> Thus, according to *Yoder* parents have no right independent of the Free Exercise Clause to withhold their children from school, and according to *Smith* they have no such right under the Free Exercise Clause. How can claimants be entitled to greater relief under a "hybrid" claim than they could attain under either of the components of the hybrid? One suspects that the notion of "hybrid" claims was created for the sole purpose of distinguishing *Yoder* in this case.

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<sup>40</sup> See *Thomas v Review Board*, 450 US 707, 723 (1981) (Rehnquist dissenting); *Hobbie v Unemployment Appeals Comm'n*, 480 US 136, 147 (1987) (Rehnquist dissenting) (adhering to his position in *Thomas*); *United States v Lee*, 455 US 252, 263 (1982) (Stevens concurring). It is reported that Chief Justice Rehnquist publicly acknowledged at the Fourth Circuit Judicial Conference that *Smith* "represents a new departure in this line of cases." Tony Mauro, *With Remarkable Swiftmess, an Era Ends*, 13 *Legal Times of Wash* 8, 9 (Aug 6, 1990).

<sup>41</sup> *Texas Monthly, Inc. v Bullock*, 109 S Ct 890, 912 (1989) (Scalia dissenting) (emphasis in original).

<sup>42</sup> See also *Edwards v Aguillard*, 482 US 578, 617 (1987) (Scalia dissenting) (characterizing five cases, including *Yoder*, as holding "that in some circumstances States must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations").

<sup>43</sup> 110 S Ct at 1601.

<sup>44</sup> *Id* at 1601 n 1, quoting *Yoder*, 406 US at 233.

<sup>45</sup> 406 US at 215-16.

But does it serve even that purpose? Why isn't *Smith* itself a "hybrid" case? Whatever else it might accomplish, the performance of a sacred ritual like the ingestion of peyote communicates, in a rather dramatic way, the participants' faith in the tenets of the Native American Church. *Smith* and *Black* could have made a colorable claim under the Free Speech Clause that the prohibition of peyote use interfered with their ability to communicate this message. If burning a flag is speech because it communicates a political belief,<sup>86</sup> ingestion of peyote is no less. And even if *Smith* and *Black* would lose on a straight free speech claim, following the logic of *Smith's* explanation of *Yoder*, why shouldn't their claim prevail as a "hybrid" with their free exercise claim? The answer, a legal realist would tell us, is that the *Smith* Court's notion of "hybrid" claims was not intended to be taken seriously.

b) *The unemployment cases.* The *Smith* Court had even more difficulty distinguishing a line of cases involving unemployment compensation for unemployment caused by religious objections to available work. There have been four such cases, the most recent being a unanimous decision only a year before *Smith*.<sup>87</sup> These cases have generally been considered prime examples of free exercise exemptions from generally applicable laws, because workers are excused from the requirement of accepting any "suitable" employment.<sup>88</sup> Even though workers who decline work for other important, conscientious reasons (for example, because of ideological objections to the work or because of the need to care for a dependent) would not receive unemployment compensation,<sup>89</sup> workers who decline work for religious reasons must be given benefits.

The *Smith* Court began its discussion of these cases by noting that the compelling interest test had not led to the invalidation of

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<sup>86</sup> *Texas v Johnson*, 109 S Ct 2533 (1989).

<sup>87</sup> Mysteriously, the *Smith* Court said there were only three, omitting the most recent. I can offer no explanation for this omission. The four cases are *Frazee v Illinois Department of Employment Security*, 489 US 829 (1989); *Hobbie v Unemployment Appeals Commission*, 480 US 136 (1987); *Thomas v Review Board*, 450 US 707 (1981); *Sherbert v Verner*, 374 US 398 (1963).

<sup>88</sup> It must be noted that the unemployment compensation cases are thought problematic even by some commentators who otherwise endorse the compelling interest test, on the ground that they may place religious workers in a position superior to others. For a discussion of these issues, see Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U Chi L Rev 1, 35-38, 40-41 (1989).

<sup>89</sup> See *Wimberly v Labor and Industrial Relations Comm'n*, 479 US 511 (1987) (holding that worker unemployed on account of pregnancy is not entitled to unemployment compensation).

any government action "except the denial of unemployment compensation,"<sup>60</sup> as if that were a coherent distinction. Beyond that, the Court noted that the unemployment compensation cases involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."<sup>61</sup> The unemployment cases thus "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."<sup>62</sup> On its face, this is not a very persuasive distinction. Difficulty of administration can fairly constitute at least part of the governmental interest in enforcing the law without exceptions,<sup>63</sup> but it is hard to see why this concern should limit the universe of potential claims. Moreover, if this is the distinction, it is hard to see why the compelling interest test does not apply to many contexts other than just unemployment compensation—indeed, to the full universe of claims governed by the due process requirement of "some kind of hearing."

Under this analysis, *most* of the Supreme Court's free exercise cases resemble the unemployment compensation cases in that they involve individuated governmental assessments of the claimant's circumstances. In *United States v Lee*, for example, a procedural mechanism already existed for administering religious objections to social security taxation.<sup>64</sup> In *Lyng v Northwest Indian Cemetery Protective Ass'n*, the Forest Service was already required to study and consider the impact of the logging road on Native American religious practices as well as on the environment.<sup>65</sup> Indeed, every decision to build a road must be made on a case-by-case basis. In *O'Lone v Estate of Shabazz*, prison officials had informally accommodated the religious needs of the Muslim prisoners but stopped doing so, apparently because the officials interpreted a prison directive to disallow the accommodation.<sup>66</sup> These cases are typical.

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<sup>60</sup> 110 S Ct at 1602.

<sup>61</sup> *Id.* at 1603.

<sup>62</sup> *Id.* This explanation for the unemployment compensation cases has had a checkered career in recent Supreme Court decisions. It was first propounded in a plurality opinion written by Chief Justice Burger in *Bowen v Roy*, 476 US 693, 706 (1986). It was rejected by a majority of six Justices in *Hobbie*, 480 US at 142 n 7, including two (White and Scalia) who formed part of the majority in *Smith*. It now appears to command the votes of the five Justices in the *Smith* majority.

<sup>63</sup> See Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw U L Rev 146, 155-58 (1996).

<sup>64</sup> 456 US 252, 260 (1982).

<sup>65</sup> 485 US 439, 442 (1988).

<sup>66</sup> 482 US 342, 346 (1987).

In each of them the government "ha[d] in place a system of individual exemptions."<sup>66</sup> The unemployment cases cannot be distinguished on this ground.

Even more strikingly, the "individual governmental assessment" distinction cannot explain the result in *Smith* itself. If *Smith* is viewed as an unemployment compensation case, the distinction is obviously spurious. If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial.

The purported distinction thus has no obvious connection to either the circumstance of *Smith* or to the Court's precedents. Like the distinction of *Yoder*, it appears to have one function only: to enable the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions.

### 3. Precedents relied on.

More surprising than the precedents distinguished were the precedents relied upon. The Court relied most heavily, with lengthy quotation, on *Minersville School District v Gobitis*, the first flag salute case, which allowed the criminal prosecution of school children for refusing on religious grounds to recite the Pledge of Allegiance.<sup>67</sup> The Court neglected to mention that, three years after *Gobitis*, it overruled the case in one of the most celebrated of all opinions under the Bill of Rights.<sup>68</sup> Relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v Ferguson*<sup>69</sup> without mentioning *Brown v Board of Education*.<sup>70</sup>

The second case cited by the Court, a Mormon polygamy case from 1879, was decided on the theory that the Free Exercise Clause protects only beliefs and not conduct<sup>71</sup>—a premise that the Court repudiated in 1940.<sup>72</sup> Because the *Smith* Court expressly reaffirmed that the Free Exercise Clause protects conduct as well as belief,<sup>73</sup> why does it cite a decision predicated on the opposite

<sup>66</sup> *Smith*, 110 S Ct at 1603.

<sup>67</sup> 310 US 586, 695 (1940). *Gobitis* is cited twice in *Smith*, 110 S Ct at 1600.

<sup>68</sup> *West Virginia State Board of Education v Barnette*, 319 US 624 (1943).

<sup>69</sup> 163 US 637 (1896).

<sup>70</sup> 347 US 483 (1954). Of course, the Court could have pointed out that since *Barnette* was decided on free speech grounds, *Gobitis* was not technically overruled. But by the same token, since *Brown* was decided as an education case, *Plessy* was not overruled, either.

<sup>71</sup> *Reynolds v United States*, 98 US 145, 166-67 (1879).

<sup>72</sup> *Cantwell v Connecticut*, 310 US 296, 303-04 (1940).

<sup>73</sup> 110 S Ct at 1599.

premise? The third citation is to a concurring opinion attacking the majority's use of the compelling interest test.<sup>74</sup> The fourth is to *Gobitis* again. Thus, the primary affirmative precedent marshalled by the Court to support its decision consists *entirely* of overruled and minority positions.

Then follow two older cases in which the Court upheld laws against free exercise challenges, both decided prior to the formal announcement of the compelling interest test. In *Prince v Massachusetts*, the Court upheld a conviction under the child labor laws for the distribution of a religious publication by a minor in the company of her guardian.<sup>75</sup> Significantly, the Court in *Prince* did not so much as mention that the law in question was neutral and generally applicable. Rather, it relied on the principle that "[t]he state's authority over children's activities is broader than over like actions of adults."<sup>76</sup> While conceding that the law in question would be "invalid" if it were "applicable to adults or all persons generally,"<sup>77</sup> the *Prince* Court concluded that the possibility of "emotional excitement and psychological or physical injury" to a minor from what it called "[s]treet preaching" was sufficient to support the state law.<sup>78</sup>

In *Braunfeld v Brown*, the Court upheld application of a Sunday closing law to a Jewish merchant on the ground that it constituted "only an indirect burden on the exercise of religion," by which the Court meant a law that makes the religious practice more costly but not illegal.<sup>79</sup> The clear implication was that a "direct" interference would have been unconstitutional, a proposition contradicted in *Smith*.<sup>80</sup> Thus, neither *Prince* nor *Braunfeld* supports the holding of *Smith*. In fact, the rationales of the decisions point to the opposite interpretation of the Free Exercise Clause.

<sup>74</sup> *United States v Lee*, 456 US 252, 263 n 3 (1982) (Stevens concurring).

<sup>75</sup> 321 US 158, 170 (1944).

<sup>76</sup> *Id.* at 168.

<sup>77</sup> *Id.* at 167.

<sup>78</sup> *Id.* at 169-70. It is interesting, and a little troubling, that the *Prince* Court analyzed the general child labor law as if it were specifically directed at religious or political activity and upheld it on that ground. According to the Court, "[t]he zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face." This hints that the controversial nature of street proselytizing or political activity, and the possible adverse reaction of others, provide a sound basis for limiting the rights of youthful speakers.

<sup>79</sup> 366 US 599, 606 (1961).

<sup>80</sup> 110 S Ct at 1603 (under Court's precedents, the Free Exercise Clause has "nothing to do with an across-the-board criminal prohibition on a particular form of conduct"). There can be no more "direct" burden on free exercise than an absolute criminal prohibition.

The Court then adverted to three modern cases rejecting free exercise claims on the basis of the compelling interest test.<sup>61</sup> One would think these were precedents *against* the theory of *Smith*, because they unequivocally applied the very constitutional standard that *Smith* stated had "never" been applied. The Court now asserts that it only "purported" to apply the compelling interest test in those recent cases.<sup>62</sup>

The Court also relied on four recent decisions that did *not* employ the compelling interest test. One of these cases involved the military and another the prison system; both opinions stressed the limited reach of constitutional rights in those special, confined settings.<sup>63</sup> It is not auspicious for the Court to measure the constitutional rights of free civilians according to the rights of prisoners and military personnel.

The other two cases in which the Court did not apply the compelling interest test involved claimants who objected to the internal procedures of the government or to the government's use of its own land.<sup>64</sup> Again, it is not auspicious for the rights of individuals to be free from government interference with their religious practices to be compared to the rights of individuals to compel the government to behave in conformity to their religious principles.<sup>65</sup> In effect, the Court converted exceptional cases into the general rule.

<sup>61</sup> *Gillette v United States*, 401 US 437, 461-62 (1971) (rejecting religious exemption from conscription on the part of a claimant who was not opposed to fighting in all wars); *United States v Lee*, 455 US 252, 261 (1982) (rejecting claim to exemption from social security taxes by Amish farmers whose religious tenets would not permit them to participate in the program); *Hernandez v Commissioner*, 109 S Ct 2136, 2148-49 (1989) (rejecting claim for income tax deductibility of certain religious payments).

<sup>62</sup> 110 S Ct at 1602.

<sup>63</sup> *Goldman v Weinberger*, 475 US 503, 507-08 (1986) (rejecting free exercise challenge to Air Force uniform regulations by Orthodox Jew barred from wearing a yarmulke); *O'Lone v Estate of Shabazz*, 482 US 342, 349 (1987) (holding that prison officials do not have a duty to accommodate prison work schedules to Muslim inmates' religious observances).

<sup>64</sup> *Bowen v Roy*, 476 US 693 (1986) (holding that a state welfare agency's use of social security numbers does not violate the Free Exercise Clause); *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439 (1988) (holding that the Free Exercise Clause does not prohibit the government from permitting timber harvesting and road construction in area of a national forest traditionally used by Indians for religious purposes).

<sup>65</sup> In both *Roy* and *Lyng*, the Court reasoned that the First Amendment does not "require the government *itself* to behave in ways that the individual believes will further his or her spiritual development. . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy*, 476 US at 699 (emphasis in original). See also *Lyng*, 485 US at 449. *Smith*, of course, involved whether the individual believer could conduct his affairs in accordance with his religious beliefs. To the extent *Lyng* holds that the Free Exercise Clause does not constrain the government's actions in its capacity as landowner, I disagree with its reasoning, as well as its result; but I agree that the constitutional

The Court also failed to point out that in one of these cases, *Bowen v Roy*, five Justices expressed the view that adherents to a traditional Abenaki religion under which computer-generated numbers are deemed to rob the individual's spirit of its power were entitled to an exemption from the requirement that welfare recipients provide a social security number on their application.<sup>66</sup> This did not become a holding of the Court because one of the five Justices supporting the result concluded that this aspect of the case had become moot.<sup>67</sup> But it is surely misleading for the *Smith* Court to rely on the *Bowen* Court's holding—that the claimants had no right to insist that the government not use a social security number already in its possession—to support a conclusion that the Free Exercise Clause does not require exemptions from generally applicable laws; a majority of the *Bowen* Court firmly stated that another claim for exemption in the same case was constitutionally compelled.

#### 4. Was there really a compelling interest test?

Notwithstanding all that has just been said about the Court's reliance on precedent, it must be conceded that the Supreme Court before *Smith* did not really apply a genuine "compelling interest" test. Such a test would allow the government to override a religious objection only in the most extraordinary of circumstances. In an area of law where a genuine "compelling interest" test has been applied, intentional discrimination against a racial minority, no such interest has been discovered in almost half a century. Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases, and they were correct to do so.<sup>68</sup> The "compelling interest" standard is a misnomer.<sup>69</sup>

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standard for such action should be less exacting than for the government in its capacity as regulator.

<sup>66</sup> 478 US at 712-16 (Blackmun concurring in part); id at 724-32 (O'Connor, joined by Brennan and Marshall, concurring in part and dissenting in part); id at 733 (White dissenting).

<sup>67</sup> 478 US at 714 (Blackmun concurring in part).

<sup>68</sup> See, for example, *O'Lone v Estate of Shabazz*, 482 US 342, 354 (1987) (Brennan dissenting, joined by Marshall, Blackmun, and Stevens) (completely barring religious ceremony in prison requires government to demonstrate "important" governmental interest). If compelling "really means what it says," *Smith*, 110 S Ct at 1605, the test resembles that proposed in Virginia by the young James Madison: that free exercise be protected "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered." Sanford H. Cobb, *The Rise of Religious Liberty in America* 492 (Macmillan, 1902). This proposal was rejected, and no state adopted so strict a standard. See McConnell, 103 Harv L Rev at 1463 (cited in note 24).

<sup>69</sup> This is not, however, unique to the Free Exercise Clause. In most areas of constitutional law, the Court's supposed "compelling interest test" falls far short of that. See, for

But just because the test was not so strong as "compelling" does not mean that the Court failed to apply heightened scrutiny in its previous decisions. There is no support in the precedents for the Court to replace the prior test with nothing more than the toothless rationality review that is applicable to all legislation. As explained in more detail below, a serious examination of the purported justifications for restricting religious exercise is necessary to separate objective differences from prejudice. Rather than taking the extreme step that it took, the Court should have recast the "compelling interest" test in a more realistic form.

I favor returning to the standards articulated in state constitutions at the time of the framing: repugnancy to the "peace and safety of the State."<sup>90</sup> Madison's formulation is also apt: that free exercise should be protected "in every case where it does not trespass on private rights or the public peace."<sup>91</sup> This means that we are free to practice our religions so long as we do not injure others. Modern scholars have also attempted to articulate a more accurate test. Stephen Pepper poses the issue this way: "[I]s there a real, tangible (palpable, concrete, measurable), non-speculative, non-trivial injury to a legitimate, substantial state interest."<sup>92</sup> Judge Richard Posner and I proposed that "[e]ffects on religious practice must be minimized, and can be justified only on the basis of a demonstrable and unavoidable relation to public purposes unrelated to the effects on religion."<sup>93</sup> Any of these tests would achieve the purposes of the Free Exercise Clause without rhetorical overkill.

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example, *Roberts v United States Jaycees*, 468 US 609, 621-23 (1984) ("Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women"; state's compelling interest in eradicating discrimination outweighs Jaycees' freedom of association); *City of Richmond v J.A. Croson Co.*, 488 US 469 (1989) (city failed to demonstrate a compelling governmental interest justifying a construction contract plan requiring that a percentage of work be subcontracted to "Minority Business Enterprises"). Admittedly, the free exercise cases may be the most extreme example. See, for example, Justice Stevens's concurrence in *Lee*, in which he notes that the justifications are so flimsy that the Court must not be applying the test. 455 US at 262-63 (Stevens concurring).

<sup>90</sup> See the discussion of state free exercise provisions in McConnell, 103 Harv L Rev at 1461-66 (cited in note 24).

<sup>91</sup> Letter from James Madison to Edward Livingston (July 10, 1822), in Gaillard Hunt, ed., 9 *The Writings of James Madison* 98, 100 (G.P. Putnam's Sons, 1901).

<sup>92</sup> Stephen L. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N Ky L Rev 265, 289 (1982).

<sup>93</sup> McConnell and Posner, 56 U Chi L Rev at 14 (cited in note 57). In another attempt, I suggested that a law with the purpose or likely effect of increasing religious uniformity by inhibiting the religious practice of the person or group challenging the law "will be permit-



### III. THE THEORETICAL ARGUMENT

Perhaps because of its purported reliance on precedent, the *Smith* opinion does not present a sustained explanation of its theoretical underpinnings. Yet the opinion rests, in the end, not on text or history or precedent, but on the majority's view, revealed in a few key sentences in the opinion, of the proper relation between law and religious conscience. It is unfortunate that Justice Scalia wrote the opinion in this way, for while the argument based on precedent is hopelessly contrived, the theoretical argument is serious and substantial, even if mistaken. It requires careful attention and deserves a thorough response.

Virtually the entire theoretical argument of the *Smith* opinion is packed into this one sentence:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.<sup>94</sup>

The rhetoric of this sentence is certainly impolitic, leaving the Court open to the charge of abandoning its traditional role as protector of minority rights against majoritarian oppression. The "disadvantaging" of minority religions is not "unavoidable" if the courts are doing their job. Avoiding certain "consequences" of democratic government is ordinarily thought to be the very purpose of a Bill of Rights. But the argument reflected in this sentence nonetheless contains ideas that cannot be dismissed so lightly.

The Court's argument has a certain unity, but for purposes of analysis I propose to break it up into five separate but related ideas expressed in this sentence and a few other key passages in the opinion. The first idea is an implied devaluation of the impor-

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ted only if it is the least restrictive means for (a) protecting the private rights of others, or (b) ensuring that the benefits and burdens of public life are equitably shared." Michael W. McConnell, *Taking Religion Seriously*, *First Things* 30, 34 (May 1990). Readers troubled by the fact that I have put forward two non-identical tests should be forewarned that before I stop thinking about these things I shall probably come up with other tests.

<sup>94</sup> 110 S Ct at 1606.

tance of denominational neutrality under the Religion Clauses.<sup>86</sup> Second is the assumption that free exercise exemptions are a form of special preference for religion and that generally applicable laws written from the perspective of the majority are necessarily and by definition neutral. Third is the claim that exceptions under the Free Exercise Clause are a constitutional anomaly. Fourth is that decisions regarding free exercise exemptions are inherently subjective and therefore legislative in character; in other words, courts have no non-arbitrary way to adjudicate conflicts between religious conscience and law. Fifth, and most important, is that it is contrary to the rule of law—it would be “courting anarchy”<sup>87</sup>—for individual conscience to take precedence over law.

#### A. Denominational Neutrality

The *Smith* opinion does not specifically address how one should weigh the evils of disadvantaging religious minorities against those of arbitrary judging and lawlessness. The outcome of the case, however, implicitly suggests that denominational neutrality is of secondary importance. The opinion characterizes the doctrine of free exercise exemptions as a “luxury,”<sup>87</sup> suggesting that its purposes, while worthy, are distinctly subordinate. Had this proposition been raised explicitly, the Court would have found much in our constitutional history bearing on the question and might have found it more difficult to reach the balance it struck.

In *Larson v Valente*, the Court noted that the “clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>88</sup> This conclusion is confirmed repeatedly in both statements and constitutional enactments of the founding period. Baptist leader John Leland proposed an amendment to the Massachusetts Constitution forbidding the legislature to “establish any religion by law, [or] give any one sect a preference to another . . . .”<sup>89</sup> In a similar vein, Jonas Phillips, Revolutionary War patriot and founder of a synagogue in Philadelphia, informed the Constitutional Convention by petition that the Jews wished the Constitution to be framed so that “all

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<sup>86</sup> By “denominational neutrality” I mean neutrality among religions, but not necessarily neutrality between religion and other belief systems.

<sup>87</sup> 110 S Ct at 1606.

<sup>88</sup> *Id.*

<sup>89</sup> 456 US 228, 244 (1982).

<sup>90</sup> L.F. Greene, ed, *The Writings of the Late Elder John Leland* 229 (G.W. Wood, 1846).

Religious societies are on an Equal footing."<sup>100</sup> Rhode Island's proposed amendment to the federal Constitution asked that "no particular sect or society ought to be favored or established by law."<sup>101</sup>

The twelve state constitutional free exercise provisions extant in 1789 were different in many respects, but all contained language referring to denominational equality (though in two states this equality was extended only to Christian denominations). New York and South Carolina both specified that the right of free exercise was to be "without discrimination or preference,"<sup>102</sup> and Virginia provided that "all men are equally entitled to the free exercise of religion."<sup>103</sup> Other states used words like "every," "all," "no," "equal," or "equally" to make the same point.<sup>104</sup> This idea carried forward to the federal Constitution. Although the language did not survive to the final version, Madison's initial draft of the Free Exercise Clause provided that "the full and equal rights of conscience [shall not] be in any manner, nor on any pretext, infringed."<sup>105</sup> The words "full and equal" help to capture the demand for neutrality among religions that imbued the movement for free exercise protections.

Against this background, it seems the Supreme Court should have given more serious attention to the problem of "plac[ing] a relative disadvantage those religious practices that are not widely engaged in" before concluding that this consideration is out-

<sup>100</sup> Letter from Jonas Phillips to the Federal Constitutional Convention (Sept 7, 1787), reprinted in Morris U. Schappes, ed, *A Documentary History of the Jews in the United States 1654-1875* 68, 69 (Citadel, 1950). The petition noted that "[i]t is well known among all the Citizens of the 13 united states that the Jews have been true and faithful whigs, & during the late Contest with England they have been foremost in aiding and assisting the states with their lives & fortunes, they have supported the cause, have bravely fought and bled for liberty which they can not Enjoy."

<sup>101</sup> Jonathan Elliot, 1 *The Debates in the Several States on the Adoption of the Federal Constitution* 334 (Taylor & Maury, 2d ed 1854).

<sup>102</sup> NY Const of 1777, Art XXXVIII, reprinted in 2 *Poore's* at 1329, 1338 (cited in note 38); SC Const of 1790, Art VIII, § 1, reprinted in *id* at 1628, 1632-33.

<sup>103</sup> Va Bill of Rights of 1776, § 16, reprinted in 2 *Poore's* at 1906-09 (cited in note 38).

<sup>104</sup> For numerous examples, see McConnell, 103 *Harv L Rev* 1456-57 & n 242 (cited in note 24).

<sup>105</sup> Joseph Gales, ed, 1 *Annals of the Congress of the United States* 434 (Madison, June 8, 1789) (Gales and Seaton, 1834). Two printings exist of the first two volumes of the *Annals of Congress*. They contain different pagination, running heads, and back titles. The printing with the running head "History of Congress" conforms to the remaining volumes of the series, while the printing with the running head "Gales & Seaton's history of debates in Congress" is unique. This page citation is to the latter version; the corresponding reference in the other volume can be found by using the date of Madison's proposal.

weighed by other principles less firmly rooted in our constitutional scheme.<sup>106</sup>

Why did the majority feel it necessary to take this position? The reason, I believe, arises not from concerns about the Free Exercise Clause but from concerns about the Establishment Clause. Under the *Smith* Court's conception, courts will not be able to order exceptions from laws of general applicability—but legislatures will. Indeed, the Court declares such exemptions “desirable.”<sup>107</sup> The problem, as the Court candidly acknowledges, is that the political branches, being political, will tend to be most solicitous of the value of familiar, popular, and socially acceptable religious faiths. Prior to *Smith*, the Free Exercise Clause functioned as a corrective for this bias, allowing the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process. The Free Exercise Clause, prior to *Smith*, was an equalizer.

There is, however, an alternative equalizer: the Establishment Clause. If the political branches enact accommodations that tend to benefit mainstream more than fringe religions, the solution could be to strike them down under the Establishment Clause. Rather than ensuring that all religious faiths receive equal solicitude, the courts can ensure that all receive equal indifference. This is the position of some secularists who take a strong position on establishment and a weak position on free exercise.<sup>108</sup> It is evident that the *Smith* majority prefers denominational inequality to an Establishment Clause-driven policy of indifference. Indeed, from the Court's perspective, an activist establishment jurisprudence is no less objectionable than an activist free exercise jurisprudence.

Moreover, the establishment strategy would fail, even if it were desirable. Accommodation can be accomplished by inaction just as it can by action. In other words, the legislatures can simply refrain from passing laws that burden the exercise of religion by mainstream groups, and there is nothing the Establishment Clause can do about this. In the end, the only hope for achieving denominational neutrality is a vigorous Free Exercise Clause.

<sup>106</sup> 110 S Ct at 1606.

<sup>107</sup> *Id.*

<sup>108</sup> Justice Stevens is the closest example on the current Supreme Court. He alone has consistently voted against free exercise and for establishment claims in divided cases in recent years.

## B. Special Privileges or Neutrality in the Face of Differences?

Throughout the *Smith* opinion, generally applicable laws are treated as presumptively neutral, with religious accommodations a form of special preference, akin to affirmative action. The opinion describes religious accommodations as laws that "affirmatively foster" the "value" of "religious belief."<sup>100</sup> In *Sherbert v Verner*, by contrast, Justice Brennan's majority opinion characterized a religious exemption as "reflect[ing] nothing more than the governmental obligation of neutrality in the face of religious differences."<sup>101</sup> In a sense, then, both *Smith* and *Sherbert* are about neutrality toward religion. But which has the correct understanding of neutrality?<sup>102</sup>

To examine this question, I will use the facts of *Stansbury v Marks*, the first recorded case raising free exercise issues after adoption of the First Amendment.<sup>103</sup> The case arose in the Pennsylvania courts and was decided under state law. The Reporter's summary of the holding of the case was: "A Jew may be fined for refusing to testify on his Sabbath."<sup>104</sup> The entire report of the case is as follows:

In this cause (which was tried on Saturday, the 5th of April), the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The court, therefore, fined him 10l.; but the defendant, afterwards, waiving the benefit of his testimony, he was discharged from the fine.<sup>104</sup>

We can assume that, in those days of the six-day work week, the courts of Pennsylvania were routinely open for business on Saturday. The decision to operate on Saturday, we may assume, was not aimed at members of the Jewish faith, but was simply a matter of convenience. Nor was the law allowing parties to civil suits to com-

<sup>100</sup> 110 S Ct at 1606.

<sup>101</sup> 374 US 398, 409 (1963).

<sup>102</sup> For more detailed discussion of these two understandings of neutrality, see McConnell, 103 Harv L. Rev at 1419-20 (cited in note 24); Douglas C. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev 993 (1990).

<sup>103</sup> 2 US 213 (1793). I use *Stansbury* for its facts; as is evident from my discussion. I think this case was wrongly decided. The case has been cited only once in a reported Supreme Court opinion, Justice Frankfurter's dissent in *West Virginia State Board of Education v Barnette*, 319 US 624, 655 (1943) (Frankfurter dissenting) (citing, inter alia, *Stansbury* for proposition that general requirement of flag salute is not first instance of requiring obedience to laws that "offend[] deep religious scruples").

<sup>104</sup> 2 US 213.

<sup>105</sup> Id.

pel witnesses to attend court proceedings, on pain of paying a fine, instituted for the purpose of restricting religious exercise. This is an example of a generally applicable, otherwise valid, law. Is it neutral toward religion?

No, it is not. The courts were closed on Sundays, the day on which the Christian majority of Pennsylvania observed the sabbath. The effect of the six-day calendar was to impose a burden on Saturday sabbath observers (mostly Jews) that is not imposed on others (mostly Christians). It is anything *but* neutral—not because the burden happened to fall disproportionately on Jews, but because the burden was attached to a practice that, among others, defines what it means to be a faithful Jew.

What would neutrality require? Surely it is not necessary to conduct court business on Sunday. Since the vast majority of Pennsylvanians were Christians and observed Sunday as the day of sabbath, that would create needless conflict and administrative costs. It would be more neutral to close on both Saturday and Sunday, the modern solution, but that has significant costs in an era of a six-day work week. And if there were other religious minorities in the Commonwealth who observed the sabbath on other days, Moslems perhaps, then this solution would not work at all. The best, least costly, and most neutral solution is to exempt Saturday sabbath observers from the obligation of testifying on Saturday. Thus, an exemption is not “affirmative fostering” of religion; it is more like *Sherbert’s* neutrality in the face of differences.

It may be objected that this example is loaded because the selection of days of rest is fraught with religious significance. The selection of Sunday as the day on which the courts would not operate was itself a religious choice, almost an establishment of the Christian religion. It might be said that an exemption is required in that case only to equalize a situation in which Christians had already been granted a benefit on account of religious practice.

But this objection presupposes that there are decisions that are *not* fraught with religious significance. And perhaps there are—but those decisions will not give rise to free exercise claims. All free exercise claims involve government decisions that are fraught with religious significance, at least from the point of view of the religious minority. In this respect, *Stansbury v Marks* cannot be distinguished from *Smith*. In *Smith*, the generally applicable law was the prohibition on the use of hallucinogenic drugs. The Native American Church uses peyote as its sacrament. Application of the anti-drug laws to the sacramental use of peyote effectively destroys the practice of the Native American Church. Is this neutral?

No, it is not. Christians and Jews use wine as part of their sacrament, and wine is not illegal. Even when wine was illegal during Prohibition, Congress exempted the sacramental use of wine from the proscription. The effect of laws prohibiting hallucinogenic drugs but not alcohol, or of allowing exemptions from one law but not the other, is to impose a burden on the practice of the Native American Church that is not imposed on Christians or Jews. It is no more neutral than operating courts on Saturday and not on Sunday.

But perhaps this overstates the case. Whether to operate courts on Saturday or Sunday is clearly a decision involving commensurables. Hallucinogenic drugs are far more dangerous than wine. The difference in treatment can be said to be based on objective differences between the effects of the two substances. But is this true? Evidence in the *Smith* case showed that ingestion of peyote by members of the Native American Church is *not* dangerous and does not lead to drug problems or substance abuse. Indeed, it is statistically and culturally associated with resistance to substance abuse.<sup>118</sup> The federal government and twenty-three of the states have approved the use of peyote in Native American Church ceremonies for this reason, and the federal government even licenses a facility for the production of peyote.

If this evidence is valid, then the decision to ban the sacramental use of peyote but not the sacramental use of wine is not based on any objective differences between the effects of the two substances. Rather, it is based on the fact that most ordinary Americans are familiar with the use of wine and consider Christian and Jewish sacramental use harmless and perhaps even a good thing; but the same ordinary Americans consider peyote a bizarre and threatening substance and have no respect or solicitude for the Native American Church. In short, the difference is attributable to prejudice.

The only way to tell whether the difference in treatment between peyote and wine is the result of prejudice or the result of objective differences in the substances is to examine closely the purported governmental purpose. If the purpose is important, and if the means are closely related to the purpose, then the policy is probably based on objective differences. If the purpose is weak or the means only loosely related to the purpose, then the policy is

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<sup>118</sup> See text at note 17.

more likely the result of prejudice. This, of course, is a rough description of the compelling interest test. That test, therefore, is not a form of "affirmative[] foster[ing]" of religion.<sup>116</sup> It is a way to determine whether government decisions that interfere with the religious exercise of religious minorities are in fact neutral.

It should be apparent why a mere absence of attention to religious consequences on the part of the legislature cannot prove that legislation is neutral. In a world in which some beliefs are more prominent than others, the political branches will inevitably be selectively sensitive toward religious injuries. Laws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice. If believers of all creeds are to be protected in the "full and equal rights of conscience," then selective sensitivity is not enough.<sup>117</sup> The courts offer a forum in which the particular infringements of small religions can be brought to the attention of the authorities and (assuming the judges perform their duties impartially) be given the same sort of hearing that more prominent religions already receive from the political process.<sup>118</sup>

<sup>116</sup> 110 S Ct at 1606.

<sup>117</sup> Professor Mark Tushnet has argued that the effects of government action are unlikely to bear more heavily on minority religions: "In a pluralistic society with crosscutting group memberships, the overall distribution of benefits and burdens is likely to be reasonably fair." Tushnet, 76 *Georgetown L J* at 1700 (cited in note 1). As an empirical assessment, this claim seems wildly off the mark. Most legislators are unaware of the problems of minority religions, and many (though not all) minority religions are poorly positioned to defend their own interests.

<sup>118</sup> Professor Tushnet has also criticized the compelling interest test on the ground that it is weighted in favor of "mainstream" religious claims, largely because judges are more likely to deem such claims "sincere." Tushnet, 1989 *S Ct Rev* at 382-83 (cited in note 1). Indeed, Tushnet states: "[P]ut bluntly, the pattern is that sometimes Christians win but non-Christians never do." *Id.* at 381. While I share Tushnet's pessimistic assessment of a number of Supreme Court decisions rejecting strong free exercise claims on the part of non-Christian claimants, I do not share his diagnosis. It would be more accurate to state that non-Christians never win, and Christians almost never win, either. The insensitivity about which Tushnet complains is virtually indiscriminate, suggesting not so much a preference for mainstream religions as a blindness toward nonsecular concerns.

Indeed, although the number of winning claims is so small that there can be no statistical verification, the claims of "non-mainstream" groups seem to enjoy something of an advantage in free exercise litigation, because judges are less likely to second-guess their claims about the needs of their religious practice. Judges are notoriously unwilling to accept the possibility that sects made up of otherwise ordinary Americans might entertain religious convictions that are out of the ordinary. See, for example, *Mozert v Hawkins County Board of Education*, 827 F2d 1058 (6th Cir 1987) (court unable to comprehend how exposure to certain public school curriculum could burden religious beliefs of fundamentalists). The more obviously "different" religions—like the Hare Krishnas or the Amish—are less likely to encounter this problem.



### C. Constitutional Anomalies

Closely related to the preceding point is the *Smith* Court's claim that the compelling interest test in free exercise exemption cases is "a constitutional anomaly."<sup>110</sup> According to the Court, use of the compelling interest test in cases of racial discrimination or content-based speech regulation

is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment, and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.<sup>110</sup>

Drawing on analogies from several other fields of constitutional law, including freedom of the press, disproportionate impact cases under the Equal Protection Clause, and content-neutral restrictions on speech, the Court concluded that "the only approach compatible with these precedents" is to hold that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."<sup>111</sup>

It is far from clear what is wrong with the Free Exercise Clause being a "constitutional anomaly." Different clauses of the Constitution perform different functions and have different logical structures. It is hard to see how precedents drawn from other areas of constitutional law can have the effect of foreclosing any particular interpretation of the Free Exercise Clause. The Free Exercise Clause is framed in terms of a substantive liberty; there is no reason to expect it to have the same logic as the Equal Protection Clause. Nonetheless, if the Free Exercise Clause were the only provision of the Constitution that required exceptions from generally applicable laws, this might give cause for reexamination. But it isn't.

The language of exemptions, exceptions, or accommodations is largely confined to free exercise cases, but other fields have their

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In any event, the question is one of relative competence. However deficient judges may be, their institutional responsibilities incline them to take seriously the claims of under-represented groups. It is difficult to see how the position of non-mainstream religions is improved by relegating them to political remedies.

<sup>110</sup> 110 S Ct at 1604.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1604 n 3.

equivalents. For example, the concept of an "as applied" challenge to a law is a precise parallel.<sup>133</sup> The law remains in force as to most applications, but an exception is carved out for those to whom its application, under their particular circumstances, would be a constitutional violation. That this means that some citizens are exempt from laws applied to other citizens has never been thought illegitimate in other constitutional contexts.

In particular, and contrary to the *Smith* opinion,<sup>133</sup> exceptions from generally applicable laws are an established part of the protections for free speech and press under the First Amendment. Indeed, the very core of the free press clause—the freedom from prior restraints—can be seen as an exemption from a form of regulation that can be applied to virtually every other commercial business. To be sure, as the court points out, antitrust and labor laws have been applied to the press without First Amendment difficulty.<sup>134</sup> But that is because such laws pose no special problems for the press. As the Court put it in one press case, "[t]he regulation here in question has no relation whatever to the impartial distribution of news."<sup>135</sup> For the same reason, fire and safety (and a host of other) regulations can be applied to churches. But when the regulations in question *do* have a substantial impact on the press or on religion, they raise a serious claim for exemption.

In free speech cases involving regulations not specifically directed at speech (the equivalent to generally applicable laws not specifically directed at religion), the Court has reached a doctrinal conclusion similar to that in the pre-*Smith* cases. In the leading case, *United States v O'Brien*, the Court held that a regulation that has the effect of restricting speech even though the governmental interest is unrelated to the suppression of free expression can be enforced only "if it furthers an important or substantial

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<sup>133</sup> See, for example, *Bowen v Kendrick*, 487 US 589 (1988) (Adolescent Family Life Act held not to be a facial violation of Establishment Clause; "as applied" challenge remanded for additional fact-finding); *United States v Salerno*, 481 US 739 (1987) (pretrial detention authorized by Bail Reform Act not a facial violation of Eighth Amendment); *Brown v Socialist Workers '74 Campaign Committee*, 459 US 87 (1982) (campaign disclosure laws held to be facially valid, but invalid as applied to minor party where disclosure would likely subject contributors to harassment).

<sup>134</sup> The *Smith* Court asserted that "generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment." 110 S Ct at 1604 n 3 (emphasis in original) (citations omitted).

<sup>135</sup> *Citizen Publishing Co. v United States*, 394 US 131, 139 (1969) (antitrust); *Associated Press v NLRB*, 301 US 103 (1937) (labor). The *Smith* Court cites *Citizen Publishing* at 110 S Ct at 1600.

<sup>136</sup> *Associated Press*, 301 US at 133.

governmental interest" and "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>126</sup> This approach is virtually identical to the free exercise exemptions test, once it is stripped of overblown language about "compelling" interests.<sup>127</sup> More recently, the Court has stated that generally applicable ("incidental") restrictions that have a highly disproportionate impact on persons engaged in First Amendment activity trigger First Amendment scrutiny.<sup>128</sup> This, too, is parallel to the theory rejected in *Smith*: the anti-drug law has a highly disproportionate impact on practitioners of the Native American Church because it makes their central religious activity illegal.

The *Smith* opinion also draws an analogy to "race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group,"<sup>129</sup> noting that such laws "do not thereby become subject to compelling-interest analysis under the Equal Protection Clause."<sup>130</sup> This is true, but the difference in doctrinal analysis is rooted in the nature of the underlying constitutional principles.<sup>131</sup>

At the risk of oversimplification, it can be said that the ideal of racial nondiscrimination is that individuals are fundamentally equal and must be treated as such; differences based on race are irrelevant and must be overcome. The ideal of free exercise of religion, by contrast, is that people of different religious convictions are different and that those differences are precious and must not be disturbed. The ideal of racial justice is assimilationist and integrationist.<sup>132</sup> The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform.

<sup>126</sup> 391 US 367, 377 (1968).

<sup>127</sup> Interestingly, prior to *O'Brien* the Court had used the language of "compelling" interests in the context of regulations not directed at speech, but in *O'Brien* settled on the less extreme language of "important or substantial." *Id.* at 377. Perhaps free exercise doctrine would have been less susceptible to the sort of attack it suffered in *Smith* if it had earlier undergone a similar rhetorical deflation. See text at note 94.

<sup>128</sup> *Arcara v Cloud Books, Inc.*, 478 US 697, 703-04 (1986).

<sup>129</sup> 110 S Ct at 1604 n 3 (emphasis in original).

<sup>130</sup> *Id.*, citing *Washington v Davis*, 426 US 229 (1976).

<sup>131</sup> See also Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 *Wm & Mary L. Rev.* 985, 988-94 (1986) (comparing free exercise exemption with free speech and equal protection doctrine).

<sup>132</sup> I do not overlook the fact that there is a significant competing understanding of racial justice that is nonintegrationist and seeks to preserve and emphasize racial solidarity. But that competing understanding rejects *Washington v Davis* and thus provides no support for the *Smith* Court's portrayal of exemptions as constitutional anomalies.

A better analogy can be drawn between free exercise theory and the theory of handicap discrimination, which is quite different from race discrimination. The theory of handicap discrimination recognizes that individuals with a handicap *are* different in a way that cannot be changed but can only be accommodated. Failure to install a low-cost ramp for access to a building, for example, is a core violation of the norms of handicap discrimination theory—even though a rampless building was presumably not constructed for the purpose of exclusion. Religion is more like handicap than it is like race. A person who cannot work on Saturday is not merely disproportionately disadvantaged by a requirement that he accept “suitable” work (where “suitable” is defined in secular terms); he is excluded precisely on account of his “difference,” as surely as the wheelchair-bound person is from a rampless building. By contrast, the black job applicant in *Washington v Davis* was not excluded on account of his “difference,” but on account of a factor that under the ideal vision of racial justice is wholly unrelated to his “difference.” If the paradigmatic instance of race discrimination is treating people who are fundamentally the same as if they were different, the paradigmatic instance of free exercise violations or handicap discrimination is treating people who are fundamentally different as if they were the same.<sup>133</sup>

Based on these analogies, to which others could be added,<sup>134</sup> the free exercise exemptions doctrine is not a constitutional anomaly.<sup>135</sup> It is parallel to doctrines under the free speech and press provisions, and while it is different from the doctrine of race-

<sup>133</sup> It is significant that in devising standards for discrimination, Congress used an identical formulation—reasonable accommodation—when describing the obligations with respect to religion and handicap, while using language of equal treatment when describing the obligations with respect to race. See Title VII, 42 USC § 2000e (1982), for religion, and the Americans with Disabilities Act of 1990, Pub L No 101-336 § 101(3), 104 Stat 327 (1990), to be codified at 42 USC § 12111, for handicap.

<sup>134</sup> Other constitutional doctrines, not mentioned in *Smith*, can require exceptions from generally applicable laws. See, for example, negative Commerce Clause (see *American Trucking Ass'n v Scheiner*, 483 US 266 (1987) (generally applicable lump-sum annual tax on trucks held to discriminate against interstate carriers)); freedom of association (see *NAACP v Alabama*, 367 US 449 (1968) (state statute requiring foreign corporations to make certain disclosures to qualify for doing business could not be applied to require NAACP to disclose membership lists)); Speech or Debate Clause (members of Congress have privileges and immunities from various laws during attendance in Congress and going to or returning from sessions).

<sup>135</sup> Robert Nagel has observed that a wide array of constitutional doctrines follow the compelling interest model. Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 106-108 (Berkeley, 1989). Nagel, like the *Smith* majority, is critical of this analytical approach. But unlike the Court, he sees it as all too common and not as anomalous.

neutral laws with a disproportionate impact, that difference follows from the theories underlying race discrimination and free exercise.

#### D. The Judicial Role

A major theme of the *Smith* opinion is that the compelling interest test forces the courts to engage in judgments that cannot be made on a nonarbitrary basis. The Court commented that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."<sup>136</sup> It is better that minority religions will be at "a relative disadvantage," the Court said, than that judges have to "weigh the social importance of all laws against the centrality of all religious beliefs."<sup>137</sup>

The Court illustrated this concern with what it playfully admitted to be a "parade of horrors"—claims for free exercise exemptions from such laws as compulsory military service, health and safety regulation, compulsory vaccination laws, traffic laws, and social welfare legislation including minimum wage, child labor, and animal cruelty laws.<sup>138</sup> Putting aside the fact that many of the Court's "horrors" are far from horrible,<sup>139</sup> and that some of its "horrors" involve anti-religious discrimination and thus are unaffected by the *Smith* holding,<sup>140</sup> this parade is almost risible in its

<sup>136</sup> 110 S Ct at 1606 n 5.

<sup>137</sup> *Id* at 1606.

<sup>138</sup> *Id* at 1606.

<sup>139</sup> Why should it be thought troubling that a religious community in which members work without pay out of religious convictions be exempted from the minimum wage laws? See *Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290 (1985), cited by *Smith*, 110 S Ct at 1605. Isn't it a bit ridiculous to apply child labor laws to a girl passing out religious tracts in the company of her aunt? See *Prince v Massachusetts*, 321 US 158 (1944), cited at 110 S Ct at 1605. And why shouldn't a private university that receives no federal funds be able to forbid interracial dating among its students on religious grounds without forfeiting its tax exempt status? See *Bob Jones University v United States*, 461 US 574 (1983), cited at 110 S Ct at 1606. Far from suggesting that free exercise claims are outlandish, these examples suggest that the courts have been far too parsimonious in upholding them.

<sup>140</sup> *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 723 F Supp 1467 (S D Fla 1989), cited by *Smith* at 110 S Ct at 1606, involves a city ordinance that prohibits the "ritual slaughter" of animals. The city permits the slaughter of animals, no matter how cruelly, if done for any other reason, including pest control, food, or sport. This sort of law, aimed specifically at the religious practice of a small and unpopular racial and religious minority, should presumably be unconstitutional even after *Smith*. That the Supreme Court would include this case in its parade of horrors while the case is on appeal is particularly troubling on due process grounds given that the reference might well prejudice the case in the appellate court. Indeed, the appellee quoted the *Smith* dictum prominently in its brief. See *id*, No 90-5176, Brief of Appellee-Defendant City of Hialeah at 19, 28, 29 (11th Cir.) (I

one-sidedness. For every claim that would, if granted, produce a horrible result, there is a claim that *ought* to be granted but will not be after the *Smith* decision.

Consider the fact that employment discrimination laws could force the Roman Catholic Church to hire female priests, if there are no free exercise exemptions from generally applicable laws.<sup>141</sup> Or that historic preservation laws could prevent churches from making theologically significant alterations to their structures.<sup>142</sup> Or that prisons will not have to serve kosher or hallel food to Jewish or Moslem prisoners.<sup>143</sup> Or that Jewish high school athletes may be forbidden to wear yarmulkes and thus excluded from interscholastic sports.<sup>144</sup> Or that churches with a religious objection to unrepentant homosexuality will be required to retain an openly gay individual as church organist,<sup>145</sup> parochial school teacher,<sup>146</sup> or even a pastor. Or that public school students will be forced to at-

filed an amicus curiae brief in support of the church's position, on behalf of the Baptist Joint Committee, the Rutherford Institute, and the Christian Legal Society.)

<sup>141</sup> Title VII, 42 USC § 2000e (1982), contains no exception for religious bodies, although it is possible that the church might be able to prove that gender is a bona fide occupational characteristic under the statute. (It is interesting to contemplate how a secular court would approach such a question of ecclesiastical practice, since deference to the employer would be entirely out of keeping with the allocation of burdens of proof under Title VII.) In employment discrimination cases prior to *Smith*, the courts uniformly held that the Free Exercise Clause exempts religious organizations with respect to positions of religious significance. See, for example, *Rayburn v General Conference of Seventh-Day Adventists*, 772 F2d 1164, 1169 (4th Cir 1985); *McClure v Salvation Army*, 460 F2d 553, 558-59 (5th Cir 1972); *EEOC v Southwestern Baptist Theological Seminary*, 651 F2d 277, 285-86 (6th Cir 1981).

<sup>142</sup> See *First Covenant Church v City of Seattle*, 114 Wash 2d 392, 787 P2d 1352 (1990) (en banc) (government regulation of exterior of church held unconstitutional); *Society of Jesus v Boston Landmarks Comm.*, Nos 87-3168, 87-4571, 87-6586, slip op (Mass Super, Nov 2, 1989) (government regulation of the placement of church altars held unconstitutional under the Free Exercise Clause). For an excellent discussion of the constitutional issues, see Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill L Rev — (forthcoming 1991).

<sup>143</sup> Prior to *Smith*, the federal courts frequently required the prisons to make reasonable accommodations to the religious dietary needs of prisoners. See *Hunafa v Murphy*, 907 F2d 48 (7th Cir 1990) (upholding Muslim prisoner's right to receive food uncontaminated by pork and remanding for factfinding on governmental interest; the court noted that prison officials may raise the intervening *Smith* decision on remand and that this may eliminate the free exercise claim). See also *McElyea v Babbitt*, 833 F2d 196, 198 (9th Cir 1987) (per curiam); *Kahane v Carlson*, 527 F2d 492, 496 (2d Cir 1975).

<sup>144</sup> See *Menora v Illinois High School Ass'n*, 683 F2d 1030 (7th Cir 1982).

<sup>145</sup> *Walker v First Presbyterian Church*, 22 FEP Cases (BNA) 762 (Cal S Ct 1980) (holding that Free Exercise Clause bars application of local gay rights ordinance to employment of church organist).

<sup>146</sup> *Lewis ex rel Murphy v Buchanan*, 21 FEP Cases (BNA) 696 (D Minn 1979) (same, as applied to parochial school teacher).

tend sex education classes contrary to their faith.<sup>147</sup> Or that religious sermons on issues of political significance could lead to revocation of tax exemptions.<sup>148</sup> Or that Catholic doctors in public hospitals could be fired if they refuse to perform abortions.<sup>149</sup> Or that Orthodox Jews could be required to cease and desist from sexual segregation of their places of worship.<sup>150</sup>

If the Court wishes to consider a parade of horrors, it should parade the horrors on both sides. But while the two parades may be of the same length, they are of very different quality. The judicial system is able to reject claims that would be horrible if granted; believers are helpless to deal with infringements on religious freedom that the courts refuse to remedy.

Challenged by Justice O'Connor's rejoinder that the parade of horrors only "demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests,"<sup>151</sup> the Court retreated to the proposition that "the purpose of our parade . . . is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice . . . suffices to permit us to confer an exemption."<sup>152</sup>

The Court's evident hostility to subjective judicial second-guessing of legislative judgments is generally salutary, at least if

<sup>147</sup> Prior to *Smith*, the courts generally concluded that the Free Exercise Clause requires that students be excused from sex education classes contrary to their faith. See, for example, *Smith v Ricci*, 89 NJ 514, 446 A2d 501 (1982); *Medeiros v Kiyosaki*, 52 Hawaii 436, 478 P2d 314 (1970). It is possible that these exemptions will survive *Smith* on the ground that they are "hybrid" claims involving the rights of parents to control their children's education. See text at notes 52-55.

<sup>148</sup> *Christian Echoes National Ministry, Inc. v United States*, 470 F2d 849 (10th Cir 1972). Compare *United States Catholic Conference v Abortion Rights Mobilization, Inc.*, 487 US 72 (1988) (lawsuit by ideological opponents of the Roman Catholic Church to force the IRS to revoke the Church's tax exempt status because of its teaching against abortion rights).

<sup>149</sup> Most states protect the right of medical personnel to refuse to assist in abortions, see, for example, *Kenny v Ambulatory Centre of Miami*, 400 S2d 1262 (Fla App 1981), but prior to *Smith* this would also seem to have been a constitutional right.

<sup>150</sup> The ordinance at issue in *Roberts v United States Jaycees*, 468 US 609 (1984), prohibited sex discrimination in any "place of public accommodation," a term that could be interpreted to include a synagogue. The Court suggested that an exemption would be required for religious associations. *Id.* at 618. Because this involves freedom of speech and association, it is possible that it would be considered a "hybrid" and thus protected even after *Smith*.

<sup>151</sup> *Smith*, 110 S Ct at 1612 (O'Connor concurring).

<sup>152</sup> *Id.* at 1608 n 5.

not taken to extremes. But it raises the question: Why is the Free Exercise Clause a particular target? The author of the *Smith* opinion, Justice Scalia, is reasonably consistent regarding the undesirability of judicial discretion.<sup>103</sup> In most areas of constitutional law, however, the majority of the Court does not hesitate to weigh the social importance of laws against their impact on constitutional rights. There is no particular reason to believe that judgments under the Free Exercise Clause are any more discretionary or prone to judicial abuse than judgments under the Commerce Clause, the Due Process Clause, or the Free Speech Clause, to take a few examples from the current catalog of compelling interest or balancing tests. Unless *Smith* is the harbinger of a wholesale retreat from judicial discretion across the range of constitutional law, there should be some explanation of why the problem in this field is more acute than it is elsewhere.

The *Smith* opinion suggests that the problem with the compelling interest test is that it requires inquiry into whether religious beliefs are "central" to the claimant's religion,<sup>104</sup> which is "akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"<sup>105</sup> But is this true? In such cases, the court is not judging the "merits" of religious claims but solely trying to determine what they are. To be sure, the court may get it wrong, but what is the grave injury from that (other than the impact on the case itself)? The court does not purport to be resolving issues of religious interpretation for any purpose other than understanding the nature of the plaintiff's claim, and its misinterpretation carries no weight beyond the courtroom. I agree that courts must be sensitive to the impropriety of second-guessing religious doctrine, but I cannot agree that the possibility of error warrants abandonment of the enterprise.

Even so, Justice Scalia's opinion rightly calls attention to the arbitrariness of judicial balancing under the prior compelling interest test. The opinion is correct that the doctrine was poorly developed and unacceptably subjective. But the opinion proposes to solve this problem by eliminating the doctrine of free exercise exemptions rather than by contributing to the development of a more principled approach. In my judgment, the theory of the Free Exercise Clause (as opposed to its application) offers a principled

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<sup>103</sup> See, for example, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1176 (1989).

<sup>104</sup> 110 S Ct at 1604.

<sup>105</sup> 110 S Ct at 1604, quoting *Lee*, 456 US at 263 n 2 (Stevens concurring).



basis for decision in cases of conflict between law and religious conscience. Judges are not forced into the sort of free-wheeling balancing of incommensurate interests that the majority feared in *Smith*. To be sure, there are hard cases, as there are under any constitutional provision. But there are also easy cases—cases that can be decided without any case-specific balancing whatsoever—and the principles constrain judicial discretion. Indeed, in most free exercise cases no “balancing” is required at all, because the relevant factors are ones of kind rather than of degree.

First, the history of the free exercise principle shows that governmental interests do not extend to protecting the members of the religious community from the consequences of their religious choices. Both the evangelical advocates of religious freedom and the Enlightenment liberals agreed that the “legitimate powers of government extend only to punish men for working ill to their neighbors.”<sup>106</sup> The common pattern of state free exercise provisions prior to 1789 protected religious exercise only to the extent consistent with public “peace” and “safety.”<sup>107</sup> As Madison summarized the point, free exercise should prevail “in every case where it does not trespass on private rights or the public peace.”<sup>108</sup> Where the putative injury is internal to the religious community, the government generally has no power to intervene, with the narrow exception of injury to children.<sup>109</sup>

Under this standard, the unanimous decision in *Alamo Foundation v Secretary of Labor*<sup>100</sup> was mistaken. Minimum wage and maximum hour laws are legitimate social legislation to protect workers from exploitation by employers. But if members of the Alamo religious movement are inspired to work for the glory of God for long hours at no pay, their neighbors are not injured and the government has no legitimate power to intervene. Religions

<sup>106</sup> Greene, ed, *The Writings of the Late Elder John Leland* at 118 (cited in note 99). Jefferson similarly stated that “[t]he legitimate powers of government extend to such acts only as are injurious to others.” Thomas Jefferson, *Query XVII Religion*, in William Peden, ed, *Notes on the State of Virginia* 157, 159 (North Carolina, 1955).

<sup>107</sup> See text at notes 39, 91, and 92. See also McConnell, 103 Harv at 1461-64 (cited in note 24).

<sup>108</sup> Hunt, ed, 9 *The Writings of James Madison* at 100 (cited in note 91).

<sup>109</sup> This principle can be understood in terms of the economic concept of externalities. Where the government is preventing the imposition of negative externalities, its interest generally overrides free exercise claims, but otherwise (except in special circumstances) it does not. For an elaboration, see McConnell and Posner, 56 U Chi L Rev at 46 (cited in note 57).

<sup>100</sup> 471 US 290 (1985). I was the principal author of the Secretary’s brief in *Alamo Foundation* but, as is apparent from the text, my position here is not the same.

often require sacrifice that outsiders may deem to be excessive. Similarly, under this standard Amish farmers should not be compelled to participate in the government-sponsored social security system when they believe that support for the aged is the exclusive responsibility of the religious community. The unanimous Supreme Court decision to the contrary, *United States v Lee*,<sup>141</sup> was mistaken.

Most controversially, for a religious school to prohibit interracial dating among its students is morally repugnant to most of us, but its direct effects are purely internal to the religious group; only those who choose to become part of the religious community defined by Bob Jones are governed by its rules. It might be argued that racist or other antisocial practices of religious groups affect outsiders by their influence on the climate of opinion. By forbidding interracial dating, for example, Bob Jones University might foster the belief that the white and black races are fundamentally unequal, to the injury of individuals who have neither joined nor consented to Bob Jones's policies. But this argument implies that religious conduct must be regulated because of its communicative impact. Even apart from the Free Exercise Clause, the Free Speech Clause disallows prohibition of conduct where the government's sole purpose is to prevent the spread of offensive ideas.<sup>142</sup> If the government cannot restrain so-minded persons from advocating racist ideas, it should not be able to restrain otherwise protected religious conduct on the ground that it will communicate racist ideas. Once again, a unanimous Supreme Court reached the opposite conclusion.<sup>143</sup>

A second principle that emerges from the theory of the Free Exercise Clause is that the government is not required to create exemptions that would make religious believers better off relative to others than they would be in the absence of the government program to which they object. The purpose of free exercise exemptions is to ensure that incentives to practice a religion are not adversely affected by government action. By the same token, govern-

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<sup>141</sup> 455 US 252 (1982).

<sup>142</sup> *United States v Eichman*, 110 S Ct 2404 (1990).

<sup>143</sup> *Bob Jones University v United States*, 461 US 574 (1983). Justice Rehnquist dissented on statutory grounds, but joined in the majority's rejection of the free exercise claim. To be sure, *Bob Jones* involved tax exemptions rather than a direct prohibition, thus introducing an unconstitutional conditions element to the analysis. *Bob Jones* is thus structurally similar to a case in which a nonprofit advocacy group is denied tax exempt status on the ground that it burns the American flag at its meetings.

ment action should not have the effect of creating incentives to practice religion.

This principle, too, allows some free exercise cases to be easily decided without the need for ad hoc balancing. An example is *Hernandez v Commissioner*, in which the Court correctly rejected a claim that denial of an income tax deduction for the expenses of a religious practice violated the free exercise of religion.<sup>164</sup> In the absence of an income tax, the believer would bear the full cost of his religious exercise. With an income tax and with deductibility, a portion of the cost of the religious exercise is shifted from the believer to the state. This leaves the believer better off, relative to nonbelievers, than he would be with no income tax at all.<sup>165</sup>

A third principle is that the claims of minority religions should receive the same consideration under the Free Exercise Clause that the claims of mainstream religions receive in the political process. This follows from the principle of denominational neutrality discussed above. To a great extent, the advocates of religious freedom at the time of the founding believed that minority religions would be adequately secured in their rights so long as they were on the "same footing" as the mainstream faiths. To achieve equal rights of conscience, the courts should frame the free exercise inquiry as follows: Is the governmental interest so important that the government would impose a burden of this magnitude on the majority in order to achieve it?

A practical example can be found in an early New York case, *People v Philips*.<sup>166</sup> The question was whether a Roman Catholic priest could be compelled to testify in court regarding a matter divulged to him in the confessional. The New York City court, presided over by DeWitt Clinton, sometime governor of New York and candidate for president of the United States, held that the free exercise provision of the New York Constitution exempted the priest from testifying. After noting that requiring testimony would annihilate the sacramental practice of penance, the court compared the matter to restrictions on Protestants.<sup>167</sup> Although Protestants did not practice auricular confession, and thus had no need of this particular form of accommodation, the court stated that

<sup>164</sup> 109 S Ct 2136 (1989).

<sup>165</sup> The taxpayer in *Hernandez* also claimed that the government engaged in denominational discrimination in its treatment of tax deductions. *Id.* at 2146. This claim, unlike the claim discussed in text, was meritorious and should not have been rejected by the Court.

<sup>166</sup> The case is reprinted in William Sampson, *The Catholic Question in America* 5 (Gillespy, 1813) (reprinted in 1974 by De Capo Press).

<sup>167</sup> *Id.* at 38.

"[e]very man who hears me will answer in the affirmative" that a law of the state that prevented administration of one of the Protestant sacraments would be unconstitutional.<sup>166</sup>

Thus, the exemption was required in order to maintain neutrality between the Protestant majority and the Catholic minority. Neutrality did not mean treating them the same way; that would have resulted in grave injustice to the Catholics. Rather, the court posed and answered the hypothetical question: Is the government's interest in compelling testimony so strong that it would interfere with a Protestant sacrament in order to achieve it? The Catholic is entitled to no less protection.

Under this principle, a court faced with a free exercise claim is not required to determine, in the abstract, how important a governmental purpose is or how central a religious practice is. The court instead must engage in the hypothetical exercise of comparing burdens. The degree of protection for religious minorities should be no less than that which our society would provide for the majority. This should be enough to decide many cases quite easily. Who can doubt that unobtrusive exceptions to military uniform regulations would be made if Christians, like Orthodox Jews, had to wear yarmulkes at all times?<sup>167</sup> Who can doubt that there would be exceptions to social security (or, more likely, no social security at all) if mainstream Christians were forbidden by their religion to participate?<sup>170</sup> Who can doubt that the United States Forest Service would find a way to avoid despoiling Christian worship sites when building logging roads?<sup>171</sup>

Other cases would come out the other way. A country could probably not survive if it allowed selective conscientious objection to war.<sup>172</sup> Nor would it allow trespass or interference with the private rights of others. A government interest is sufficient if it is so important that it is not conceivable that the government would waive it even if the religious needs of the majority so required.<sup>173</sup>

<sup>166</sup> *Id.* at 207.

<sup>167</sup> Contrast *Goldman v Weinberger*, 475 US 503 (1986).

<sup>168</sup> Contrast *United v Lee*, 455 US 252 (1982).

<sup>169</sup> Contrast *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439 (1988).

<sup>170</sup> Compare *Gillette v United States*, 401 US 437 (1971).

<sup>171</sup> This is similar to David Strauss's formulation of the intent standard in equal protection cases:

A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.

David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U Chi L Rev 936,

No doubt cases will arise in which these principles are inapplicable or incomplete, and in which the judicial task is more indeterminate. Cases involving children are particularly difficult (as they are when arising under other constitutional provisions). But these principles are sufficient to resolve the large majority of free exercise cases that have come before the Supreme Court in recent years without the need for unconstrained case-by-case balancing. In some instances, the principles suggest that the Court has been plainly wrong in denying free exercise claims. But the broader point is that the Free Exercise Clause, properly understood, does not pose the problem of subjective judicial discretion so feared by the majority in *Smith*.

#### E. The Rule of Law

The deepest and most important theme of the *Smith* opinion is its perception of a conflict between free exercise exemptions and the rule of law. The Court refers to exemptions as "a private right to ignore generally applicable laws."<sup>174</sup> Elsewhere, it states that to apply the compelling interest test rigorously "would be courting anarchy" and warns against making "each conscience . . . a law unto itself."<sup>175</sup> These fears are an unconscious echo of John Locke, who wrote in his *Letter Concerning Toleration* that "the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation."<sup>176</sup>

Viewed through the lens of legal positivism, this concern is wholly out of place in the context of a written constitution with a provision that, by hypothesis, authorizes exemptions. The Court itself concedes that there is nothing inappropriate or "anomalous" about legislation that makes exceptions for religious conflicts. Presumably, legislation of this sort is valid whether it is specific (like laws exempting the Native American Church from the ban on consumption of peyote) or general (like laws requiring employers to make reasonable accommodations of their employees' religious needs). Although the judicial role is broader when the legislation is general, the Court would not say that such legislation is therefore

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957 (1989). If *Strauss* is correct, this would suggest that the free exercise exemptions doctrine has more in common with *Washington v Davis* than indicated in the discussion above.

<sup>174</sup> 110 S Ct at 1604.

<sup>175</sup> *Id* at 1605-06.

<sup>176</sup> John Locke, *A Letter Concerning Toleration*, in Maurice Cranston, *Locke on Politics, Religion, and Education* 104, 136 (Macmillan, 1965)

improper or unconstitutional. Why, then, is it problematic for the People to enact a similar provision into constitutional law? From the perspective of legal positivism there is no difference between statutes and constitutional amendments. Both are commands of the sovereign.

If there is nothing wrong with statutory commands of the sovereign that make exceptions from generally applicable laws in cases of conflict with religious conscience, then there should be nothing wrong with constitutional commands of the same sort.<sup>177</sup> To Locke, the right to claim exemptions was tantamount to the right to rebellion, since there was no written constitution expressing the sovereign will in a form superior to legislation, and no institution of judicial review to mediate claims of exemption.<sup>178</sup> To the modern Supreme Court, the claim to exemptions is a routine matter of invoking the supreme law of the land. There is nothing lawless or anarchic about it.

From the perspective of legal positivism, free exercise exemptions do not make each conscience "a law unto itself." An arm of the government, the court, decides in each instance what the reach of the law will be. The Free Exercise Clause draws a boundary between the powers of the government and the freedom of the individual, but that boundary is defined and enforced by the government. The significance of the Free Exercise Clause is that the definition and enforcement of the boundary is entrusted to the arm of the government most likely to perform the function dispassionately and best equipped to consider the specifics of the case. The individual believer is not judge in his own case.

From a natural rights perspective, the Court's concerns about the rule of law are more substantial. According to eighteenth-cen-

<sup>177</sup> To be sure, this assumes that the Free Exercise Clause was intended to authorize exemptions as a matter of positive law, which is the ultimate issue. But the Court's jurisprudential qualms about the rule of law are irrelevant to determining whether that is the correct reading of the clause, just as they would be irrelevant to an interpretation of a particular statute that appears to carve out a religious exemption.

<sup>178</sup> Interestingly, Locke uses the same term—the "appeal to heaven"—in the *Letter Concerning Toleration* to describe what the believer should do if the magistrate makes a command at odds with the commands of God, and in *The Second Treatise of Government* to describe what the body of the people should do if the government does not honor the social contract. Compare *Letter Concerning Toleration* at 137 (cited in note 176), with John Locke, *The Second Treatise of Government* § 242 in Peter Laslett, ed, *Two Treatises of Government* 287, 427 (Cambridge, student ed 1963) (originally published 1698). The "appeal to heaven" in the *Letter* appears to be in the literal, spiritual sense. The "appeal to heaven" in the *Second Treatise* is a reference to rebellion. The use of the same terminology accentuates the connection between conscience and rebellion in the absence of a written constitution and judicial review.

tury legal thought, freedom of religious conscience was not a product of the sovereign's will but a natural and inalienable right. The New Hampshire Constitution of 1784, for example, declared: "Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE."<sup>179</sup> George Washington addressed the Hebrew Congregation of Newport, Rhode Island, in these words: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."<sup>180</sup> The reason the rights of conscience were deemed inalienable is that they represented *duties to God* as opposed to *privileges of the individual*.<sup>181</sup> Thus, the Free Exercise Clause is not an expression of the will of the sovereign but a declaration that the right to practice religion is jurisdictionally beyond the scope of civil authority. This, then, is an anarchic idea: that duties to God, perceived in the conscience of the individual, are superior to the law of the land.<sup>182</sup>

That the idea may be anarchic does not mean that we should dismiss it, for there is reason to believe that this inalienable rights understanding is the genuine theory of the Religion Clauses of the First Amendment. One of the leading expositions of the thinking of the day about government and religion, James Madison's *Memorial and Remonstrance Against Religious Assessments*, makes the point in this way:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil So-

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<sup>179</sup> 2 *Poore's* at 1280-81 (cited in note 38).

<sup>180</sup> John C. Fitzpatrick, ed, 31 *The Writings of George Washington* 93-94 n 65 (GPO, 1939).

<sup>181</sup> See James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted as an appendix to the dissenting opinion in *Everson v Board of Education*, 330 US 1, 64 (1947) (The right of religious freedom "is unalienable also; because what is here a right towards men, is a duty towards the Creator.").

<sup>182</sup> More accurately, this idea is not anarchic but dyarchic. The individual is not free from law; he is subject to two potentially conflicting sources of law, spiritual and temporal. This is an important distinction, because the established tenets of a religious tradition have their own dynamic safeguards of order and good sense, superior to individual will. See F.A. Hayek, in W.W. Bartley III, ed, *The Fatal Conceit* 66, 88 (Chicago, 1988).

ciety, do it with a saving of his allegiance to the Universal Sovereign.<sup>100</sup>

Note the contrast between the *Smith* opinion and Madison's *Memorial and Remonstrance*. *Smith* insists that conscience must be subordinate to civil law; Madison insists that civil law must be subordinate to conscience.

At its very core, the Free Exercise Clause, understood as Madison understood it, reflected a theological position: that God is sovereign.<sup>101</sup> It also reflected a political theory: that government is a subordinate association. The theological and political positions are connected. To recognize the sovereignty of God is to recognize a plurality of authorities and to impress upon government the need for humility and restraint. To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like "God" that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority. Those are propositions that few Americans, today or in 1789, could accept.

#### CONCLUSION

According to the *Smith* opinion, the argument for free exercise exemptions "contradicts both constitutional tradition and common sense."<sup>102</sup> Unfortunately, the Court never presents that argument so that readers might be able to judge for themselves. The argument is this: the Free Exercise Clause, by its very terms and read in the light of its historic purposes, guarantees that believers of every faith, and not just the majority, are able to practice their religion without unnecessary interference from the government. The clause is not concerned with facial neutrality or general applicability. It singles out a particular category of human activities for particular protection, a protection that is most often needed by practitioners of non-mainstream faiths who lack the ability to protect themselves in the political sphere, but may, on occasion, be needed by any person of religious convictions caught in conflict with our secular political culture.

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<sup>100</sup> Reprinted in *Everson*, 330 US at 64.

<sup>101</sup> Among the framers and ratifiers, some presumably accepted the theological position as a matter of personal faith, while others (perhaps even Madison) merely respected and deferred to the prevailing religious commitments of the people.

<sup>102</sup> 110 S Ct at 1603.



For this protection the *Smith* opinion substitutes a bare requirement of formal neutrality. Religious exercise is no longer to be treated as a preferred freedom; so long as it is treated no worse than commercial or other secular activity, religion can ask no more. The needs of minority religion are no longer to be legally entitled to equal consideration from the state. If practitioners of minority religions cannot protect themselves, that is the "consequence of democratic government," which they should recognize as "unavoidable."

I do not believe that constitutional principles should be chosen on the basis of our own normative judgments, divorced from constitutional text and tradition. I would prefer that *Smith* be decided on the basis of the constitutional text, history, and precedent. But if it is necessary to confront the normative question directly, I would say that a full guarantee for religious freedom is preferable to a largely redundant equal protection clause for religion, and that a genuine neutrality toward minority religions is preferable to a mere formal neutrality, which can be expected to reflect the moral and religious presuppositions of the majority. To be sure, this will increase the power and discretion of judges. But that seems a weak justification for the *Smith* opinion's reinterpretation of the Free Exercise Clause. Indeed, when the Constitution imposes limits on governmental power, interpretation of those limits in marginal cases is—to borrow some of the *Smith* Court's words—the "unavoidable consequence" of constitutionalism.

## THE WILLIAMSBURG CHARTER

A celebration and reaffirmation of the Religious Liberty clauses,  
drafted by representatives of America's leading faiths on the occa-  
sion of the 200th anniversary of the call for the Bill of Rights

### OUTLINE

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## THE WILLIAMSBURG CHARTER

Keenly aware of the high national purpose of commemorating the bicentennial of the United States Constitution, we who sign this Charter seek to celebrate the Constitution's greatness, and to call for a bold reaffirmation and reappraisal of its vision and guiding principles. In particular, we call for a fresh consideration of religious liberty in our time, and of the place of the First Amendment Religious Liberty clauses in our national life.

We gratefully acknowledge that the Constitution has been hailed as America's "chief export" and "the most wonderful work ever struck off at a given time by the brain and purpose of man." Today, two hundred years after its signing, the Constitution is not only the world's oldest, still-effective written constitution, but the admired pattern of ordered liberty for countless people in many lands.

In spite of its enduring and universal qualities, however, some provisions of the Constitution are now the subject of widespread controversy in the United States. One area of intense controversy concerns the First Amendment Religious Liberty clauses, whose mutually reinforcing provisions act as a double guarantee of religious liberty, one part barring the making of any law "respecting an establishment of religion" and the other barring any law "prohibiting the free exercise thereof."

The First Amendment Religious Liberty provisions epitomize the Constitution's visionary realism. They were, as James Madison said, the "true remedy" to the predicament of religious conflict they originally addressed, and they well express the responsibilities and limits of the state with respect to liberty and justice.

Our commemoration of the Constitution's bicentennial must therefore go beyond celebration to rededication. Unless this is done, an irreplaceable part of national life will be endangered, and a remarkable opportunity for the expansion of liberty will be lost.

For we judge that the present controversies over religion in public life pose both a danger and an opportunity. There is evident danger in the fact that certain forms of politically reassertive religion in parts of the world are, in principle, enemies of democratic freedom and a source of deep social antagonism. There is also evident opportunity in the growing philosophical and cultural awareness that all people live by commitments and ideals, that value-neutrality is impossible in the ordering of society, and that we are on the edge of a promising mo-

ment for a fresh assessment of pluralism and liberty. It is with an eye to both the promise and the peril that we publish this Charter and pledge ourselves to its principles.

We readily acknowledge our continuing differences. Signing this Charter implies no pretense that we believe the same things or that our differences over policy proposals, legal interpretations and philosophical groundings do not ultimately matter. The truth is not even that what unites us is deeper than what divides us, for differences over belief are the deepest and least easily negotiated of all.

The Charter sets forth a renewed national compact, in the sense of a solemn mutual agreement between parties, on how we view the place of religion in American life and how we should contend with each other's deepest differences in the public sphere. It is a call to a vision of public life that will allow conflict to lead to consensus, religious commitment to reinforce political civility. In this way, diversity is not a point of weakness but a source of strength.

## I. A TIME FOR REAFFIRMATION

We believe, in the first place, that the nature of the Religious Liberty clauses must be understood before the problems surrounding them can be resolved. We therefore affirm both their cardinal assumptions and the reasons for their crucial national importance.

With regard to the assumptions of the First Amendment Religious Liberty clauses, we hold three to be chief:

### 1. The Inalienable Right

Nothing is more characteristic of humankind than the natural and inescapable drive toward meaning and belonging, toward making sense of life and finding community in the world. As fundamental and precious as life itself, this "will to meaning" finds expression in ultimate beliefs, whether theistic or non-theistic, transcendent or naturalistic, and these beliefs are most our own when a matter of conviction rather than coercion. They are most our own when, in the words of George Mason, the principal author of the Virginia Declaration of Rights, they are "directed only by reason and conviction, not by force or violence."

As James Madison expressed it in his Memorial and Remonstrance, "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to

exercise it as these may dictate. This right is in its nature an unalienable right."

Two hundred years later, despite dramatic changes in life and a marked increase of naturalistic philosophies in some parts of the world and in certain sectors of our society, this right to religious liberty based upon freedom of conscience remains fundamental and inalienable. While particular beliefs may be true or false, better or worse, the right to reach, hold, exercise them freely, or change them, is basic and non-negotiable. Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities.

The right to freedom of conscience is premised not upon science, nor upon social utility, nor upon pride of species. Rather, it is premised upon the inviolable dignity of the human person. It is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. This basic civil liberty is clearly acknowledged in the Declaration of Independence and is ineradicable from the long tradition of rights and liberties from which the Revolution sprang.

## 2. The Ever Present Danger

No threat to freedom of conscience and religious liberty has historically been greater than the coercions of both Church and State. These two institutions — the one religious, the other political — have through the centuries succumbed to the temptation of coercion in their claims over minds and souls. When these institutions and their claims have been combined, it has too often resulted in terrible violations of human liberty and dignity. They are so combined when the sword and purse of the State are in the hands of the Church, or when the State usurps the mantle of the Church so as to coerce the conscience and compel belief. These and other such confusions of religion and state authority represent the misordering of religion and government which it is the purpose of the Religious Liberty provisions to prevent.

Authorities and orthodoxies have changed, kingdoms and empires have come and gone, yet as John Milton once warned, "new Presbyter is but old priest writ large." Similarly, the modern persecu-

tor of religion is but ancient tyrant with more refined instruments of control. Moreover, many of the greatest crimes against conscience of this century have been committed, not by religious authorities, but by ideologues virulently opposed to traditional religion.

Yet whether ancient or modern, issuing from religion or ideology, the result is the same: religious and ideological orthodoxies, when politically established, lead only too naturally toward what Roger Williams called a "spiritual rape" that coerces the conscience and produces "rivers of civil blood" that stain the record of human history.

Less dramatic but also lethal to freedom and the chief menace to religious liberty today is the expanding power of government control over personal behavior and the institutions of society, when the government acts not so much in deliberate hostility to, but in reckless disregard of, communal belief and personal conscience.

Thanks principally to the wisdom of the First Amendment, the American experience is different. But even in America where state-established orthodoxies are unlawful and the state is constitutionally limited, religious liberty can never be taken for granted. It is a rare achievement that requires constant protection.

### 3. The Most Nearly Perfect Solution

Knowing well that "nothing human can be perfect" (James Madison) and that the Constitution was not "a faultless work" (Gouverneur Morris), the Framers nevertheless saw the First Amendment as a "true remedy" and the most nearly perfect solution yet devised for properly ordering the relationship of religion and the state in a free society. There have been occasions when the protections of the First Amendment have been overridden or imperfectly applied. Nonetheless, the First Amendment is a momentous decision for religious liberty, the most important political decision for religious liberty and public justice in the history of humankind. Limitation upon religious liberty is allowable only where the State has borne a heavy burden of proof that the limitation is justified — not by any ordinary public interest, but by a supreme public necessity — and that no less restrictive alternative to limitation exists.

The Religious Liberty clauses are a brilliant construct in which both No establishment and Free exercise serve the ends of religious liberty and freedom of conscience. No longer can sword, purse and sacred mantle be equated. Now, the government is barred from using

religion's mantle to become a confessional State, and from allowing religion to use the government's sword and purse to become a coercing Church. In this new order, the freedom of the government from religious control and the freedom of religion from government control are a double guarantee of the protection of rights. No faith is preferred or prohibited, for where there is no state-definable orthodoxy, there can be no state-punishable heresy.

With regard to the reasons why the First Amendment Religious Liberty clauses are important for the nation today, we hold five to be preeminent:

1. The First Amendment Religious Liberty provisions have both a logical and historical priority in the Bill of Rights. They have logical priority because the security of all rights rests upon the recognition that they are neither given by the state, nor can they be taken away by the state. Such rights are inherent in the inviolability of the human person. History demonstrates that unless these rights are protected our society's slow, painful progress toward freedom would not have been possible.
2. The First Amendment Religious Liberty provisions lie close to the heart of the distinctiveness of the American experiment. The uniqueness of the American way of disestablishment and its consequences have often been more obvious to foreign observers such as Alexis de Tocqueville and Lord James Bryce, who wrote that "Of all the differences between the Old world and the New, this is perhaps the most salient." In particular, the Religious Liberty clauses are vital to harnessing otherwise centrifugal forces such as personal liberty and social diversity, thus sustaining republican vitality while making possible a necessary measure of national concord.
3. The First Amendment Religious Liberty provisions are the democratic world's most salient alternative to the totalitarian repression of human rights and provide a corrective to unbridled nationalism and religious warfare around the world.
4. The First Amendment Religious Liberty provisions provide the United States' most distinctive answer to one of the world's most pressing questions in the late-twentieth century. They address the problem: How do we live with each other's deepest differences? How do religious convictions and political freedom complement rather than threaten each other on a small planet in a pluralistic age? In a world in which bigotry, fanaticism, terrorism and the state control of religion are all too common responses to these questions, sustaining

the justice and liberty of the American arrangement is an urgent moral task.

5. The First Amendment Religious Liberty provisions give American society a unique position in relation to both the First and Third worlds. Highly modernized like the rest of the First World, yet not so secularized, this society — largely because of religious freedom — remains, like most of the Third World, deeply religious. This fact, which is critical for possibilities of better human understanding, has not been sufficiently appreciated in American self-understanding, or drawn upon in American diplomacy and communication throughout the world.

In sum, as much if not more than any other single provision in the entire Constitution, the Religious Liberty provisions hold the key to American distinctiveness and American destiny. Far from being settled by the interpretations of judges and historians, the last word on the First Amendment likely rests in a chapter yet to be written, documenting the unfolding drama of America. If religious liberty is neglected, all civil liberties will suffer. If it is guarded and sustained, the American experiment will be the more secure.

## II. A TIME FOR REAPPRAISAL

Much of the current controversy about religion and politics neither reflects the highest wisdom of the First Amendment nor serves the best interests of the disputants or the nation. We therefore call for a critical reappraisal of the course and consequences of such controversy. Four widespread errors have exacerbated the controversy needlessly.

### 1. The Issue Is Not Only What We Debate, but How

The debate about religion in public life is too often misconstrued as a clash of ideologies alone, pitting "secularists" against the "sectarians" or vice versa. Though competing and even contrary worldviews are involved, the controversy is not solely ideological. It also flows from a breakdown in understanding of how personal and communal beliefs should be related to public life.

The American republic depends upon the answers to two questions. By what ultimate truths ought we to live? And how should these be related to public life? The first question is personal, but has a public dimension because of the connection between beliefs and public virtue. The American answer to the first question is that the govern-



ment is excluded from giving an answer. The second question, however, is thoroughly public in character, and a public answer is appropriate and necessary to the well-being of this society.

This second question was central to the idea of the First Amendment. The Religious Liberty provisions are not "articles of faith" concerned with the substance of particular doctrines or of policy issues. They are "articles of peace" concerned with the constitutional constraints and the shared prior understanding within which the American people can engage their differences in a civil manner and thus provide for both religious liberty and stable public government.

Conflicts over the relationship between deeply held beliefs and public policy will remain a continuing feature of democratic life. They do not discredit the First Amendment, but confirm its wisdom and point to the need to distinguish the Religious Liberty clauses from the particular controversies they address. The clauses can never be divorced from the controversies they address, but should always be held distinct. In the public discussion, an open commitment to the constraints and standards of the clauses should precede and accompany debate over the controversies.

## 2. The Issue Is Not Sectarian, but National

The role of religion in American public life is too often devalued or dismissed in public debate, as though the American people's historically vital religious traditions were at best a purely private matter and at worst essentially sectarian and divisive.

Such a position betrays a failure of civil respect for the convictions of others. It also underestimates the degree to which the Framers relied on the American people's religious convictions to be what Tocqueville described as "the first of their political institutions." In America, this crucial public role has been played by diverse beliefs, not so much despite disestablishment as because of disestablishment.

The Founders knew well that the republic they established represented an audacious gamble against long historical odds. This form of government depends upon ultimate beliefs, for otherwise we have no right to the rights by which it thrives, yet rejects any official formulation of them. The republic will therefore always remain an "undecided experiment" that stands or falls by the dynamism of its non-established faiths.

### 3. The Issue Is Larger Than the Disputants

Recent controversies over religion and public life have too often become a form of warfare in which individuals, motives and reputations have been impugned. The intensity of the debate is commensurate with the importance of the issues debated, but to those engaged in this warfare we present two arguments for reappraisal and restraint.

The lesser argument is one of expediency and is based on the ironic fact that each side has become the best argument for the other. One side's excesses have become the other side's arguments; one side's extremists the other side's recruiters. The danger is that, as the ideological warfare becomes self-perpetuating, more serious issues and broader national interests will be forgotten and the bitterness deepened.

The more important argument is one of principle and is based on the fact that the several sides have pursued their objectives in ways which contradict their own best ideals. Too often, for example, religious believers have been uncharitable, liberals have been illiberal, conservatives have been insensitive to tradition, champions of tolerance have been intolerant, defenders of free speech have been censorious, and citizens of a republic based on democratic accommodation have succumbed to a habit of relentless confrontation.

### 4. The Issue Is Understandably Threatening

The First Amendment's meaning is too often debated in ways that ignore the genuine grievances or justifiable fears of opposing points of view. This happens when the logic of opposing arguments favors either an unwarranted intrusion of religion into public life or an unwarranted exclusion of religion from it. History plainly shows that with religious control over government, political freedom dies; with political control over religion, religious freedom dies.

The First Amendment has contributed to avoiding both these perils, but this happy experience is no cause for complacency. Though the United States has escaped the worst excesses experienced elsewhere in the world, the republic has shown two distinct tendencies of its own, one in the past and one today.

In earlier times, though lasting well into the twentieth century, there was a *de facto* semi-establishment of one religion in the United States: a generalized Protestantism given dominant status in national institutions, especially in the public schools. This development was

largely approved by Protestants, but widely opposed by non-Protestants, including Catholics and Jews.

In more recent times, and partly in reaction, constitutional jurisprudence has tended, in the view of many, to move toward the de facto semi-establishment of a wholly secular understanding of the origin, nature and destiny of humankind and of the American nation. During this period, the exclusion of teaching about the role of religion in society, based partly upon a misunderstanding of First Amendment decisions, has ironically resulted in giving a dominant status to such wholly secular understandings in many national institutions. Many secularists appear as unconcerned over the consequences of this development as were Protestants unconcerned about their de facto establishment earlier.

Such de facto establishments, though seldom extreme, usually benign and often unwitting, are the source of grievances and fears among the several parties in current controversies. Together with the encroachments of the expanding modern state, such de facto establishments, as much as any official establishment, are likely to remain a threat to freedom and justice for all.

Justifiable fears are raised by those who advocate theocracy or the coercive power of law to establish a "Christian America." While this advocacy is and should be legally protected, such proposals contradict freedom of conscience and the genius of the Religious Liberty provisions.

At the same time there are others who raise justifiable fears of an unwarranted exclusion of religion from public life. The assertion of moral judgments as though they were morally neutral, and interpretations of the "wall of separation" that would exclude religious expression and argument from public life, also contradict freedom of conscience and the genius of the provisions.

Civility obliges citizens in a pluralistic society to take great care in using words and casting issues. The communications media have a primary role, and thus a special responsibility, in shaping public opinion and debate. Words such as public, secular and religious should be free from discriminatory bias. "Secular purpose," for example, should not mean "non-religious purpose" but "general public purpose." Otherwise, the impression is gained that "public is equivalent to secular; religion is equivalent to private." Such equations are neither accurate nor just. Similarly, it is false to equate "public" and "governmental." In a society that sets store by the necessary limits on

government, there are many spheres of life that are public but non-governmental.

Two important conclusions follow from a reappraisal of the present controversies over religion in public life. First, the process of adjustment and readjustment to the constraints and standards of the Religious Liberty provisions is an ongoing requirement of American democracy. The Constitution is not a self-interpreting, self-executing document; and the prescriptions of the Religious Liberty provisions cannot by themselves resolve the myriad confusions and ambiguities surrounding the right ordering of the relationship between religion and government in a free society. The Framers clearly understood that the Religious Liberty provisions provide the legal construct for what must be an ongoing process of adjustment and mutual give-and-take in a democracy.

We are keenly aware that, especially over state-supported education, we as a people must continue to wrestle with the complex connections between religion and the transmission of moral values in a pluralistic society. Thus, we cannot have, and should not seek, a definitive, once for all solution to the questions that will continue to surround the Religious Liberty provisions.

Second, the need for such a readjustment today can best be addressed by remembering that the two clauses are essentially one provision for preserving religious liberty. Both parts, No establishment and Free exercise, are to be comprehensively understood as being in the service of religious liberty as a positive good. At the heart of the Establishment clause is the prohibition of state sponsorship of religion and at the heart of Free Exercise clause is the prohibition of state interference with religious liberty.

No sponsorship means that the state must leave to the free citizenry the public expression of ultimate beliefs, religious or otherwise, providing only that no expression is excluded from, and none governmentally favored, in the continuing democratic discourse.

No interference means the assurance of voluntary religious expression free from governmental intervention. This includes placing religious expression on an equal footing with all other forms of expression in genuinely public forums.

No sponsorship and no interference together mean fair opportunity. That is to say, all faiths are free to enter vigorously into public life and to exercise such influence as their followers and ideas engender. Such democratic exercise of influence is in the best tradition of

American voluntarism and is not an unwarranted "imposition" or "establishment."

### III. A TIME FOR RECONSTITUTION

We believe, finally, that the time is ripe for a genuine expansion of democratic liberty, and that this goal may be attained through a new engagement of citizens in a debate that is reordered in accord with constitutional first principles and considerations of the common good. This amounts to no less than the reconstitution of a free republican people in our day. Careful consideration of three precepts would advance this possibility:

#### 1. The Criteria Must Be Multiple

Reconstitution requires the recognition that the great dangers in interpreting the Constitution today are either to release interpretation from any demanding criteria or to narrow the criteria excessively. The first relaxes the necessary restraining force of the Constitution, while the second overlooks the insights that have arisen from the Constitution in two centuries of national experience.

Religious liberty is the only freedom in the First Amendment to be given two provisions. Together the clauses form a strong bulwark against suppression of religious liberty, yet they emerge from a series of dynamic tensions which cannot ultimately be relaxed. The Religious Liberty provisions grow out of an understanding not only of rights and a due recognition of faiths but of realism and a due recognition of factions. They themselves reflect both faith and skepticism. They raise questions of equality and liberty, majority rule and minority rights, individual convictions and communal tradition.

The Religious Liberty provisions must be understood both in terms of the Framers' intentions and history's sometimes surprising results. Interpreting and applying them today requires not only historical research but moral and political reflection.

The intention of the Framers is therefore a necessary but insufficient criterion for interpreting and applying the Constitution. But applied by itself, without any consideration of immutable principles of justice, the intention can easily be wielded as a weapon for governmental or sectarian causes, some quoting Jefferson and brandishing No establishment and others citing Madison and brandishing Free exercise. Rather, we must take the purpose and text of the Constitution seriously, sustain the principles behind the words and add an appreci-

ation of the many-sided genius of the First Amendment and its complex development over time.

## 2. The Consensus Must Be Dynamic

Reconstitution requires a shared understanding of the relationship between the Constitution and the society it is to serve. The Framers understood that the Constitution is more than parchment and ink. The principles embodied in the document must be affirmed in practice by a free people since these principles reflect everything that constitutes the essential forms and substance of their society — the institutions, customs and ideals as well as the laws. Civic vitality and the effectiveness of law can be undermined when they overlook this broader cultural context of the Constitution.

Notable, in this connection is the striking absence today of any national consensus about religious liberty as a positive good. Yet religious liberty is indisputably what the Framers intended and what the First Amendment has preserved. Far from being a matter of exemption, exception or even toleration, religious liberty is an inalienable right. Far from being a sub-category of free speech or a constitutional redundancy, religious liberty is distinct and foundational. Far from being simply an individual right, religious liberty is a positive social good. Far from denigrating religion as a social or political "problem," the separation of Church and State is both the saving of religion from the temptation of political power and an achievement inspired in large part by religion itself. Far from weakening religion, disestablishment has, as an historical fact, enabled it to flourish.

In light of the First Amendment, the government should stand in relation to the churches, synagogues and other communities of faith as the guarantor of freedom. In light of the First Amendment, the churches, synagogues and other communities of faith stand in relation to the government as generators of faith, and therefore contribute to the spiritual and moral foundations of democracy. Thus, the government acts as a safeguard, but not the source, of freedom for faiths, whereas the churches and synagogues act as a source, but not the safeguard, of faiths for freedom.

The Religious Liberty provisions work for each other and for the federal idea as a whole. Neither established nor excluded, neither preferred nor proscribed, each faith (whether transcendent or naturalistic) is brought into a relationship with the government so that each is

separated from the state in terms of its institutions, but democratically related to the state in terms of individuals and its ideas.

The result is neither a naked public square where all religion is excluded, nor a sacred public square with any religion established or semi-established. The result, rather, is a civil public square in which citizens of all religious faiths, or none, engage one another in the continuing democratic discourse.

### 3. The Compact Must Be Mutual

Reconstitution of a free republican people requires the recognition that religious liberty is a universal right joined to a universal duty to respect that right.

In the turns and twists of history, victims of religious discrimination have often later become perpetrators. In the famous image of Roger Williams, those at the helm of the Ship of State forget they were once under the hatches. They have, he said, "One weight for themselves when they are under the hatches, and another for others when they come to the helm." They show themselves, said James Madison, "as ready to set up an establishment which is to take them in as they were to pull down that which shut them out." Thus, benignly or otherwise, Protestants have treated Catholics as they were once treated, and secularists have done likewise with both.

Such inconsistencies are the natural seedbed for the growth of a *de facto* establishment. Against such inconsistencies we affirm that a right for one is a right for another and a responsibility for all. A right for a Protestant is a right for an Orthodox is a right for a Catholic is a right for a Jew is a right for a Humanist is a right for a Mormon is a right for a Muslim is a right for a Buddhist — and for the followers of any other faith within the wide bounds of the republic.

That rights are universal and responsibilities mutual is both the premise and the promise of democratic pluralism. The First Amendment, in this sense, is the epitome of public justice and serves as the golden rule for civic life. Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves. Whereas the wearer of the English crown is officially the Defender of the Faith, all who uphold the American Constitution are defenders of the rights of all faiths.

From this axiom, that rights are universal and responsibilities mutual, derives guidelines for conducting public debates involving religion in a manner that is democratic and civil. These guidelines are

not, and must not be, mandated by law. But they are, we believe, necessary to reconstitute and revitalize the American understanding of the role of religion in a free society.

First, those who claim the right to dissent should assume the responsibility to debate: Commitment to democratic pluralism assumes the coexistence within one political community of groups whose ultimate faith commitments may be incompatible, yet whose common commitment to social unity and diversity does justice to both the requirements of individual conscience and the wider community. A general consent to the obligations of citizenship is therefore inherent in the American experiment, both as a founding principle ("We the people") and as a matter of daily practice.

There must always be room for those who do not wish to participate in the public ordering of our common life, who desire to pursue their own religious witness separately as conscience dictates. But at the same time, for those who do wish to participate, it should be understood that those claiming the right to dissent should assume the responsibility to debate. As this responsibility is exercised, the characteristic American formula of individual liberty complemented by respect for the opinions of others permits differences to be asserted, yet a broad, active community of understanding to be sustained.

Second, those who claim the right to criticize should assume the responsibility to comprehend: One of the ironies of democratic life is that freedom of conscience is jeopardized by false tolerance as well as by outright intolerance. Genuine tolerance considers contrary views fairly and judges them on merit. Debased tolerance so refrains from making any judgment that it refuses to listen at all. Genuine tolerance honestly weighs honest differences and promotes both impartiality and pluralism. Debased tolerance results in indifference to the differences that vitalize a pluralistic democracy.

Central to the difference between genuine and debased tolerance is the recognition that peace and truth must be held in tension. Pluralism must not be confused with, and is in fact endangered by, philosophical and ethical indifference. Commitment to strong, clear philosophical and ethical ideas need not imply either intolerance or opposition to democratic pluralism. On the contrary, democratic pluralism requires an agreement to be locked in public argument over disagreements of consequence within the bonds of civility.

The right to argue for any public policy is a fundamental right for every citizen; respecting that right is a fundamental responsibility



for all other citizens. When any view is expressed, all must uphold as constitutionally protected its advocate's right to express it. But others are free to challenge that view as politically pernicious, philosophically false, ethically evil, theologically idolatrous, or simply absurd, as the case may be seen to be.

Unless this tension between peace and truth is respected, civility cannot be sustained. In that event, tolerance degenerates into either anathetic relativism or a dogmatism as uncritical of itself as it is uncomprehending of others. The result is a general corruption of principled public debate.

Third, those who claim the right to influence should accept the responsibility not to inflame: Too often in recent disputes over religion and public affairs, some have insisted that any evidence of religious influence on public policy represents an establishment of religion and is therefore precluded as an improper "imposition." Such exclusion of religion from public life is historically unwarranted, philosophically inconsistent and profoundly undemocratic. The Framers' intention is indisputably ignored when public policy debates can appeal to the theses of Adam Smith and Karl Marx, or Charles Darwin and Sigmund Freud but not to the Western religious tradition in general and the Hebrew and Christian Scriptures in particular. Many of the most dynamic social movements in American history, including that of civil rights, were legitimately inspired and shaped by religious motivation.

Freedom of conscience and the right to influence public policy on the basis of religiously informed ideas are inseverably linked. In short, a key to democratic renewal is the fullest possible participation in the most open possible debate.

Religious liberty and democratic civility are also threatened, however, from another quarter. Overreacting to an improper veto on religion in public life, many have used religious language and images not for the legitimate influencing of policies but to inflame politics. Politics is indeed an extension of ethics and therefore engages religious principles; but some err by refusing to recognize that there is a distinction, though not a separation, between religion and politics. As a result, they bring to politics a misplaced absoluteness that idolizes politics, "Satanizes" their enemies and politicizes their own faith.

Even the most morally informed policy positions involve prudential judgments as well as pure principle. Therefore, to make an absolute equation of principles and policies inflates politics and does

violence to reason, civil life and faith itself. Politics has recently been inflamed by a number of confusions: the confusion of personal religious affiliation with qualification or disqualification for public office; the confusion of claims to divine guidance with claims to divine endorsement; and the confusion of government neutrality among faiths with government indifference or hostility to religion.

Fourth, those who claim the right to participate should accept the responsibility to persuade: Central to the American experience is the power of political persuasion. Growing partly from principle and partly from the pressures of democratic pluralism, commitment to persuasion is the corollary of the belief that conscience is inviolable, coercion of conscience is evil, and the public interest is best served by consent hard won from vigorous debate. Those who believe themselves privy to the will of history brook no argument and need never tarry for consent. But to those who subscribe to the idea of government by the consent of the governed, compelled beliefs are a violation of first principles. The natural logic of the Religious Liberty provisions is to foster a political culture of persuasion which admits the challenge of opinions from all sources.

Arguments for public policy should be more than private convictions shouted out loud. For persuasion to be principled, private convictions should be translated into publicly accessible claims. Such public claims should be made publicly accessible for two reasons: first, because they must engage those who do not share the same private convictions, and second, because they should be directed toward the common good.

### RENEWAL OF FIRST PRINCIPLES

We who live in the third century of the American republic can learn well from the past as we look to the future. Our Founders were both idealists and realists. Their confidence in human abilities was tempered by their skepticism about human nature. Aware of what was new in their times, they also knew the need for renewal in times after theirs. "No free government, or the blessings of liberty," wrote George Mason in 1776, "can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."

True to the ideals and realism of that vision, we who sign this Charter, people of many and various beliefs, pledge ourselves to the

enduring precepts of the First Amendment as the cornerstone of the American experiment in liberty under law.

We address ourselves to our fellow citizens, daring to hope that the strongest desire of the greatest number is for the common good. We are firmly persuaded that the principles asserted here require a fresh consideration, and that the renewal of religious liberty is crucial to sustain a free people that would remain free. We therefore commit ourselves to speak, write and act according to this vision and these principles. We urge our fellow citizens to do the same.

To agree on such guiding principles and to achieve such a compact will not be easy. Whereas a law is a command directed to us, a compact is a promise that must proceed freely from us. To achieve it demands a measure of the vision, sacrifice and perseverance shown by our Founders. Their task was to defy the past, seeing and securing religious liberty against the terrible precedents of history. Ours is to challenge the future, sustaining vigilance and broadening protections against every new menace, including that of our own complacency. Knowing the unquenchable desire for freedom, they lit a beacon. It is for us who know its blessings to keep it burning brightly.

No. 87-416

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In The  
**Supreme Court of the United States**  
October Term, 1987

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UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,  
*Petitioners,*

v.

ABORTION RIGHTS MOBILIZATION, INC.,

and

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, and  
LAWRENCE B. GIBBS, COMMISSIONER OF INTERNAL REVENUE,  
*Respondents.*

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On Certiorari to the Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL OF  
CHURCHES OF CHRIST IN THE U.S.A., THE AMERICAN  
JEWISH CONGRESS, JAMES E. ANDREWS AS STATED CLERK  
OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN  
CHURCH (U.S.A.), THE BAPTIST JOINT COMMITTEE ON  
PUBLIC AFFAIRS, THE CATHOLIC LEAGUE FOR RELIGIOUS  
AND CIVIL RIGHTS, THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, THE LUTHERAN CHURCH-MISSOURI  
SYNOD, THE NATIONAL ASSOCIATION OF EVANGELICALS,  
THE SYNAGOGUE COUNCIL OF AMERICA, AND THE  
WORLDWIDE CHURCH OF GOD, IN SUPPORT OF PETI-  
TIONERS

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**QUESTIONS PRESENTED**

Whether an order holding a major religious body in civil contempt and imposing substantial fines for refusal to comply with massive discovery requests for sensitive internal church records should be vacated for want of subject matter jurisdiction because the plaintiffs lack standing, either as voters or as members of the clergy, to challenge directly the tax-exempt status of the religious body.

Whether a major religious body held in civil contempt may be denied standing as a witness to challenge the underlying jurisdiction of the federal court that ordered the discovery that triggered the contempt citation, on the view that "colorable" jurisdiction suffices to postpone consideration of the church's jurisdictional challenge until the requested discovery of the church's records is completed and the underlying action to revoke the tax-exempt status of the church is decided on the merits.

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## STATEMENT OF INTERESTS

Amici curiae are major religious bodies in the United States or membership organizations concerned with the preservation of religious freedom. This brief is directed to the profound implications of this case for religious freedom. Every aspect of this case, including the substantive theory of the plaintiff's case, threatens core values of the Religion Clause. The autonomy and integrity of all religious bodies is threatened by conferring standing on private parties hostile to the moral teaching of a target church to litigate to revoke the exempt status of that religious body. (Part I, *infra*). The freedom of religious bodies is likewise threatened by denying appellate standing to a church held in civil contempt until the discovery of its internal records has been completed by hostile outsiders and a decision has been reached on the merits of the claims of these outsiders. (Part II, *infra*). Indeed, religious freedom suffers from the very court orders that the church is attempting to appeal in this case, for those orders purport to compel massive discovery of sensitive internal church records by ideological opponents of the church and to enforce the discovery order by a contempt citation imposing coercive fines on the church for its refusal to comply with the discovery order. (Part III, *infra*). From beginning to end, this case is a First Amendment nightmare. Amici hold widely varying views on the ethics of abortion, but are in concerted agreement on these First Amendment issues.

These First Amendment issues are adequately preserved in the record of this case. The petitioners, however, have chosen to present this case to this Court pri-

marily as a technical matter of standing, without focusing in detail on the claims arising under the Religion Clause. This Court may decide the case as the petitioners have presented it, but amici urge that it consider the standing issues in light of First Amendment considerations set forth in this brief. In a case so pervaded with sensitive issues arising under the Religion Clause, there is an enormous risk of dictum which may later be taken to preclude or limit further consideration of these issues. This brief informs this Court of the First Amendment implications of this case.

If this Court decides the case on the narrow ground suggested by the petitioners, amici urge this Court to limit its opinion carefully by reserving the question of intrusive civil discovery of the internal records of a religious body, and by refraining from dicta that would serve in any way to diminish the associational privacy of religious bodies by broadening the access of hostile outsiders to their internal records. If this Court decides the case on the narrow ground suggested by the petitioners, amici likewise urge this Court to reserve the question of the imposition of excessive fines on a religious body, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into whether the interest in behalf of the contempt order in this case was truly "compelling."

Counsel for petitioners and respondents have granted consent to the filing of this brief. The particular statement of interest of each amicus participating in this brief is contained in the appendix.

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### SUMMARY OF ARGUMENT

Amici are interested in the correct resolution of four mistakes in this case affecting religious freedom. The first two mistakes relate to the legal standing of the petitioners and the private respondents. The other two mistakes concern the threat to the autonomy and integrity of all religious bodies posed by the court order of discovery of sensitive internal records of a major religious denomination and by the imposition of coercive fines on that church in unprecedented severity. None of these constitutional errors is "harmless."

The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters or as members of the clergy, to challenge the tax-exempt status of a major religious organization. This mistake enlarges the power of the judiciary and diminishes the role of the executive over the administration of federal tax policy in a manner directly contrary both to the requirements of the constitution and to the clear intent of Congress. (Part I)

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of

the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. This mistake bootstraps the governmental interest in efficient administration of criminal justice into an undifferentiated and unreviewable power over religious bodies in a civil suit, on a record where it is plain that the church had no legal mechanism available to it other than civil contempt in order to seek appellate review of the first standing mistake. (Part II)

Religious freedom was also jeopardized by the ruling of the district court requiring the petitioners to hand over to the plaintiffs *massive amounts of sensitive internal church records*. These records include confidential tax returns which the private respondents may not obtain from the federal respondents because Congress has expressly prohibited the executive from disclosing such information to anyone, let alone to the political adversaries of a not-for-profit religious organization. Religious freedom was also threatened by the raw judicial power of the district court in holding a major religious body in civil contempt and in imposing *finer in the amount of \$100,000 per day on the church petitioners* for each day in which they refuse to comply with the court's compulsory discovery order. (Part III)

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**ARGUMENT****I. THE SENSITIVE TASK OF REVOCATION OF THE TAX-EXEMPT STATUS OF A NOT-FOR-PROFIT RELIGIOUS ORGANIZATION SHOULD NOT BE ENTRUSTED TO PRIVATE THIRD PARTIES WHO MAY ACT MERELY BECAUSE THEY DO NOT AGREE WITH THE RELIGIOUS MESSAGE OF THE EX-EMPT ORGANIZATION.**

Although this case is fraught with First Amendment difficulties of the highest magnitude, the standing issues are the principal matters now before this Court, and it is understandable that this Court may seek a narrow ground for disposing of this case. In the view of the amici, however, the correct disposition of these standing issues requires at least an awareness of the pernicious consequences to religious freedom and to the associational rights of religious communities which flow from the rulings of the courts below. The underlying reason for the petitioners' reluctant decision to allow itself to be held in contempt of court is its conviction, based on the advice of its legal counsel, that the district court lacks jurisdiction over the subject matter, and therefore is without power to enforce the subpoenas duces tecum of the plaintiffs, private third parties who attack the tax-exempt status of the church. In the petition for certiorari and brief in opposition, the parties discuss this case as though it presented an unadorned matter of standing. Amici urge that this Court view these standing matters through First Amendment lenses, in order to see the full seriousness of allowing the federal courts to be used by opponents of religious bodies to strip them of their exempt status.

The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters, *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 480-482 (S.D.N.Y. 1982), A. 69a-74a, or as members of the clergy, *id.* at 478-479, A. 67a-69a, to challenge the tax-exempt status of a major religious denomination, on the view that the federal respondents had allegedly “denigrated” the plaintiffs’ religious beliefs and “frustrated” their ministry by giving “tacit government endorsement of the Roman Catholic Church view of abortion.”

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to seek appellate review of the jurisdiction of the federal court to enter a compulsory discovery order massive in scope against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. (See II, *infra*). Both of these standing errors represent significant departures from the binding precedents of this Court,<sup>1</sup> and are addressed fully in the briefs of the petitioners and the federal respondents.<sup>2</sup> Al-

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<sup>1</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *United States v. Richardson*, 418 U.S. 166 (1972); and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1972).

<sup>2</sup> In this case the federal respondents agree with the petitioners that the district court lacks subject matter jurisdiction. Indeed, the government has sought review of this very issue in the court of appeals and this Court on repeated occasions. See, e.g., Briefs of the United States in Nos. 86-157 and 86-162.



though it is extremely unlikely that the petitioners in this particular case will modify their teaching on abortion, no matter what the outcome of the lawsuit, amici urge that the very threat of such litigation may impact severely on the ability of not-for-profit religious organizations to communicate their varying messages on matters of public concern.<sup>3</sup> For these reasons amici urge this Court to reverse the decisions below on the standing issues.

**A. The District Court erred in Conferring Standing on the Private Respondents (Plaintiffs below) to Challenge the Exempt Status of a Major Religious Organization on the Grounds that the Plaintiffs are either Voters or Members of the Clergy.**

This Court has clarified repeatedly that in order to have standing, a plaintiff must demonstrate actual or threatened injury that can fairly be “traced to the challenged action” and “is likely to be redressed by a favorable decision,” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Like this case, *Simon* involved a challenge to the tax-exempt status of third party organizations. In *Simon* this Court refused to find a causal link between a revenue ruling under I.R.C. § 501(c) (3) and a reduction in services to indigents. The *Simon*

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<sup>3</sup> As is evident from the statement of interests of the amici, some of the amici agree with the position of the petitioners on the abortion issue and others do not. Nonetheless, all of the amici are of one mind that in the American constitutional order a religious body must be free to address matters of public policy without being subjected on that account to harassing litigation by outsiders. For example, the American Jewish Congress and the Presbyterian Church should not be exposed to costly litigation by right to life advocates who might, under the theory advanced by the plaintiffs in the instant case, attack the exempt status of these organizations for allegedly excessive involvement in the political order on the opposite side of the abortion issue.

Court ruled that “[i]t is purely speculative whether the denials of service specified in the complaint fairly could be traced to petitioners’ encouragement or instead result from decisions made by the hospitals without regard to the tax implications,” *Id.* at 42-43. In *Allen v. Wright*, 468 U.S. 737 (1984), this Court held that even if a plaintiff has sustained an injury, standing is still deficient where “the injury alleged is not fairly traceable to the Government’s conduct . . . challenge[d] as unlawful.” *Id.* at 757. The *Allen* Court reasoned that it was “entirely speculative whether withdrawal of the tax exemption of racially discriminatory schools would have any impact on the ability of respondents’ children to receive a desegregated education.” *Id.* at 758.

### (i) Voter Standing

Ignoring the dictates of *Simon* and *Allen*, the district court conferred standing on the plaintiffs in their capacity as voters, on the view that they have somehow been disadvantaged by the federal respondents’ alleged “preferential treatment” of the church. The fallacious premise for this view is that taxed contributions translate into less voting power than non-taxed contributions. This analysis is flawed for two reasons. First, the plaintiffs have not experienced a cognizable injury in their capacity as voters. The actual voting power of each individual plaintiff at the polling place is not in the least restricted by campaign activities, whether conducted by taxed or tax-exempt organizations. The plaintiffs’ votes are no less significant than those of other voters. *Baker v. Carr*, 369 U.S. 186, 208 (1962).

Second, even if it were assumed that the plaintiffs in this case had suffered some palpable injury to their rights

of franchise, the injury was not caused by the actions of the government, as it was in *Baker v. Carr, supra*. The injury claimed is the purported "added influence" that the Catholic church has because of deductible contributions which it may spend on campaigns opposing abortion. This claimed injury is actually traceable neither to the federal respondents nor even to the petitioners, but to third party taxpayers who choose voluntarily to make charitable contributions to the petitioners. It is purely conjectural to believe that taxing these charitable gifts will in any significant way diminish voluntary giving to that church.<sup>4</sup> It is still more speculative to imagine that taxing these gifts would in any significant way decrease that church's efforts to influence abortion policy in this country, for the church's campaign against abortion is grounded in sincerely held religious beliefs. Because the claimed injury to voting rights is not cognizable injury which is traceable to governmental action or redressable by a court order, it is insufficient to confer standing on the private respondents in their capacity as voters to challenge the exempt status of the petitioners.

The remedy sought by the plaintiffs as voters, moreover, does not advance the First Amendment goal of affording more voices to be heard in our democracy. To the contrary, it seeks to penalize those who espouse a viewpoint on a public controversy different from that of the plaintiffs, and thus would have the effect of diminishing the flow of information to voters and to elected represen-

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<sup>4</sup> The hypothetical character of the plaintiffs' claim is underscored by the fact that the majority of taxpayers (60.8% in tax year 1985) do not itemize charitable contributions, but prefer to take the standard deduction. *IRS Statistics of Income Division Bulletin 1* (Winter 1986-87). With the increase of the standard deduction in the Tax Reform Act of 1986, tax analysts expect a further decrease in the number of taxpayers who itemize.

tatives. Allowing voters to resort to the courts to revoke the exempt status of a religious body because of its dissemination of views on matters of public concern has the inevitable effect of chilling the expression of moral views which have ramifications in public policy choices. Although a sound argument may be advanced for allowing voters greater access to the judiciary in order to ensure *fuller participation in the political process by all*, see, e.g., J. Ely, *Democracy and Distrust* 105-125 (1980), it makes no sense to expand the power of the nonpolitical branch to issue rulings that have the effect of chilling or *diminishing the pluralistic character of debate* on matters of public concern. For this reason as well, this Court should reverse the conclusion that plaintiffs have standing as voters to challenge the exempt status of the petitioners.

#### (ii) Clergy Standing

The district court likewise erred in conferring standing on the clergy plaintiffs on the view that the protected activity of the petitioners violates the rights of these clergy plaintiffs secured under the Establishment Clause. This conclusion is erroneous for three reasons. First, the mere fact that a plaintiff seeks relief under the Establishment Clause does not mean that the normal requirements for standing are diminished. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Important as the prohibition against governmental establishment of religion is in our society, it nonetheless remains true that not "all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

Second, a plaintiff must show direct and palpable injury caused by the illegal conduct of the defendant, not

mere psychological distress that one's view of the constitutional order has been offended. In *Valley Forge* the Court held that the plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. Similarly in *Allen, supra*, this Court denied standing to black parents who claimed that they suffered "stigmatic" injury because of the tax-exempt status of segregated private schools, on the view that the alleged injury was too abstract to fulfill standing requirements. 468 U.S. at 754-56.<sup>5</sup>

Mere mechanical pleadings raising claims of abstract stigmatic injury are not enough to expose a not-for-profit religious organization to costly litigation initiated by its ideological adversaries. The claimed injury to the clergy in this case is as intangible as the "psychological" injury found insufficient to confer standing in *Valley Forge* and the "abstract stigmatic" injury addressed in *Allen*. The extent of the "injury" to these members of the clergy is easy to assert, but difficult if not impossible to measure. Thus it is hard to imagine how the ability of the clergy plaintiffs to minister to their flocks could be helped in any significant way by the outcome of this liti-

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<sup>5</sup> Although *Allen* seems plainly to require the result that the private respondents lack standing, the district court in *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985), A. 93a-102a, expressly declined to modify its earlier ruling on voter and clergy member standing in the light of *Allen*, or even to certify the standing matter for purposes of an interlocutory appeal by the petitioners. The district court's refusal to certify its rulings on this matter for interlocutory appeal triggered the contempt proceedings as the only legal mechanism available to the petitioners to challenge the jurisdiction of the court to order massive discovery of sensitive internal church records. See Part III B, *infra*.

gation, for the plaintiffs are not seeking restoration of tax-exempt status for themselves, but the revocation of the exempt status of a third party.

Third, the substantive theory of the plaintiffs' case is based on the view that the severe restrictions on political speech imposed by I.R.C. § 501(c)(3) on exempt organizations are required by the First Amendment. Amended Complaint, par. 16 & 17.<sup>6</sup> It is, however, contrary to the clear teaching of this Court, *Walz v. Tax Commission*, 397 U.S. 664 (1970), to suppose that the grant of tax-exempt status to a religious body constitutes, as the district court imagined, impermissible "government endorsement of the Roman Catholic Church view of abortion," A. 67a, or "official approval of an orthodoxy." A. 68a.<sup>7</sup> And it is equally fanciful to suppose that the federal

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<sup>6</sup> In their brief before the court of appeals, plaintiffs urged that this result is required by the holding in *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). Congress, however, expressly declined to give its approval or disapproval to the rationale for § 501(c)(3) in *Christian Echoes*, Tax Reform Act of 1976, § 1307(b)(3), Pub. L. 84-455, 90 Stat. 1722.

Plaintiffs also rely on this Court's ruling in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), and *Cammarano v. United States*, 358 U.S. 498 (1959). Neither of these two tax cases, however, involved a religious body attempting to communicate its religious message on matters of public concern. *Taxation With Representation*, moreover, is not directly controlling because the "saving" feature of I.R.C. 501, viz., 501(c)(4), is of no practical use to a preacher, who cannot be required to announce at the beginning of a sermon whether he is speaking for a 501(c)(3) church or a 501(c)(4) clone, let alone to switch birettas or yarmulkes in the midst of such a sermon.

<sup>7</sup> In *Walz* this Court sustained tax exemption for property used exclusively for religious worship, on the view that, far from establishing religion, this practice avoided governmental interference with religion. In addition, the Court expressly noted: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this

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respondents have impliedly “denigrated” the religious beliefs of the plaintiffs who are members of the clergy or that the Secretary of the Treasury and the Commissioner of the IRS have in any way “frustrated” the ministry of those plaintiffs. On this record it is all too plain who is attempting to frustrate whom. It is the plaintiffs whose constitutional theory undermine the necessary degree of flexibility or “room for play in the joints” deemed appropriate in *Walz*, 397 U.S. at 669.<sup>8</sup> Although the plaintiffs who are clergy members may subjectively feel that their beliefs are “denigrated” by the tax-exempt status of the Catholic church, that is not enough to establish standing under this Court’s teaching in either *Simon* or *Allen*. It is, moreover, entirely speculative to conclude, as the district court did, that the revocation of the tax-exempt status of a religious body necessarily marks its decline in

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case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as secular bodies and private citizens have that right.” *Id.* at 670.

<sup>8</sup> It is difficult to conceive of greater rigidity than to give to any opponent of the teachings of a religious body access to federal court to seek an injunction to compel the revocation of that church’s exemption from the payment of federal income tax and a whole series of cascading events flowing from the loss of that status. With the loss of exempt status under I.R.C. § 501(c)(3), a religious body would not only have to pay taxes on all net income, but all contributions to the church would no longer be deductible by the contributing taxpayer for purposes of federal income tax, I.R.C. § 170(c)(2)(D), estate tax, I.R.C. §§ 2055(a)(2) and 2106(a)(2)(A)(ii), and gift tax, I.R.C. § 2522(a)(2). In addition, most of the states have parallel provisions in their tax codes which incorporate I.R.C. § 501(c)(3) by reference, for purposes of determining the exemption of a religious body from payment of a wide variety of state and local taxes. Some states, moreover, predicate their regulatory authority over an entity seeking charitable contributions on the entity’s federal tax-exempt status, conferring, for example, an exemption from annual reporting requirements to groups which are exempt under § 501(c)(3).

influence; this belief ignores the myriad of factors that influence the moral vitality of a religious community.

Like others who favor abortion, plaintiffs have First Amendment protection in advocating their views. As the diversity among religious bodies included among the amici demonstrates, the moral teaching of various religious bodies on abortion has not been contingent upon the teaching of the Catholic church on this matter, let alone on the even more attenuated question of whether that church enjoys tax-exempt status. The implication to the contrary in the district court's ruling in *ARM I* merely emphasizes the need for rules of standing that preclude the use of the federal courts for attacking religious organizations.

**B. The Private Respondents Lack Statutory Standing because Congress has Entrusted to the Federal Respondents the Sensitive Task of Granting and Revoking the Tax-exempt Status of Charitable Organizations.**

The standing requirement limits the jurisdiction of federal courts "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83, 97 (1968), and then only if Congress has conferred jurisdiction. Although plaintiffs have not claimed statutory standing, the basic posture that they occupy in this case is that of a private attorney-general seeking to compel enforcement of the tax law against a third party. Far from conferring statutory standing on the plaintiffs in this lawsuit, however, Congress has given several indications in the tax code that support the opposite conclusion.<sup>9</sup> In short, Congress plainly intended

<sup>9</sup> In the Anti-Injunction Act, I.R.C. § 7421(A), Congress prohibited suits to restrain assessment or collection of any tax,

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the administration of the code, including the granting and revocation of exempt status under § 501(c)(3), to be within the discretion of the federal respondents over whom Congress has a great deal of control through the oversight process, rather than within the boundless imagination of plaintiffs seeking to enforce their notions of tax equity in the federal courts.

The district court's view of standing, however, undermines the express intent of Congress by allowing private parties and the federal courts to usurp the role of both the legislative and executive branches, contrary to this Court's teaching in *Valley Forge* that Article III power is "not an unconditioned authority to determine the constitutionality of legislative or executive acts." 454 U.S. at 471. It is likewise clear under *Valley Forge* that the plaintiffs do not have "license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487. This Court should re-emphasize this teaching here, lest fundamental rights of religious autonomy be exposed to attack through lawsuits by hostile outsiders.

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whether brought by a taxpayer or, as here, by a third party. Congress has delegated the administration and enforcement of the tax laws exclusively to the Secretary and the Commissioner. I.R.C. § 7801(a). In addition, Congress gave to the federal respondents the power to "prescribe all needful rules and regulations for the enforcement of" those laws. I.R.C. § 7805(a). And Congress reserved for itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system (I.R.C. §§ 8001-8023). These provisions reflect congressional intent to operate the tax system within the legislative and executive branches. Congress, moreover, has expressly mandated that the IRS maintain the confidentiality of tax records, I.R.C. § 6103; and out of concern for the delicate character of religious freedom, Congress has expressly limited the power of the IRS to conduct audits of church bodies. I.R.C. § 7611.

Even when suits to compel the executive branch to undertake enforcement committed to its discretion are “premiered on allegations of several instances of violations of law, [they] are rarely if ever appropriate for federal-court adjudication.” *Allen*, 468 U.S. at 759-760. Noting that an agency decision regarding enforcement proceedings “has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’ U.S. Const., art. II, § 3,” *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), this Court has emphasized that executive agency decisions *not to enforce* are characteristically unsuitable for judicial resolution because this discretionary choice “often involves a complicated balancing of a number of factors which are peculiarly within its expertise.” *Id.* at 831.<sup>10</sup> One of the reasons why Congress has entrusted delicate decisions concerning the exempt status of religious organizations to the federal respondents is that they take an oath of office to support the constitutional limits on their own authority. Private litigants with their own agenda are under no such obligation to take into account the protections of the First Amendment. If this case is any indication, the likelihood that disgruntled third parties will be sensitive to the free speech and free exercise concerns of non-profit organizations they oppose is slim. To the contrary, the probability

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<sup>10</sup> Unlike the district court in this case, this Court and the lower federal courts typically defer to determinations of the IRS concerning discretionary applications of the provisions of the tax code. See, e.g., *National Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472 (1979); *Tax Analysts and Advocates v. Blumenthal*, 566 F. 2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978); *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978).

that religious organizations will become the target of third parties hostile to their religious perspective is high.<sup>11</sup>

The standing rule adopted by the district court could easily open up the floodgates to litigation against churches by those hostile to their mission or ideas. See, e.g., *Khalaf v. Regan*, 85-1 U.S. Tax Case Par. 9269 (D.D.C. 1985) (dismissing on standing principles effort of anti-zionist organization to revoke exempt status of Jewish charitable organizations because of their support of Israel); *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (dismissing on standing principles attack on exempt status of American Jewish Congress by business competitors). The potential for mischief of this sort, moreover, is compounded by the suggestion in *Bob Jones University v. United States*, 461 U.S. 574 (1983), that an exempt organization may lose its exempt status by failing to conform with "public policy," id. at 586, or by failing to "be in harmony with the public interest" id. at 592; but see at 606-612 (Powell, J., concurring; rejecting suggestion that "primary function of exempt organizations is to act on behalf of the Government in carrying out governmentally approved policies").

The district court's approach to standing, moreover, is not limited to religious not-for-profit organizations, but could readily affect exempt charitable organizations which are secular in character. For example, a member of the Ku Klux Klan who is a registered voter could sue the

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<sup>11</sup> Religious organizations may on occasion quarrel with the IRS over issues of governmental intrusion into areas deemed protected under the Religion Clause. See, e.g., D. Kelley, ed., *Government Intervention in Religious Affairs* (1982). But at least the known "devil" is better than unknown private adversaries whose name is "legion."

Secretary of the Treasury to revoke the exempt status of the NAACP if the civil rights education fund were to participate in voter education deemed impermissible under the restrictive regulations in Rev. Rul. 78-248 (construing § 501(c)(3) to prohibit distribution of accurate information to voters if the voter guide focuses on a single issue such as land conservation). Similarly, opponents and proponents of gun control could use the courts rather than the halls of Congress and other legislative chambers to carry on their debates. Even if their suits were ultimately dismissed on the merits, they would have succeeded in obtaining valuable information about their opponents that would otherwise be unavailable to them.

As this record illustrates, significant harm to religious freedom may result from subjecting religious bodies to inquiries which violate their legitimate autonomy. (Part III, *infra*). See Laycock, "Towards a General Theory of the Religion Clauses," 81 Colum.L.Rev. 1373 (1981). The cost of defending such suits, moreover, represents a significant diversion of funds earmarked for charitable works. None of the amici construe the biblical command to feed the hungry (e.g., Isaiah 58:7; Matt. 25:35) to refer primarily to lawyers. At the very least, such diversion of funds cannot be justified on the basis of protecting litigants whose tax liability is not at issue, and will not be affected by the outcome of the litigation. For these reasons this Court should reverse the district court's erroneous ruling on standing.

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**II. WHERE A MAJOR RELIGIOUS BODY IS HELD IN CIVIL CONTEMPT AS A WITNESS IN EXEMPTION-REVOCATION PROCEEDINGS INITIATED BY OUTSIDERS HOSTILE TO ITS MESSAGE ON A MATTER OF PUBLIC CONCERN, THE CHURCH HAS STANDING TO SEEK APPELLATE REVIEW OF THE UNDERLYING JURISDICTION OF THE DISTRICT COURT TO ORDER DISCOVERY OF SENSITIVE INTERNAL DOCUMENTS.**

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. *In re United States Catholic Conference*, 824 F. 2d 156 (2d Cir. 1987). A. 1a-43a.<sup>12</sup> In reaching this result, the court of appeals virtually ignored the recent teaching of this Court in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326 (1986), that “every federal appellate court has a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a case under review. . . .’” 106 S.Ct. at 1331 (emphasis added). Failing to distinguish an appeal from a contempt citation and a dilatory interlocutory appeal, the court of appeals asserted that the *Bender* rule is inapplicable to interlocutory appeals. The court of appeals devised a new rule of standing, according to which the petitioners’ challenge to the power of the district court to or-

<sup>12</sup> On this record it is plain that subjecting itself to a civil contempt citation was the only available legal mechanism to seek appellate review of the first standing mistake “before undertaking any burden of compliance with the subpoena.” *United States v. Ryan*, 402 U.S. 530, 533 (1971). See note 5 *supra*.

der massive discovery of the sensitive internal documents of a major religious body must fail if the appellate tribunal finds a modicum of "colorable" jurisdiction in the lower court.

The court of appeals justified this conclusion by extensive reliance on *Blair v. United States*, 250 U.S. 273 (1919), a case which did not involve a religious body, but a challenge to the authority of the grand jury by a crucial witness in a criminal investigation. Whatever the need for the *Blair* rule in the special context of grand jury investigations, it makes little sense to extend the rule into an undifferentiated and unreviewable power of private plaintiffs over religious bodies in a civil suit, especially where the government does not assert the interest at issue in *Blair*. Even if this case were a criminal prosecution of a bogus "church," the normal rule for the judiciary would be to defer to the discretion of the executive in conducting the prosecution. See, e.g., *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965) (en banc), cert. denied, 381 U.S. 935. But this is not a case in which the government is aligned against a religious body because of an alleged violation of the tax code. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983). It is a case in which private parties seek to use the federal courts to inflict a penalty on a major religious body for the evident reason that they disagree with the moral teaching of that church on a controversial matter of public concern. Under these circumstances and in the light of *Heckler v. Chaney*, *supra*, this case is hardly an apt vehicle for extending the reach of the *Blair* rule to religious bodies which choose to speak out on matters of conscience that are controversial in nature.

**III. RELIGIOUS FREEDOM IS THREATENED WHEN FEDERAL COURTS DENY ANY MEANINGFUL REVIEW OF SUBSTANTIAL FINES IMPOSED ON A CHURCH FOR REFUSING TO DISCLOSE SENSITIVE INTERNAL DOCUMENTS RELATING TO PASTORAL PLANS FOR CONSTITUTIONALLY PROTECTED MORAL ADVOCACY ON MATTERS OF PUBLIC CONCERN.**

**A. Communicating sincerely held religious convictions on matters of public concern is protected activity.**

In the view of the private respondents, the severe restrictions on political speech imposed by I.R.C. § 501(c) (3) on exempt organizations are required by the First Amendment. Amended Complaint, par. 16 & 17. The underlying theory of the plaintiffs' case is that they must vindicate rights secured under the Establishment Clause because the federal respondents have failed to do so. In addition to the standing difficulties noted above, the major flaw with this theory is that this Court has clearly announced that, for Establishment Clause purposes, an exemption of religious bodies from the payment of taxes does not violate the First Amendment. *Walz v. Tax Commission*, 397 U.S. 664 (1970).<sup>13</sup> In disposing of this case, this Court need not and, indeed, should not address the plaintiffs' contention that § 501(c)(3) is constitutionally mandated. If, however, this Court deems it prudent to discuss the constitutionality of § 501(c)(3) in dictum, amici urge that no truly compelling governmental interest supports these statutory restraints. To the contrary, in order to safeguard the functioning of our democracy, the con-

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<sup>13</sup> Contrary to the suggestion of the private respondents, this ruling was not disturbed in *Taxation with Representation*, *supra*.

stitution should foster greater freedom of political speech rather than its inhibition or suppression.<sup>14</sup>

It is well settled that any statute that significantly burdens free speech rights may be sustained only on a showing by the government that the statute serves a truly "compelling state interest" and that the means chosen by the government to achieve this end is the alternative which is the least restrictive of cherished free speech rights. See e.g., *Hobbie v. Unemployment Appeals Commission*, 480 U.S. —, 107 S.Ct. 1046, 1049 (1987). It is also well settled that religious bodies are afforded additional constitutional protection precisely because of their religious character. The protection of the Free Exercise Clause may be invoked only by persons or groups whose sincerely held *religious* tenets are burdened by governmental action. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707, 717-718 (1981). In the leading decision directly relating this teaching to tax benefits, *Speiser v. Randall*, 357 U.S. 513 (1958), this Court stated:

It is settled that speech can be effectively limited by exercise of the taxing power. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. *Id.* at 518.

Thus, far from being constitutionally compelled by the First Amendment, the restrictions on the political speech

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<sup>14</sup> In another case before this Court during this Term amici have expressed their views that the Religion and Free Speech Clauses afford substantial protection against extensive governmental regulation of a religious body that chooses to announce sincerely held religious beliefs directly relating to matters of public concern. See Amicus Brief of Baptist Joint Committee on Public Affairs et al., in *Bemis Pentecostal Church v. State*, app. pending, No. 87-317.



of religious organizations in § 501(c)(3) are themselves vulnerable to constitutional attack because they are by no means the alternative least restrictive of their rights secured under the Religion Clause and the Free Speech Clause. Indeed, it is difficult to imagine a restriction more total than the absolute prohibition on any participation by a 501(c)(3) organization in a political campaign, whether on behalf of or in opposition to a candidate for public office. See e.g., *IRS Exempt Organizations Handbook* (IRM 7751) § 3(10)1; and see *Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii)*. It is likewise hard to imagine that IRS rulings virtually prohibiting voter education efforts by exempt organizations on topics of concern to the organization, see, e.g., *Rev. Rul. 78-160*, 1978-1 C.B. 153, revised by *Rev. Rul. 78-248*, 1978-1 C.B. 1545, and *Rev. Rul. 80-282*, 1980-2 C.B. 178, would pass muster in judicial review that took seriously the mandate of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that debate on issues of public concern must be “uninhibited, robust, and wide-open.” *Id.* at 270. See also *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J. concurring); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-778 (1978); and *Widmar v. Vincent*, 454 U.S. 263 (1981); Caron and Dessingue, “I.R.C. § 501(c)(3): Practical and Constitutional Implications of ‘Political’ Activity Restrictions,” 2 *J. of L. and Politics* 169 (1985) and literature cited *id.* at 180, n. 40, at 181, n. 41, and at 183 n. 54.

Not all of the amici have taken a position on the constitutionality of the restraints on religious organizations imposed in § 501(c)(3). All of the amici, however, have from time to time engaged in public communication of sincerely held religious convictions on matters of public concern. For example, amici and the representatives of a

host of other denominations and religious bodies are called upon regularly to express the views of religious groups on a wide variety of social and political issues with pressing ethical components. In testimony before the House Ways and Means Committee in 1972, Dr. J. Elliott Corbett of the United Methodist Church entered into the record of these hearings a policy declaration of his church which bespeaks the impossibility of any total severance of religion and politics in our society:

“We believe that churches have the right and the duty to speak and act corporately on those matters of public policy which involve basic moral or ethical issues and questions. Any concept of church-government relations which denies churches this role in the body politic strikes at the very core of the religious liberty. The attempt to influence the formation and execution of public policy at all levels of government is often the most effective means available to churches to keep before modern man the ideal of a society in which power [is] made to serve the ends of justice and freedom for all people.” *Legislative Activity by Certain Types of Exempt Organizations*, Hearings Before the House Ways and Means Committee, 92d Cong., 2d Sess. at 303, 305 (1972).

In a similar vein a representative of the National Jewish Community Relations Advisory Council (NJCRAC) generally supported participation of religious organizations in legislative matters:

Each of the affiliates of the NJCRAC regards its program as an expression of the tenets of the Jewish faith which it is organized to advance. Their activities are inspired by the Prophets' mandate to pursue justice. They believe that mandate governs man's life in all its aspects and requires those who adhere to the principles of Judaism to let their views be heard in support of justice for all. . . . The members of these organizations have banded together because they are Jews and believe that they have a responsibility to

express a Jewish point of view. . . . Thus, their activity is a form of religious expression. *Id.* at 99.<sup>15</sup>

If this Court addresses the issue of the constitutionality of § 501(c)(3) at all, it should at the very least acknowledge that the permissibility of the restraints on free speech found in this statute of recent vintage is an open question, as applied to a protected religious organization engaging in dissemination of its religious message.

**B. The massive scope of requested discovery threatens the autonomy of religious organizations.**

The means selected by the plaintiffs to achieve their goal in this case includes sweeping discovery requests that threaten the integrity and autonomy of religious bodies. The standing issue is intimately connected with the threat to religious autonomy posed by the discovery requests, for a court without jurisdiction over the subject matter clearly lacks authority to enforce subpoenas for production of documents, whether the subpoenas are narrow or broad. Amici are particularly troubled that this case might turn into an inadvertent precedent damaging the autonomy of religious bodies. Hence amici urge this Court to focus particular attention on the intrusive character of the excessively broad discovery requests in this case, and on the potential chilling effect that granting such requests entails for similarly situated religious bodies.

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<sup>15</sup> See also Statement of the Baptist Joint Committee on Public Affairs, *id.* at 282; Statement of the United States Catholic Conference, *id.* at 307-312. See also Statement of the Baptist Joint Committee on Public Affairs, in *Influencing Legislation by Public Charities*, Hearing Before the House Ways and Means Committee, 94th Cong., 2d Sess. (1976); Statement of the Lutheran Council in the U.S.A., *id.* at 75-76; Statement on Behalf of the National Council of Churches of Christ in the U.S.A., *id.* at 81-82; and Statement of the United States Catholic Conference, *id.* at 90.

Even if the district court had jurisdiction over the subject matter because at least some of the plaintiffs have standing to sue the defendants, the district court nonetheless erred in ordering massive compulsory production of internal church documents to a private third party and extensive depositions of church officials and employees.<sup>16</sup>

In the view of amici, the plaintiffs' discovery requests are seriously intrusive upon the autonomy and integrity of religious bodies. In the process of attempting to prove their case on the merits, attorneys for the plaintiffs have proceeded against the petitioners with discovery requests that seek to examine in depth and in great detail virtually all significant relationships between Roman Catholic institutions at all levels and the entire political process. The subpoenas duces tecum addressed to the petitioners demand production of voluminous materials, including internal church discussions regarding the formulation and implementation of the Catholic Bishops' position on one of the most vexing and fundamental religious and political issues of our time, abortion.

If this Court sustains these subpoenas, the impact of this decision on the amici and similarly situated religious bodies could be staggering. There would be no principled way to differentiate between the plaintiffs in this case and opponents of another religious body suing the government to secure a judicial order revoking the tax-exempt status of that body the cause of its political involvement on any number of the other issues designated by the Catholic Bishops as "pro-life" matters (e.g., nuclear war, capital punishment, adequate health care, foreign

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<sup>16</sup> The subpoenas are described in the Petition for Certiorari, at 6-7, and more extensively in the Appellants' Brief before the court of appeals, at 9-12.

policy and immigration policies relating to Latin America or South Africa). Once such a plaintiff hostile to a church's moral teaching on any one of these themes had commenced an action like this case, the door would be wide open to dissipate the resources of a not-for-profit corporation dedicated exclusively to religious purposes. Congress surely never contemplated nor intended the result of costly litigation against religious bodies initiated by private third parties hostile to their moral teachings.

This Court, however, need not support the district court's order for such broad discovery against a non-party, for the plaintiffs' discovery rights are predicated upon the ground that its claims are not without merit. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Federal courts have denied discovery altogether where no proof of facts in support of a claim would entitle the party seeking discovery to relief. See, e.g., *Westminster Investing Corp. v. G.C. Murphy*, 434 F.2d 521 (D.C. Cir. 1970). Plaintiffs ground their cause of action: (a) on the view that as registered voters they have suffered a diminution of the strength of their franchise because of alleged governmental "subsidy" of the petitioners, and (b) on the view that as members of the clergy their religious convictions have been "denigrated" by an official policy of preferential treatment of the petitioners over other religious bodies who disagree with the petitioners on the issue of abortion. As was argued above, neither of these claimed bases for standing is significantly different from the bases unsuccessfully asserted by the plaintiffs in *Allen v. Wright*, 468 U.S. 737 (1984).

For these reasons, the legal predicate underlying the plaintiffs' discovery requests is seriously flawed, and their subpoenas should not be enforced.

**C. The penalties imposed on the petitioners are excessive because certification is an equally effective alternative less restrictive of religious autonomy.**

It is well settled that religious bodies are afforded additional constitutional protection precisely because of their religious character. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The freedom of religious bodies to address many vexing social problems from a religious perspective should not be conditioned upon their compliance with overbroad and intrusive discovery orders. Nor should religious bodies be subjected to excessive sanctions for seeking appellate review of the underlying power of the court to issue such orders, unless the government can demonstrate that it has utilized the least restrictive means of achieving a truly compelling governmental interest. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. —, 107 S.Ct. 1046, 1049 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The requirement of a less restrictive alternative announced in *Sherbert* is all the more appropriate in this case, involving the contempt power, which should be enforced by the smallest sanction needed to be effective, or “the least possible power adequate to the end proposed.” *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

In this case, the district court plainly had an effective and less burdensome alternative readily available. All of the painful confrontation between the judiciary and a major religious body over the past two years could have been avoided by certifying the ruling on standing for purposes of interlocutory appeal under 28 U.S.C. § 1292(b). Where the delicate issue of religious freedom hangs in the balance, the refusal of the district court to certify his standing ruling, even after the plain teaching

of this Court in *Allen*, constitutes an abuse of discretion so significant that this Court should reverse the district court on this matter.

The permissibility of the contempt citation imposed upon the petitioners under the facts in this case and under free exercise standards is adequately preserved on this record, but this Court may likewise avoid a decision on this issue by focusing on the standing questions. In the event that this Court elects this path, amici urge this Court to make plain that the imposition of coercive fines of the magnitude in this case is a reserved question, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into whether the interest protected by the contempt order in this case was truly “compelling.”

**CONCLUSION**

For the reasons set forth in this brief, amici curiae urge this court to reverse the judgment of the court of appeals denying standing to the church witness to seek appellate review of a contempt citation, accompanied by coercive fines, that were imposed because of the church's refusal to comply with intrusive discovery requests for sensitive internal records. Amici likewise urge this court to correct the error of the district court in *ARM I* that any of the plaintiffs have standing.

Respectfully submitted,

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## App. 1

## APPENDIX

STATEMENT OF INTERESTS OF  
INDIVIDUAL AMICI

The National Council of Churches of Christ in the U.S.A. [NCC] is a community of thirty-one religious communions numbering over 40 million members. Some of these communions would agree with the views expressed by the petitioners concerning the morality of abortion; some of them would disagree. All of them have agreed, however—through their representatives on the Governing Board of the NCC—in support of religious bodies and all citizen groups to speak and to act on questions of public policy without suffering state-imposed penalties or disabilities. The Governing Board of the NCC has specifically recommended that its member communions not impair the relationships of confidence and trust within the religious community by disclosing to outsiders “the names of contributors, members, constituents . . . [or] personnel files, correspondence or other confidential and/or internal documents or information.” The NCC joins this brief in support of the right of a religious body to be free of governmental constraint to disclose such information to hostile outsiders.

The American Jewish Congress is a national organization of American Jews founded in 1918 to protect the civil, political, and religious rights of American Jews. It is exempt from taxation pursuant to I.R.C. § 501(c)(3). Although it was an early supporter of freedom of choice in abortion, and hence an opponent of the Roman Catholic position on abortion, it believes that the private respondents lack standing to challenge the church’s tax-exempt status. To hold otherwise would expose tax-

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exempt organizations to a campaign of intimidation by litigation.

James E. Andrews is the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), a national, Christian denomination with churches in all fifty states. It has approximately 3.1 million active members and approximately 11,700 congregations organized into 189 presbyteries and 20 synods. The General Assembly is the highest governing body of the church, meets annually, is composed of approximately 670 delegates known as commissioners, who are elected by the presbyteries. One-half of the commissioners are ordained clergy and the other half are ordained lay officers known as elders. This brief does not purport to reflect the views of all members of the church, but is based on policies decided by the General Assembly, or incorporated into the Constitution of the Presbyterian Church (U.S.A.) by vote of the presbyteries. The policies established by the General Assembly of the Presbyterian Church (U.S.A.) are not in agreement with the views of the petitioners with regard to matters of abortion rights and pro-life issues, but are in substantial agreement with the views on constitutional rights and religious liberty expressed in this brief.

The Baptist Joint Committee on Public Affairs [BJCPA] consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Con-

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ference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The BJCPA has as one of its mandates the obligation to respond "whenever Baptist principles are involved in, or are jeopardized through, governmental action." Among Baptists, the freedom of the church from entangling relationships with the government is a fundamental and sacred principle.

The Catholic League for Religious and Civil Rights [League] is a civil rights and anti-defamation organization, national in membership, dedicated to the defense of religious liberty and freedom of expression. Although the League does not purport to speak directly as the official voice of a religious body, this case raises substantial questions relating to central concerns of the League's members. When antagonists of a particular church invoke the power of the government to conduct far-reaching and intrusive examination of sensitive internal church documents, religious liberty suffers. When political opponents seek to penalize protected expressive activity crucial to effective church teaching on matters of public concern by maintaining costly and burdensome lawsuits, genuine freedom of expression is chilled and cannot flourish.

The Church of Jesus Christ of Latter-Day Saints [LDS Church] has an international membership in excess of 6 million members with general headquarters in Salt Lake City, Utah. There are in excess of 8,400 congregations in the United States. This brief does not purport to reflect the views of all members, but is based upon a policy decision made by the hierarchical general leader-

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ship of the Church, viz., The First Presidency and The Quorum of the Twelve Apostles. Members of these leadership organizations are regularly sustained in their positions by the general Church membership. The preservation of religious freedom is a fundamental tenet of the LDS Church. The LDS Church is particularly concerned with the threat to religious freedom posed by the massive discovery of sensitive church records ordered by the district court in this case.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It has approximately sixty-two thousand member congregations which, in turn, have approximately 2.6 million individual members.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, including fifty thousand churches from seventy-eight denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates.

The Synagogue Council of America [SCA] is a coordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative, and Reformed. It is composed of: Central Conference of American Rabbis, representing the Reformed Rabbinate; Rabbinical Assembly, representing the Conservative Rabbinate; Rabbinical Council of America, representing the Orthodox Rabbinate; Union of American Hebrew Congregations, representing the Reformed Congregations; Union of Orthodox Jewish Congregations of

## App. 5

America, representing the Orthodox Congregations; and United Synagogue of America, representing the Conservative Congregations. SCA takes no position on the merits of the underlying issue of abortion. It joins the brief solely to reverse the error of the lower courts on the questions of the standing of the petitioners and of the excessiveness of the penalty.

The present era of the Worldwide Church of God [WCG] was founded by the late Herbert W. Armstrong in 1933. Its doctrines and practices are based on a literal understanding of the Bible. WCG has approximately 330,000 members, co-workers, donors, and other adult affiliates. It has approximately 780 local congregations in 40 nations around the world, pastored by at least 1,400 ordained ministers. WCG is wary of detractors being vested with the power of the State to attack a church because dissident former members induced a court to appoint a receiver who took control of the administrative affairs of the WCG and all of its assets. At the time of hearing no evidence was introduced to support the inflammatory accusations in the complaint. Because WCG was the target of direct governmental interference with its autonomy and integrity, it is particularly sensitive to the threat to religious freedom posed by giving ideological opponents of religion free-wheeling access to the courts to pursue their agenda.

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Mr. EDWARDS. Mr. Bopp, we will hear from you now.

**STATEMENT OF JAMES BOPP, GENERAL COUNSEL, NATIONAL RIGHT TO LIFE COMMITTEE, WASHINGTON, DC**

Mr. BOPP. Thank you, Mr. Chairman. It is an honor to testify before your committee again. National Right to Life Committee opposes H.R. 2797 without an amendment excluding the creation of a religiously based abortion right.

As General Counsel for the National Right to Life Committee for almost 15 years, one of my principal responsibilities has been participating in litigation with the goal of defending statutes which protect the unborn from abortion, and undermining and eventually overturning *Roe v. Wade*. I have participated as counsel for parties in 21 cases from California to Maine to Florida in that endeavor and have filed 28 amicus, friend of the court, briefs, primarily before the U.S. Supreme Court, on the abortion issue alone.

I have also participated in the scholarly debate on these issues by editing two books and publishing 11 scholarly articles on the abortion issue alone in law reviews and in textbooks.

This is not a theoretical matter for me but a practical one. It is a realization that since the 1960's, abortion rights advocates have sought to apply various labels to abortion in order to provide constitutional protection for an unfettered right to an abortion. They have called abortion a privacy right, they have called it a right to control one's body, they have called it sex discrimination, involuntary servitude, cruel and unusual punishment, reproductive freedom, choice, and finally religious freedom. It all is simply to bring about one result; that is, an unfettered right to abortion in America.

The National Right to Life Committee opposes unrestricted abortion under my label, because abortion is different than anything else that might fall within any of these categories. And that difference is that abortion amounts to the unjust taking of innocent human life, and therefore must be treated and considered specially.

Now, one of the favorite labels for unrestricted abortion has been the claim that the free exercise of religion protects the abortion decision of a woman. This has consistently been argued since the late 1960's, and in fact, there is a large organization created specially to make that claim, the Religious Coalition for Abortion Rights.

Since 1973, this claim has been often been argued, but rarely reached in litigation which I have participated in on abortion. The reason it has rarely been reached is because, in 1973, the Court accepted the privacy label to be applied to abortion, and therefore, since that is already a determined claim, it is much easier for courts to deal with it in considering litigation on this matter.

Now, this is not true with the question of abortion funding. In 1977, the Supreme Court rejected the argument that abortion funding violated the abortion right in *Roe*. And therefore, the ACLU made the claim in *Harris v. McCray* that such a funding restriction, the Hyde amendment passed by Congress, violated the free exercise clause of the U.S. Constitution.

The district court accepted that argument, but the Supreme Court did not reach the merits of it, but did hold something very important in this debate, and that is that in order to assert that

claim, it is required that the woman seek an abortion, "under compulsion of religious belief."

Now, since 1989, with the *Webster* decision demonstrating the weakness of the privacy right analysis of *Roe*, these claims have been pursued much more seriously. In the litigation attacking Guam's protective statute, the district court expressed sympathy to the free exercise claim, but decided the case under *Roe*. In Utah, the ACLU also made the free exercise claim which, in 1992, just a few months ago, the district court rejected because of *Smith*.

It is quite clear that in this time since 1973 to the present there have been two significant legal developments which have prevented a free exercise claim being successful against a protective abortion statute. One is the limited standing which the Court has announced in *Harris v. McCray* in 1980, and that is that the woman must demonstrate that an abortion is being sought, "under compulsion of religious belief." And second is that if the standing requirement is met, the *Smith* decision protects an abortion statute from being subjected to strict scrutiny because it is a law of general applicability.

Now, into this context comes RFRA. Now, RFRA doesn't use the term "compelled" or "motivated." It says a State may not, "burden a person's exercise over religion," without a compelling interest.

This is a new and statutory standard. It would, of course, overrule *Smith*, but more—equally importantly, it would overrule *Harris v. McCray*, because as Congressman Solarz admitted here today, his bill would allow not only claims compelled by religious belief, as *Harris* held, but also claims, "motivated by religious belief."

Thus, we would have not only *Smith* overruled but *Harris* as well. Thus, RFRA is not neutral about abortion; it is a very potent new legal weapon the Congress would hand the ACLU and abortion rights advocates in order to strike down protective abortion rights laws. It is intended to treat abortion as other religious claims, by subjecting those restrictions on abortion to a compelling interest. And as we know, since 1973, subjecting abortion to a compelling interest standard is very perilous for abortion restrictions. We nearly—very few restrictions on abortion would survive that standard.

Now, the ACLU has made it quite clear that they plan to pursue such religiously based claims on abortion. She said so in her testimony yesterday, which has already been quoted. And so are the others who have participated and assisted the author of this bill in formulating this legislation. On May 9, 1991, Mark Stern of the American Jewish Congress, speaking to the drafters who were assisting Representative Solarz in this matter, proposed language which they believed reflected the purpose of the bill, and they said, RFRA, "could be invoked by persons who for religious reasons wish to obtain or not participate in abortions where a law imposed contrary restrictions or allegations."

So we are talking about—as is made clear by those who support this legislation, we talking about not only compelled by religious belief but also motivated by it. In fact, in a letter to Congressman Solarz signed by various academics who have been strongly in support of this legislation, including Dean Gaffney, and Professor

Laycock, who will testify in the next panel, they argue it would be a mistake to tighten the language of the act by confining it to conduct, "compelled by," religious belief. They believe these motivated claims are in the statute.

Now, what are we talking about when we talk about a motivated claim? Well, you can look to the Utah legislation where the ACLU said that the woman plaintiff in that case should not be required to comply with the Utah statute because she felt that she, "could not morally continue in school and have too little time to devote to her newborn."

In addition, numerous religious denominations and the Religious Coalition on Abortion Rights filed a brief in *Webster* which claimed a very wide-ranging moral religious basis to exempt themselves from governmental restrictions on abortion. They said that, "the promotion of responsible parenthood and preservation of the life and well-being of existing living persons ranked among the highest religiously commanded obligations."

There is simply no end to these, albeit sincere, claimed restrictions on abortion. That is why the attack—that is why RFRA represents not a neutral statute seeking to—having no effect on abortion, but is, in fact, a powerful new legal weapon against protecting unborn human life.

This bill is, therefore, about abortion, and Representative Solarz made that quite plain in his testimony by saying that if this bill was truly neutralized on the question of abortion, it would not be a weapon to be used by one side against the other in this debate, then this bill would fail. What that means is that abortion rights advocates are holding this bill hostage in their demand for a new legal weapon to be used against the unborn and to prevent restrictions on abortion.

Thus, their price for religious liberty is a right to abortion on demand throughout pregnancy. It is our view that that price should not be paid.

Thank you.

[The prepared statement of Mr. Bopp follows:]



PREPARED STATEMENT OF JAMES BOPP, JR., GENERAL COUNSEL, NATIONAL  
RIGHT TO LIFE COMMITTEE, INC.

I. INTRODUCTION

I am James Bopp, Jr., attorney at law and general counsel for the National Right to Life Committee. Thank you for the opportunity to address this subcommittee on the subject of the Religious Freedom Restoration Act of 1991.

Congressman Steve Solarz (D-NY) and others have introduced legislation known as the "Religious Freedom Restoration Act of 1991" (RFRA) (H.R. 2797, 102d Cong. 1st Sess. (1991)). This legislation is a response to the April, 1990, United States Supreme Court decision in *Employment Decision v. Smith*, 110 S. Ct. 1595 (1990), in which the Court ruled that Oregon could enforce a law forbidding the use of the drug peyote even by members of the Native American Church, who consider the use of the drug sacramental. Supporters of the RFRA believe that the *Smith* ruling had the effect of greatly diminishing the ability of plaintiffs to escape such government regulations by asserting infringement of their rights under the Free Exercise Clause of the First Amendment. The RFRA was introduced in an attempt to provide a federal *statutory* basis for such free exercise claims.

The RFRA, as it currently exists in H.R. 2797, states that "Government may burden a person's exercise of religion only if it demonstrates that the application of the burden to the person — (1) is essential to further a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." H.R. 2797, § 3(b).

The National Right to Life Committee is opposed to the RFRA without an amendment excluding a claim to a right to an abortion under the RFRA. As shown below, such claims are a real danger, not a remote one. We propose an amendment such as the following:

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<sup>1</sup>B.A., Indiana University, 1970; J.D., University of Florida School of Law, 1973; Partner, Brames, Bopp, Abel & Oldham, Terre Haute, Indiana; General Counsel, National Right to Life Committee, Inc.; Former Member, President's Committee on Mental Retardation; Editor, *ISSUES IN LAW & MEDICINE*.

Nothing in this Act shall be construed to grant, secure, or guarantee any right to abortion, access to abortion services, or funding of abortion.

## II. THE DANGER TO LEGAL PROTECTION OF THE UNBORN POSED BY THE RFRA IS REAL.

The abortion-on-demand movement is urgently seeking new moorings for a constitutional right to abortion because of the ongoing scholarly and judicial rejection of the *Roe v. Wade* abortion privacy analysis. Pro-abortion partisans have repeatedly and forcefully asserted a free-exercise-of-religion right to abortion.

This viewpoint is most often identified with the American Civil Liberties Union (ACLU) and with the Religious Coalition for Abortion Rights (RCAR), a well-funded "umbrella" organization with a permanent headquarters in the United Methodist Building in Washington (directly across the street from the U.S. Capitol). RCAR represents some of the major Protestant and Jewish religious bodies in the United States. The central tenets of RCAR are that any restriction on abortion violates both the Free Exercise Clause (based on the premise that abortion constitutes the practice of religion) and the Establishment Clause (by ostensibly legislating one "religious viewpoint" and rejecting others).

We emphatically reject the RCAR construction of the first amendment. While we would include a life-of-the-mother exception in all proposed state and federal laws restricting abortion, we reject the concept that the Free Exercise Clause of the First Amendment can be construed to encompass a right to abortion in any circumstances.

First amendment free exercise of religion law is currently governed by decision of the United States Supreme Court in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that one could not challenge a neutral law of general applicability on a free exercise of religion basis. Under *Smith*, free exercise of religion claims to an abortion right would be impossible. See, e.g. *Jane L. v. Bangerter*, No. 91-C-345G, slip op. at 9 (D. Utah Apr. 10, 1992) (orders vacating trial, etc.) ("This court holds that the Utah [abortion] statute as a matter of law does not interfere with free exercise of religion." (citing *Smith*)); Brief for the United States as Amicus Curiae Supporting Respondents at 18 n.13, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3rd Cir. 1991), cert. granted 112 S. Ct. 931-32 (Jan. 21, 1992) (Nos. 91-744 and 91-902 consolidated) (In this case now before the U.S. Supreme Court, the Solicitor General observed that *Smith* currently bars free exercise claims to an abortion right.). Enactment of the RFRA would change the state of the law with regard to free exercise of religion abortion claims, making such claims once again viable.

Without the RFRA, two federal district courts have found a free-exercise component to "abortion rights." An unamended RFRA would make the recognition of a serious free-exercise-

of-religion abortion right easier by making it easier for women to have standing to bring law suits asserting a free-exercise claim. It would enlarge the class of women who could make such a claim by (1) requiring only that they claim that their exercise of a religious belief is "burdened" by the governmental restriction and (2) opening the class not just to women whose religion allows abortion to preserve the life of the mother but also for many other reasons. Because abuse of the rights gained by this already enlarged class will be inevitable, the potential exists for a very large class of women to obtain abortions under an unamended RFRA.

That free-exercise abortion rights claims under the RFRA would be a reality is evidenced by Proposed Committee Report Language set forth by Marc D. Stern, a member of the coalition of drafters of the RFRA. The memorandum represented the consensus of the drafters in a meeting held the day before. In the memorandum, the Proposed Committee Report Language declared:

Likewise, RFRA could not be invoked to challenge the bare existence of restrictive or permissive abortion laws, but it could be invoked by persons who for religious reasons wish to obtain, or not participate in, abortions where a law imposed contrary restrictions or obligations.

Memorandum from Marc D. Stern to Michael Farris, Samuel Ericsson, David Saperstein, et al. at 2 (May 9, 1991).

From this, it is evident that free-exercise of religion rights under the RFRA are contemplated by the drafters of the RFRA.

#### A. *The RFRA Poses Real Dangers to the Legal Protection of the Unborn.*

Abortion rights advocates have long argued that abortion restrictions violate the Free Exercise Clause of the First Amendment (which states that "Congress shall make no law respecting the establishment of religion or *prohibiting the free exercise thereof* . . ." (emphasis added)). See generally Bopp, *Will There Be A Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. Contemporary L. 131 (1989). At least one court has embraced such an analysis. See *McRae v. Califano*, 491 F.Supp. 630, 741-42 (E.D.N.Y. 1980). Pro-abortion groups continue to press such claims. See Memorandum of Points and Authorities in Support of Motion for Summary Judgment and Permanent Injunction, *Doe v. Ada*, Civil Action No. 90-00013 (D. Guam 1990) (where the ACLU argued that "Jewish and several Protestant faiths, each with a substantial number of adherents on Guam, hold religious beliefs that . . . under certain circumstances — to be determined in the first instance by the pregnant woman herself — a woman is morally permitted or, in some cases, even required to obtain an abortion.").

However, on only one occasion in abortion litigation has the U.S. Supreme Court addressed this claim. In *Harris v. McRae*, 100 S.Ct. 2671 (1980), the claim was made that the Hyde Amendment was unconstitutional under the Free Exercise Clause. The Court did not reach the merits of this claim, because the Court found that the plaintiffs did not have standing to assert the claim.

First, the Court said that the individual indigent pregnant women plaintiffs lacked standing "because none alleged, much less proved, that she sought an abortion under compulsion of religious belief." *Id.* at 2690. The Court acknowledged that two officers of the Women's Division of the United Methodist Church "did provide a detailed description of their religious beliefs," but found that they also did not have standing because "they failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid." *Id.* Thus the two essential elements of standing were lacking, i.e. (1) that an individual woman was seeking an abortion "under compulsion of religious belief" and (2) that the statute in question was applicable to them.

We can expect that these two elements of standing set forth in *Harris v. McRae* will be met in future litigation by abortion rights advocates. If proper standing is shown, the Court, under *Smith*, would determine whether the abortion restriction is rationally related to the governmental interest. This is the test applied when no fundamental constitutional right is impinged and under which virtually any law would be upheld. Even under *Roe v. Wade*, the Court recognized that protection of unborn life was a rational reason for abortion restrictions (although it is not enough to support restricting the fundamental right to abortion). Since a rational basis is all that *Smith* requires to uphold a state law, the free exercise claim would not prevail on the merits as of today.

Under the Religious Freedom Restoration Act of 1991, however, in the face of a challenge by women claiming a "burden" on the exercise of their religious belief, a *compelling governmental interest* must be shown. This test is very stringent and, historically, few laws are able to survive such rigorous scrutiny. Under the holding of *Roe v. Wade*, there is no *compelling interest* in unborn life until after viability. If the Religious Freedom Restoration Act is viewed by the Court to incorporate this holding of *Roe*, then a free exercise claim under the Religious Freedom Restoration Act would prevail against a law restricting abortion.

This matter would be further aggravated (and the holding of *Harris v. McRae*, referred to above, would be overruled) if the Religious Freedom Restoration Act were viewed to protect not only conduct "compelled" by religious belief, as *Harris v. McRae* appears to require, but also conduct consistent with religious belief. The RFRA does not limit claims to only those "compelled" by religious belief, but such claims are allowed if the religious exercise is merely "burdened." Obviously, this vastly increases the pool of potential free exercise plaintiffs against abortion restrictions.

One further point. Beyond being assured that an asserted belief is "sincere" and "religious," the courts are loath to try to determine whether a religious belief is valid or bona

vide. Thus, that there may be a dispute as to whether abortion is compelled by, consistent with, or motivated by a *valid* religious belief is not relevant and would provide no defense to a free exercise claim.

The effect of a successful free exercise claim is to exempt the person from the offending statute. See *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). Thus, this claim does not serve as a basis to invalidate the entire statute, but prevents the application of the statute to those asserting such religious beliefs. While, on the face of it, such a claim would seem to have limited applicability to an abortion restriction, in practice it would provide a tremendous loophole. A woman coming to an abortion clinic, even in a state which prohibits abortions except to save the life of the mother, could simply check a box on the admitting form which says that she is seeking the abortion under compulsion of a sincerely held religious belief (or, if applicable, that the abortion is consistent with or motivated by a sincerely held religious belief). It would be exceedingly difficult to enforce the law in the face of such a claim. It is even harder to imagine that an attempt to enforce the law would be made in such a context. As a result, the ability to enforce the statute would be seriously impaired.

There are, however, countervailing arguments that could be made. As I have argued elsewhere, a majority of the Supreme Court has already recognized, even though the Court itself has not specifically *held*, that there *is* a compelling interest in unborn life throughout pregnancy. See Bopp & Coleson, *What Does Webster Mean?*, 138 U. Penn. L. Rev. 157, 162-64 (1989). Therefore, some argue, the compelling interest required by the RFRA for the burdening of a free exercise of religion right would be established already, and religiously-based abortion rights claims would fail.

Under the proposed statute, however, abortion rights advocates are likely to argue that it was Congress' intent (or at least understanding) when it adopted the Religious Freedom Restoration Act that, since *Roe v. Wade's* specific holding on this point had *not* yet been specifically overturned, no compelling interest in unborn life exists *under the statute*.

Unfortunately, even a *favorable* holding by the Court on the compelling interest question does not resolve the inquiry. In addition to the requirement that a state law be supported by a compelling interest, the bill requires that it be "the least restrictive means of furthering that compelling governmental interest" (which is also the second test in the Court's constitutional jurisprudence). In this regard, abortion rights advocates are likely to argue that a general prohibition on abortion is not the "least restrictive means" available to further the state's compelling interest in unborn life. This would be a fertile field for pro-abortion litigation.<sup>2</sup>

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<sup>2</sup>Interesting, Justice O'Connor has apparently abandoned the "narrowly tailored" requirement in favor of a "rationally related" requirement as the second step in compelling interest analysis of abortion restrictions. See Bopp & Coleson, *What Does Webster Mean?*, *supra*, at 164-65. The rationally related test is a more favorable one for upholding state laws that are subject to the compelling interest test. The proposed Religious Freedom Restoration Act, however, would reject this development.

Therefore, the Religious Freedom Restoration Act would restore to viability a free exercise claim against abortion legislation which is currently effectively precluded by the *Smith* decision. While there are arguments against such claims, even under the Religious Freedom Restoration Act, the claims are weighty ones and the outcome would be uncertain. Even with the explicit reversal of *Roe v. Wade* by the Court, which I expect, the new species of challenges to pro-life laws made possible by the bill would have to be resolved *before* effective abortion restrictions can be enforced — which could take years.

Furthermore, these claims provide the potential for a “safe harbor” for abortion *even if* *Roe* is explicitly overruled and, thus, provide an opportunity for a future Supreme Court to protect the abortion right after *Roe*'s reversal in a way that would avoid the obvious flip-flopping back and forth that a later restoration of the “privacy right” would involve.

These points are developed more fully in the following sections.

***B. Pro-Abortion Advocates Have Forcefully Claimed for Over Two Decades That Free Exercise of Religion Protects Abortion on Demand.***

Even before *Roe v. Wade*, pro-abortion advocates were claiming that protective abortion laws could interfere with a woman's free exercise of religion under the Free Exercise Clause of the First Amendment. Oteri, Benjoia & Souweine, *Abortion and the Religious Liberty Clauses*, 7 Harv. C.R.-C.L. L. Rev. 559, 592-96 (1972). Oteri, Benjoia & Souweine concluded that protective abortion statutes placed an onerous burden “on individuals who wish to act in a manner consistent with their religious beliefs.” *Id.* at 594. Examining the legislative purposes underlying protective abortion statutes, these three authors concluded that they served no compelling governmental interest and were, therefore, unconstitutional under the Free Exercise clause. *Id.* at 594-96.

Of course, *Roe* relied on a privacy theory under the fourteenth amendment's liberty clause. However, this did not stop the speculation on alternative theories to protect an abortion right within the Constitution. Indeed, because of the powerful scholarly attacks on *Roe*'s privacy theory, many efforts were made to find ways of propping up the abortion right with alternative constitutional theories.

After *Roe*, Rhonda Copelon, appearing on behalf of the Center for Constitutional Rights in New York City, argued before a Senate subcommittee that:

The first amendment also protects the right to follow religious and conscientious convictions. It demands that the state respect diverse beliefs and practices that involve worship, ritual, and decisions about everyday life. We recognize as religious, matters of life and death and of ultimate concern. The decision whether to bear a child, like conscientious objection to military service, is one of conscientious dimension. The

religions and people of this country are deeply divided over the propriety and, indeed, necessity of abortion. While for some any consideration of abortion is a grave evil, others hold that *a pregnant woman has a religious and moral obligation to make a decision* and to consider abortion where the alternative is to sacrifice her well-being or her family's or that of the incipient life. *The right to abortion is thus rooted in the recognition that women too make conscientious decisions.*

*Legal Ramifications of Human Life Amendment: Hearings on S.J. Res. 3 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 98th Cong., 1st Sess. 132 (1983) (statement of Rhonda Copelon) (citations omitted, emphasis added).*

It should be especially noted that the argument of the pro-abortion partisans quoted above does not require that a woman's religion *compel her* to have an abortion. Rather, her religion need only compel her to make a conscientious decision, which, according to them, must include the option of choosing abortion in order to be a fully conscientious decision. As a result, they argue that a woman's religion "may specify situations appropriate for an abortion or may leave the entire decision to the individual to be resolved in a manner consistent with her understanding of her religion." Oteri, Benjoia & Souweine, *supra*, at 593.

In the 1980 case of *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980), abortion rights activists were again pushing a free exercise abortion right. This time they had launched their attack in a federal district court. Plaintiffs included the Women's Division of the Board of Global Ministries of the United Methodist Church and two of its officers. These plaintiffs and their expert witnesses asserted that their religion imposed on them a religious duty of *responsible parenthood*, which required pregnant women not to simply "let nature take its course" in a pregnancy but, rather, to "act responsibly and seriously" and abort a child if "the conditions into which the new life is being born" are not right to fulfill "God's intention" for the unborn child. *Id.* at 701, 742 (emphasis added). Moreover, women are to "make their *own* responsible decisions concerning the personal or moral questions surrounding the issue of abortion." *Id.* at 701 (emphasis added).

In sum, this religious view is that women are compelled to exercise responsible parenthood, meaning that they have a religious duty not to bring a child to term in certain (broadly defined) circumstances, and that women are religiously compelled to make up their own minds about whether they should have an abortion.

Because the abortion statute at issue in *McRae* (dealing with the Hyde Amendment which prohibited federal funding for almost all abortions) did not provide for women to make such a conscientious decision about abortion, the *McRae* court enjoined the statute. Judge Dooling held:

These teachings, in the mainstream of the country's religious beliefs, and conduct conforming to them, exact the legislative tolerance that the First Amendment assures. . . . The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each

individual's freedom of conscientious decision and conscientious nonparticipation. Judgment must be for plaintiffs.

*Id.* at 742.

On appeal to the United States Supreme Court, that Court held that these women did not really have legal standing to raise such an issue and so it should not have been reached by the lower court. *Harris v. McRae*, 448 U.S. 297 (1980). However, the Supreme Court did not declare that the district court was wrong on the merits if the women had had standing.

Pro-abortion advocates continue to this day to press their claim that there is a broad free-exercise right to abortion. They made such a claim in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), in the Brief Amicus Curiae for American Jewish Congress, Board of Homeland Ministries-United Church of Christ, National Jewish Community Relations Advisory Council, The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, The Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, and thirty other religious groups. In this Brief, these groups claimed:

Together, the right of privacy and the right to religious liberty exclude the state from personal decisions about the critical issues of family life, reproduction, and child-rearing. Missouri's law impermissibly secularizes these choices. The state law constrains critical, private choices about child-bearing and thereby burdens the free exercise of religion and its crucial component, protection of individual conscience. . . . Deciding whether to marry or divorce, and whether to conceive and bear a child are simultaneously matters of individual choice and religious significance. The Constitution has provided, and must continue to assure, protection against governmental arrogation of crucial decisions which require the guidance of religious teachings and individual conscience.

*Id.* at 8 (citations omitted).

This Brief also stated:

The Free Exercise Clause of the First Amendment should control this case. Missouri cannot claim that the Free Exercise Clause guarantees only people's freedom to hold pro-choice views, but not their freedom to obtain an abortion in any public facility, to discuss the matter with any public employee, or to act contrary to a state law declaring that human life begins at conception. The Free Exercise Clause guards much religiously inspired conduct, not just religious views. *Wisconsin v. Yoder*, 406 U.S. 205 . . . . In the context of religious freedoms, this constitutional protection applies where the government withholds a benefit as much as when it imposes a penalty.

*Id.* at 19.



Abortion rights advocates again asserted their free-exercise right to abortion claim in the Guam abortion case, recently decided by the Ninth Circuit. Memorandum of Points and Authorities in Support of Motion for Summary Judgment and Permanent Injunction, *Doe v. Ada*, No. 90-00013 (D. Guam 1990) (where the ACLU argued that “Jewish and several Protestant faiths, each with a substantial number of adherents on Guam, hold religious beliefs that . . . under certain circumstances — to be determined in the first instance by the pregnant woman herself — a woman is morally permitted or, in some cases, even required to obtain an abortion.”). While the Guam District Court decided the Guam case on different grounds, Judge Munson indicated his sympathy for a “religious freedom” right to choose abortion. Responding to a comment by Senator Arriola (who introduced the bill) in legislative debate that “Guam is a Christian Community,” Judge Munson remarked:

This passage calls to mind the 1856 admonition of Chief Justice Black of the Commonwealth of Pennsylvania, as quoted by Justice Brennan in *School District of Abington Township (Pa.) v. Schempp*:

The manifest object of the men who framed the institutions of this country was to have a *State without religion*, and a *Church without politics* — that is to say, they meant that one should never be used as an engine for any purpose for the other. . . .

*Schempp* is a noteworthy primer on *First Amendment religious freedom*.

*Doe v. Ada*, No. 90-00013, slip op. at 6 n.1 (D. Guam 1990) (emphasis added).

Also recently, abortion rights advocates have again asserted a free-exercise abortion right in a Michigan abortion case. In that case, attorneys for the ACLU and Planned Parenthood Federation of America sought the right of *inrer alia* the Religious Coalition for Abortion Rights to intervene as party-plaintiffs in a case challenging Michigan's parental consent to abortion for minors law. They set forth their claim in these words:

#### COUNT IV: FREEDOM OF RELIGION

33. The parental consent and judicial bypass provisions of the parental consent law violate the right to freedom of religion of the citizens of Michigan by penalizing them for acting in accordance with their religious beliefs in seeking to exercise their right of privacy to an abortion.

Proposed Intervening Plaintiffs' Complaint for Injunctive and Declaratory Relief at 7, *Planned Parenthood of Mid-Michigan et al. v. Attorney-General of Michigan*, No. D91-0571-AZ (filed Mar. 6, 1991).

It is clear that the danger of a free-exercise abortion claim is real. It has been advanced for the past two decades and is currently being urgently advanced by abortion rights advocates.

Their urgency is all the greater as *Roe's* privacy theory is falling into disrepute. And their devotion to a broad free-exercise abortion right is unstinting. Their view may be summed up in these words from the Fall, 1990, Religious Coalition for Abortion Rights (RCAR) publication *Options*:

Three hundred and fifty-five years ago this October, a young man named Roger Williams fled the Massachusetts Bay Colony . . . Williams, a Baptist, was banished from the Colony for the teaching of 'dangerous opinions' that countered the teaching of the state. . . . He eventually formed the colony of Rhode Island . . . as a place to worship according to the dictates of the soul, free from government interference.

In October 1988 . . . a young woman weaved through a wilderness of screaming, angry people to a health clinic, only to find her entrance blocked by scores of people lying in front of the door. She was . . . in the State of Rhode Island, the state founded for the purpose of 'full liberty in religious concerns.' She had made one of the most difficult decisions of her life. She was on a trek to exercise her freedom of conscience with regard to religion. She was trying to obtain an abortion. . . .

Although Williams and the young woman lived in different eras, their desire to practice their religion in freedom is the same. An individual's right to have an abortion is as much a matter of religious liberty as William's choice to preach his religion. Abortion is a religious issue because the issue of when the fetus becomes a person is a matter of religious belief, not 'scientific fact' as anti-choice proponents claim. . . .

Today, Williams' dream of freedom of conscience with regard to religion, and our constitutional right to the free exercise thereof, is in serious jeopardy. Justice Scalia, writing for the majority in the disastrous decision for the *Employment Division v. Smith* case has . . . 'eliminated the free exercise clause' of the Constitution. . . . Scalia's opinion eliminated the test of 'compelling interest' and ruled that free exercise claims are to be determined in state legislatures. This will force religious groups into the legislatures to protect their free exercise rights—rights which we had previously taken for granted. This decision allows more vocal and organized religions to enact laws through the political process, laws that may limit the free exercise of less powerful religions.

THE SUPREME COURT'S ACTIONS have signaled the opponents of abortion that they should work through the state legislatures to tear down the 'wall of separation' between church and state. . . .

The Governor of Guam, Joseph Ada, in a brief to the federal district court in support of a recently passed law that bans almost all abortions, stated that since the majority of the citizens of Guam are Catholic, and that Catholic doctrine forbids abortion, the law is an example of democracy in action. Ada's reasoning parallels Scalia's decision in *Employment Services v. Smith*, that free exercise of religion claims should be put up for a vote. . . .

THE PROPONENTS OF ANTI-ABORTION LAWS fail to consider the diversity of theological opinion on the issue of fetal personhood. They are attempting to establish their religious views as normative for society, and limit the free exercise of people of other faiths. [End of quote.]

**C. Standing to Sue Is Made Easier by the RFRA, Which Would Allow Claims for Any Abortion Claimed to be "Motivated by Religious Belief."**

The RFRA would make it easier for more plaintiffs to bring suits alleging a free-exercise right to abortion because legal standing would be easier under the RFRA than under the Constitution. However, it has been asserted by some that pro-abortion plaintiffs' standing to sue is not created or improved by the RFRA.

This questioning of the position of those opposed to the unamended RFRA is premised on the basic error of equating standing under the Free Exercise Clause of the Constitution with standing under the RFRA. Under the former, the Supreme Court, in *Harris v. McRae*, 448 U.S. 297 (1980), said that it need not reach the Free Exercise Clause claims of plaintiffs (although the district court had enjoined the Hyde amendment, in part, by recognizing plaintiffs' free exercise claims) because the plaintiffs lacked standing: "none alleged, much less proved, that she sought an abortion under *compulsion* of religious belief." *Id.* at 320 (emphasis added). Thus, plaintiffs under the Constitution in this context had to show that their religion *compelled them* to receive an abortion.

That plaintiffs must be compelled by their religious beliefs in suits brought under the First Amendment, is evidenced by other case law. For example in *Thomas v. Review Board*, 450 U.S. 707 (1981), a Jehovah's Witness sought unemployment compensation after quitting his job because he believed his religion prohibited him from producing parts for military tanks. The Supreme Court held that

Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was *forbidden* by his religion.

*Id.* at 716 (emphasis added). In *Wisconsin v. Yoder*, the Amish defendant parents who had not sent their children to school believed, according to the United States Supreme Court:

[T]hat by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.

406 U.S. 205, 209 (1972).

The recent case of *Frazee v. Illinois Dept. of Employment Security*, 109 S. Ct. 1514 (1989), also demonstrates how one's religious beliefs must compel one to a certain religious practice. In the *Frazee* case, the United States Supreme Court considered a case in which a man had been denied unemployment compensation benefits because he had refused employment which

would have cause him to work on Sunday. The case turned on the issue of whether one's sincerely held religious beliefs must be based on tenets of an established religious sect. The Court held that a religious belief is sufficient if it is a sincerely held personal religious belief, whether or not it is based on "some tenets or dogma" of "some church, sect, or denomination." *Id.* at 1516. In its discussion, the Court spoke of persons "*compelled* by their religion," of religious tenets "*forbidding*" certain activity, and of persons being "*required*" to do certain actions. *Id.* at 1517 (emphasis added).

By contrast, the RFRA would have Congress find that government may not "burden" the free exercise of religion without compelling justification which would include conduct motivated by religious belief. The phrase, "motivated by," was present in an earlier draft of the RFRA. While it has now been removed, the primary scholarly champions of the bill insist that the RFRA must be interpreted as applicable to religious motivation, not just religious compulsion. Messrs. McConnell, Gaffney, and Laycock, in their February 21, 1991, letter to Representatives Solarz and Henry, implicitly acknowledge that the statute would govern and that the standing requirement is changed by RFRA's rejection of a "compelled by" test. In the process of defending the "motivated by religious belief" language of the RFRA, they argue that the "compelled by" test, which *McRae* would require, is *not* the test they prefer:

It is difficult to capture the idea of the dictates of conscience in statutory language because different theological traditions conceptualize the force of God's moral order in different ways. Some treat it as a binding moral law; others view it as an expression of God's will, which believers will freely conform to out of love and devotion to God. For example, consider the question: must a believer tithe? Some will easily answer "yes." Others will answer: "no, but a believer *will* tithe, because he will want to act in conformity to God's will for him." For this reason, it would be a *mistake to tighten the language of the Act by confining it to conduct 'compelled by' religious belief*. By the same token, the Act should not refer to conduct 'consistent with' religious belief, since this would go beyond the dictates of conscience. The language in the operative section of the proposed Act — 'the practice of religion' — seems to avoid the extremes.

Letter from Michael W. McConnell, Edward McGlynn Gaffney, and Douglas Laycock to Representatives Solarz and Henry at 2 n.\* (Feb. 21, 1991) [hereinafter "2/21 McConnell et al. Letter"].

McConnell et al. argue that there is some protection in the language of the RFRA: "[T]he free exercise of religion does not encompass the right to engage in any conduct that one's religion deems *permissible*. It protects only conduct that is motivated by religious belief." *Id.* at 2 (emphasis in original). The distinction is more apparent than real; it breaks down when applied in a real life situation. For example, how could a court refuse a person whose religion encourages her to exercise her liberty to make personal choices on the matter of abortion, *see supra* p. 7 (position of United Methodists)? In such a situation, the woman could credibly argue that she was motivated by her religion to make this moral choice herself and that she chose abortion. It is readily apparent that this is a far easier test than whether one is compelled as a

religious duty to engage in a certain activity. Thus, even if the merely "permissible" is excluded and only the "motivated by" is allowed by the RFRA, this is still more expansive than the "compelled by" test of the Free Exercise clause.

McConnell et al. have been the driving scholarly force behind the RFRA coalition. Their continued support for the "motivated by religion" position indicates that it is still the proper way to interpret the RFRA, rather than the "compelled by religion" position. Given that the RFRA nowhere defines the phrase "burden a person's exercise of religion" and that its scholarly proponents call for a "motivated by religion" interpretation, it is doubtless that a court called upon to make the decision of whether the RFRA reaches religious motivation would find that it does. Supporters of the RFRA could, of course, easily resolve this problem by inserting "compelled by" language in the RFRA. They have neither done so nor may they be expected to do so because they believe that the "motivated by" standard is correct.

Thus, under the RFRA, a person would not have to show that they were *compelled* by a religious belief but that they were *motivated* by one. In common use, "compel" means "1: to drive or urge forcefully or irresistibly 2: to cause to do or occur by overwhelming pressure." *Webster's Ninth New Collegiate Dictionary* (1983). By contrast, "motivate" means "to provide with a motive," which means in turn "something (as a need or a desire) which causes a person to act . . . *syn* MOTIVE, IMPULSE, INCENTIVE, INDUCEMENT, SPUR, GOAD." *Id.*

Under the RFRA then, with free exercise so defined, one need only show a religious motivation, i.e., that one's personal religious beliefs would justify, condone, or encourage an action, rather than that one is compelled to do this action as religiously imposed duty. Indeed, as noted herein, pro-abortion advocates would argue that it is enough if one's religion declares that one has a duty to make one's own moral choice with regard to abortion and the state's action "burdens"<sup>3</sup> this choice. This argument was accepted by the *McRae* district court.

Clearly, the RFRA imposes an easier showing for would-be plaintiffs to obtain standing than did the *McRae* standard. Thus, persons denied standing under *McRae* would be allowed to pursue their free-exercise-of-religion attack against a protective abortion statute under the RFRA.

It has been suggested by one commentator that the courts would be free to apply the standing test of *McRae* under the RFRA. But this cannot be so, because any free-exercise-of-religion abortion claim would be brought under the RFRA, not the First Amendment, so that whatever the statute requires would supersede what the Constitution would allow.

It must be observed that the various critics opposing the RFRA have, either consciously or subconsciously, frequently jumped back and forth between the demands of the RFRA and the Constitution. For example, this was the logical error of two pieces of commentary on RFRA by the Congressional Research Service. See Ackerman, *The Religious Freedom Restoration Act*

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<sup>3</sup>The RFRA is replete with references to "burdens" on religious practice. See *infra* § II-C-1.

and the Religious Freedom Act: *A Legal Analysis* (Congressional Research Service, Apr. 17, 1992); Memorandum from Johnny H. Killian, American Law Division of Congressional Research Service, to Honorable Bill McCollum (Jul. 2, 1991). The researchers in these pieces ignored the obvious fact that any cases brought under the RFRA would be brought under the RFRA and not under prior court decisions under the first amendment to the Constitution.

However, once a statute such as the RFRA is passed, actions brought under the statute must be governed by the demands of the statute, not the Constitution. This is discussed at greater length below, but in the present context it means that whatever the statute requires will control, regardless of the prior practice in constitutional litigation.

Furthermore, under the RFRA, a woman seeking a free-exercise exemption from a protective abortion statute would not be required to *belong* to a religious body, the teachings of which motivate her to seek an abortion, but only that she is personally motivated to seek an abortion by her own sincere religious beliefs. Statements of religious bodies such as those cited below would buttress such claims, but membership in a pro-abortion religious body would by no means be a requirement for a successful claim.

#### I. The Class of Those Motivated by Religious Belief Would Be Large.

The number of women who could claim a free-exercise right to abortion would be drastically increased under the RFRA in two ways. First, those whose exercise of religion is merely burdened would be entitled to a religious exception. Second, many of these would claim a right to abortion for reasons beyond the life of the mother.

As demonstrated by the quotations above and below, there are numerous religious bodies in the United States, large and small, which assert that their doctrinal systems motivate, or even dictate, that their adherents seek abortion in very expansive circumstances, *and* that the free exercise of religion must encompass the legal right of these women to procure abortions without state "interference."

Of course, if the RFRA is enacted without an abortion amendment, those religious bodies (whether long established or newly formed) that are tolerant of abortion can be expected to reword these "doctrinal" statements to even more closely conform to the language of the RFRA. However, little in the way of adjustment would be necessary for many bodies, even if the RFRA were modified to incorporate the "*compelled by*" test. Note, for example, the language of the 1989 Religious Coalition for Abortion Rights (RCAR) brief to the Supreme Court in *Webster*, which incorporates the view that the use of abortion for "the promotion of responsible parenthood and preservation of the health and well-being of existing, living persons rank among the highest, *religiously commanded obligations*." Brief Amicus [sic] Curiae for American Jewish Congress et al. at 11, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (No. 88-605). (emphasis added).

Further, the RFRA requires only that a woman show that her exercise of religion is "burdened" by the government. H.R. 2797, §§ 2(a)(2); 2(a)(3); 2(a)(4); 2(b)(1); 2(b)(2); 3(a); 3(b); 3(c) (emphasis added). This means that a woman could logically assert that her religion requires her to make a free moral choice between abortion and carrying a pregnancy to term and that a state statute eliminating one of those options burdens her religious practice. This "burdens" language further broadens the class from those motivated by their religion to seek an abortion.

To illustrate the potential size of the class of women compelled by their religion to seek an abortion compared with the size of the class of those women motivated by their religion to make an abortion decision unburdened by state restrictions several quotations follow.

● *United Synagogue of America Statement.* "Jewish tradition cherishes the sanctity of life, even the potential of life which a pregnant woman carries with her. Under certain unfortunate circumstances, such as when the *life or health* of the mother are in jeopardy, Judaism sanctions, *even mandates*, abortion." Religious Coalition for Abortion Rights, *We Affirm* 28 (1991) (emphasis added). In a 1979 version of *We Affirm*, the United Synagogue revealed that it religiously mandated abortion for its adherents in cases of psychological health, as well: "In all cases 'the mother's life takes precedence over that of the foetus' up to the minute of its birth. This is to us an unequivocal principle. A threat to her basic health is moreover equated with a threat to of her life. To go a step further, a classical responsum places danger to one's *psychological health*, when well established, *on an equal footing* with a threat to one's physical health." (emphasis added).

● *Statements of RCAR and a Host of Religious Organizations in Webster.*

- "Together, the right of privacy and the right to religious liberty exclude the state from personal decisions about the critical issues of family life, reproduction, and child-rearing." Brief Amicus [sic] Curiae for American Jewish Congress et al. at 8, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (No. 88-605).
- "Views range from the belief that abortion is a sin forbidden by divine authority *to the view that abortion may be a religious obligation if needed to preserve the life or well-being* of the pregnant woman. Still another view maintains that promotion of responsible parenthood and preservation of the health and well-being of existing, living persons *rank among the highest, religiously commanded obligations.*" *Id.* at 10-11 (emphasis added).
- "Other Protestant Churches have declared their support for a woman's choice regarding abortion because of potential risks to the life or *physical or mental health* of the mother, *because of concerns about the social situation in which the infant might be born*, and because of instances of severe deformity of the fetus. As a matter of religious belief, many Protestant theologians maintain that 'human personhood . . . does not exist in the earlier phases of pregnancy.' The United Methodist

Church, for example, resolved in 1976 to affirm the “principle of responsible parenthood” and the right and *duty* of married persons prayerfully and responsibly to control conception [including abortion] according to their circumstances.” *Id.* at 14 (citations omitted) (emphasis added).

- “Many consider abortion to be a *religious duty*, a duty resembling obligations to observe religious rituals, when a pregnancy threatens a woman’s *life or health*. Some would protect a *woman’s choice* to abort simply as a matter of her *entitlement to control her own destiny*. *Id.* at 16 (emphasis added).
- “The Free Exercise Clause of the First Amendment should control this case. Missouri cannot claim that the Free Exercise Clause guarantees only people’s freedom to hold pro-choice *views*, but not their freedom to *obtain* an abortion in any public facility, to *discuss* the matter with any public employee, or to *act* contrary to a state law declaring that human life begins at conception. *The Free Exercise Clause guards much religiously inspired conduct, not just religious views*. *Id.* at 19 (emphasis added).
- “Through its General Assembly, as its highest governing body, the Presbyterian Church (U.S.A.) has stated that the morality of abortion is a question of stewardship of life and abortion can, therefore, be considered a responsible choice within a Christian ethical framework when, for example, serious genetic problems arise *or when resources are inadequate to care for a child appropriately*.” *Id.* at Statement of Interest (emphasis added).
- *United Methodist Statement*. “Because human life is distorted when it is unwanted and unloved, *parents seriously violate their responsibility* when they bring into the world children for whom they cannot provide love.” Religious Coalition for Abortion Rights pamphlet, 1979 (emphasis added).
- *Religious Coalition for Abortion Rights Statement*. “An individual’s right to have an abortion is as much a matter of religious liberty as [colonial Baptist preacher Roger] Williams’ choice to preach his religion. . . . Today Williams’ dream of freedom of conscience with regard to religion and our constitutional right to the free exercise thereof, is in serious jeopardy. Justice Scalia, writing for the majority in the disastrous decision for the *Employment Division v. Smith* case has . . . ‘eliminated the free exercise clause’ of the Constitution. . . . The Supreme Court’s actions have signaled the opponents of abortion that they should work through the state legislatures to tear down the ‘wall of separation’ between church and state. . . . They are attempting to establish their religious views as normative for society, and limit the free exercise of other faiths.” *Roger Williams[.] Fetal Personhood and Freedom of Conscience*, Options, Fall 1990, at 4, 5.
- *Religious Coalition for Abortion Rights Executive Director’s Statement*. “[I]t’s easy to lose sight of the fact that if a woman isn’t free to make a decision about abortion based on her own



personal beliefs, then she is not *free* to practice her own religion." Letter from RCAR Executive Director Patricia Tyson to Fund Raising Solicitors, January 1991 (emphasis added).

● *B'Nai B'Rith Women Statement*. "We wholeheartedly support the concepts of individual freedom of conscience and choice in the matter of abortion. Any constitutional amendment prohibiting abortion would deny to the population at large their basic rights to follow their own teachings and attitudes on this subject which would threaten First Amendment rights." Religious Coalition for Abortion Rights, *We Affirm* (1979).

● *Episcopal Women's Caucus Statement*. "We believe that all should be free to exercise their own consciences on this matter and that where widely differing views are held by substantial sections of the American religious community, the particular belief of one religious body should not be forced on those who believe otherwise." *We Affirm* at 13 (1991)

● *American Ethical Union, National Service Conference, Statement*. "We believe in the right of each individual to exercise his or her conscience; every woman has a civil and human right to determine whether or not to continue her pregnancy." *Id.* at 6 (1991).

● *American Jewish Congress Statement*. "Jewish religious traditions hold that a woman must be left to her own conscience and God to decide for herself what is morally correct." *Id.* at 8.

● *American Friends Service Committee Statement*. "[T]he AFSC has taken a consistent position supporting a woman's right to follow her own conscience concerning child-bearing, abortion and sterilization. . . . That choice should be made free or coercion, including the coercion of poverty, racial discrimination and unavailability of services to those who cannot pay." *Id.* at 6-7.

● *Presbyterian Church (U.S.A.) Statement*. "It is exactly this pluralism of beliefs which leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference. . . . [W]e have a responsibility to guarantee every woman the freedom of reproductive choice." 195th General Assembly of the Presbyterian Church, *Covenant and Creation: Theological Reflections on Contraception and Abortion* (1983).

● *United Methodist Church, Women's Division Statement*. "We believe deeply that all should be free to express and practice their own moral judgment on the matter of abortion. We also believe that on this matter, where there is no ethical or theological consensus, and where widely differing views are held by substantial sections of the religious community, the Constitution should not be used to enforce one particular religious belief on those who believe otherwise." *We Affirm* (1979).

● *Catholics for a Free Choice Statement*. "We affirm the religious liberty of Catholic women and men and those of other religions to make decisions regarding their own fertility free from church or governmental intervention in accordance with their own individual conscience." *Id.*

**2. The Class Would Include Not Just Women Claiming a Religious Exception to Preserve the Life of the Mother But Also for Many Other Reasons.**

The size of the class of women seeking abortions through the RFRA would include many more than those whose "religious tenets would require an abortion . . . when the pregnancy jeopardizes the life of the expectant mother." Letter from David Zwiebel, General Counsel for Agudath Israel of America, to Douglas Johnson 1 (Jan. 24, 1991). In fact, the RFRA would allow free-exercise claims by the adherents to many religions which justify abortion if chosen by the pregnant woman.

Messrs. McConnell et al. have claimed that the RFRA is not really a problem because:

The only instance of which we are aware where a sizable religious group teaches that abortion is religiously *compelled* confines that teaching to circumstances so extreme (such as endangerment of *the life of the mother*) that any anti-abortion statute likely to be passed by a state would exempt it.

2/21 McConnell et al. Letter at 2-3 (emphasis added). This comment is remarkable on its face, given the fact that McConnell et al. rejected limiting the RFRA to situations of religious compulsion — in favor of a religious motivation standard — in this same letter. *Id.* at 2 n.\*.

This statement contains two major fallacies, both already refuted above: (1) the erroneous equation of the RFRA's "motivated by" standard with the "compelled by" standard of *McRae*; and (2) the mistaken belief that "sizeable" religious bodies teach that abortion is indicated only in "extreme" circumstances such as life endangerment.

The federal district court in *McRae* cited the evidence presented at trial, which

makes clear that in the Conservative and Reform Jewish teaching the mother's welfare must always be the primary concern in pregnancy, that the fetus is not a person, and that abortion is mandated to preserve the pregnant woman's health. The American Baptist Church position recognizes that abortion should be a matter of responsible personal decision, and it envisages danger to the physical or mental health of the woman, evidence that the conceptus has a physical or mental defect, and conception in rape, incest or other felony as justifying abortion. The United Methodist Church affirms the principle of responsible parenthood and takes account, in the abortion context, of the threat of the pregnancy to the physical, mental and emotional health of the pregnant woman and her family; in that belief continuance of the pregnancy is not a moral necessity if the pregnancy endangers the life or health of the woman or poses other serious problems concerning the life, health, or mental capability of the child to be.

*McRae*, 491 F. Supp at 742.

The *McRae* court also cited testimony of Dr. James E. Wood, Jr., Executive Director of the Baptist Joint Committee on Public Affairs who asserted that those he represented believed a woman had a religious liberty of conscience to choose for themselves concerning abortion in cases such as contraceptive failure, fetal deformity, risk to a woman's mental, emotional or physical health and where a child is "unwanted for significant familial reasons." *Id.* at 700.

From these and previous quotations from religious organizations, it may be seen that the right to make a free choice between abortion and childbirth is religiously mandated, according to some religious organizations. Similarly, some assert a religious duty to practice responsible parenthood by not bringing children into less than optimum conditions. Both of these make the matter of choice itself a religious obligation. According to this view, if one of these choices, abortion, is taken away by statute, then the religiously-mandated duty to make a moral choice is burdened. It cannot be said to be prohibited, because if one makes a choice for life then that choice is available. However, say these religious groups, the choice would be "burdened" — a ubiquitous term in the RFRA.

What is evident from these positions on abortion is that major religious organizations do have religious positions approving — and giving religious justification for — abortion in much broader circumstances than the life of the mother.

***D. Once a Few Women Are Able to Procure Otherwise Illegal Abortions Via Successful RFRA-Based Claims, Pro-Life Protective Laws Will Quickly Become Unenforceable.***

**1. Strong Motivation and the Opportunity Created by the RFRA Would Make Full Exploitation of a Free-Exercise Exception to Protective Abortion Statutes Both Attractive and Possible.**

There will be sufficiently strong motivation for both women seeking abortions, and abortion clinics and abortionists, to fully exploit the RFRA to render pro-life laws "dead letters."

One mechanism could take the form of a check-off box on abortion clinic client information forms. By checking a box or signing a pre-printed declaration on the form, women could claim and clinics could "document" that the woman claimed to be motivated by religious beliefs in seeking the abortion.

It has been claimed, moreover, that the tremendous loophole projected by opponents of the RFRA won't exist, because the RFRA provides only *judicial* relief (i.e., only to individual plaintiffs who bring a lawsuit).

Of course, an initial plaintiff would have to win a free-exercise claim to an exemption from a protective abortion statute. This is possible, as outlined elsewhere. After a woman

succeeded in such a lawsuit, however, other women claiming that their abortions were motivated by their sincerely held religious beliefs would not need to litigate each case. Legal counsel for abortion clinics would simply have the clinics document in some fashion the fact that the woman claimed a free-exercise right and the clinics would perform abortions on such women without further legal proceeding. An analogy to the *Yoder* case may be helpful; after the Amish won the right to be exempted from compulsory school attendance for their children past the eighth grade, individual Amish children are no longer required to re-litigate the matter on their own behalf, but their parents simply don't send them to school. If public school authorities questioned this, they could claim a free-exercise exception under *Yoder*.

The argument has also been made that a court decision, based on a free-exercise RFRA claim, would only apply to the individual woman bringing the free-exercise law suit; the court would not enjoin the entire statute. Absurd as it may seem to some, that is exactly what the federal district court in *McRae* did. It enjoined the entire statute. While it is true that there were also other bases on which the statute was enjoined, the district court rejected the statute for not providing for such individual religious choices:

The irreconcilable conflict of deeply and widely held views on this issue of individual conscience *excludes any legislative intervention except that which protects each individuals freedom of conscientious decision* and conscientious nonparticipation.

Judgment must be for plaintiffs.

*McRae*, 491 F. Supp at 742 (emphasis added).<sup>4</sup>

Finally, it is noteworthy that, in the amicus curiae brief filed in *Webster* by RCAR and other religious bodies, individual exemptions from Missouri's law were not sought. Rather, it was urged that the statute should be enjoined from enforcement as to anyone:

We do not argue here for religious exemptions to Missouri's law not only because that would be impracticable, *given the large numbers of people whose religious beliefs are burdened by the law*. Even more importantly, any process providing for exemptions would be insufficient protection of religious freedom, given the intrusion any process for considering exemption would itself place on the individuals facing intimate decisions involving procreation and termination of pregnancy. *This Court's ruling on the dangers of government entanglement with religion would apply in any case-by-case evaluation of religious beliefs about abortion.*

Brief Amicus [sic] Curiae for American Jewish Congress et al. at 17 n.7, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (No. 88-605) (emphasis added).

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<sup>4</sup>It should be noted that the *McRae* district court decision on the merits of the free-exercise claim was not "overruled" by the United States Supreme Court, which merely held that the plaintiffs lacked standing to assert this claim for failing to assert *inter alia* that they were religiously compelled to obtain an abortion.

## 2. Difficulty of Regulation Would Make Enforcement Implausible.

Where women identified themselves as religiously motivated to seek their abortion, any enforcement against them would necessarily be after the fact. A prosecutor would have to be found who would claim that the woman was not motivated by a sincere religious belief in seeking her abortion. The reality is that it is unlikely that prosecutors will question, after the fact, a woman's religious beliefs to be certain that she qualified for the free-exercise exemption. Indeed, it is implausible to suppose that states will continue to enforce pro-life laws after the courts have established that religiously motivated abortion-seekers are exempt from those laws.

The logical conclusion is that the RFRA will tremendously expand the class of women able to obtain abortions under a free-exercise claim. Under *Smith* (requiring a rational basis only for statutes of general applicability), no woman could succeed with a free-exercise claim to abortion, and under *McRae* (requiring that religion compel one to have an abortion), few women would even have standing to claim one. Under the RFRA, however, there would be a large class of women who could successfully make the claim.

## III. A COURT WOULD NOT LIKELY FIND THAT CONGRESS INTENDED TO ESTABLISH OR ENSHIRE A COMPELLING INTEREST IN UNBORN LIFE BY PASSAGE OF THE RFRA WITHOUT AN ABORTION EXCEPTION.

Under the RFRA, a person seeking a free-exercise exemption from a protective abortion statute, would have to assert initially that the statute burdens her free exercise of her religion, which motivates her to seek this abortion. This would establish her standing to bring such a claim. In court, then, the state would have to demonstrate that (1) it has a compelling interest in protecting unborn human life which justifies the refusal to exempt this woman from the protective abortion statute and (2) that barring her from having this abortion is "the least restrictive means" of asserting this compelling interest.

Because congressional intent would control law suits under the RFRA, it would be necessary for pro-life litigators to show that Congress recognized a compelling interest in restricting abortion. This would not be likely.

A. *The Key to the Interpretation of the RFRA Will Be Congressional Intent, Not Prior Constitutional Law.*

Those who have questioned the position of opponents of the RFRA have, either consciously or unconsciously, slipped back and forth, between what the Constitution would require pre-*Smith* and what the RFRA would require. It is important to observe that any litigation brought under the RFRA will be governed by the demands of the RFRA and not the Constitution. Therefore, the sole criteria for judging what the law requires will be the congressional intent in enacting the RFRA.

Most significantly, it would not be determinative what the Supreme Court has held or not held with regard to the compelling governmental interest in protecting unborn human life throughout pregnancy under the Constitution. At issue would be whether Congress recognized a compelling interest in unborn life under the RFRA.

The deferential jurisprudential philosophy of the current Supreme Court majority would cause them to resolve any doubt on this matter in favor of a finding that Congress had not intended to establish a compelling interest in unborn life under the RFRA, because of a variety of factors. These would include the fact that, at the time of passage of the RFRA, the state interest in protecting unborn human life was not legally compelling and that the ACLU and other pro-abortion organizations came out strongly in favor of the RFRA. Cf. *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028, 1036 (1992) (“[A]bsent any contrary indication in the text or history of the statute, we presume Congress enacted this statute with the prevailing traditional rule in mind.”).

Furthermore, if the American Civil Liberties Union and the Religious Coalition for Abortion Rights challenge a protective abortion law under the RFRA, it is completely plausible that the prime sponsors of the RFRA and the committee chairmen of jurisdiction would be among the signers of an amicus curiae brief advising the Supreme Court that the RFRA guarantees the right of a woman to procure any abortion motivated by a woman’s “conscience” or “beliefs.” These persons would argue that they never intended to establish a compelling interest in protecting human life under the RFRA. They would assert that they would never have supported the bill if it had established or enshrined such a compelling interest. The ACLU will assert that its position — that there is a free-exercise right to abortion — is long-standing and well known, and it had no intention, by its support of the RFRA, to establish a compelling interest in protecting unborn human life.

**B. *While Roe v. Wade Has Been Implicitly Overruled, This Has Neither Been Done Expressly Nor Universally Been Recognized, So That a Later Court Could Find That Congress Intended to Include Roe's Failure to Recognize a Pre-Viability Compelling Interest in Unborn Life.***

*Roe v. Wade* held that (1) there is a fundamental right to abortion and (2) state interests in protecting maternal health and unborn life become compelling only after the second trimester and viability, respectively. Therefore, the *Roe* Court struck down a Texas abortion statute which prohibited abortion except to preserve the life of the mother.

I have asserted that *Roe v. Wade* was implicitly overruled in *Webster*. Bopp & Coleson, *What Does Webster Mean?*, 138 U. Pa. L. Rev. 157 (1989). However, considerable resistance to this notion has been evident in the courts and legal literature. For example, courts have declared that *Roe* remains intact. See *Guan Society of Obstetricians and Gynecologists v. Ada*, No. 90-16706, slip op. at 14 (9th Cir. Apr. 16, 1992) ("[I]t would be both wrong and presumptuous of us now to declare that *Roe v. Wade* is dead."); *Lewis v. Pearson Foundation*, 908 F.2d 318, 320 (8th Cir. 1990) ("*Roe v. Wade* both controls our decision and establishes the fundamental rights upon which [the plaintiff's] claim is based."); *Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53 (1st Cir. 1990). Given this fact, it is highly unlikely that a court would conclude that Congress intended to restore or recognize a compelling interest in unborn life when they enacted the RFRA.

Some have argued that the present Supreme Court would not do this. It is argued that (1) when the present Supreme Court majority overrules *Roe* expressly it will do so on the basis that there is a compelling interest in unborn life throughout pregnancy and (2) the present Supreme Court majority subscribes to a conservative federalism view that such matters should be resolved by the states and not under the federal Constitution.

**1. *Roe v. Wade* Could (and Will Likely) Be Overruled on the Ground That There Is No Fundamental Right to Abortion, Not on the Ground That the State Has a Compelling Interest in Unborn Life to Override the Fundamental Abortion Right, So That Recognition of a Compelling Interest in Unborn Life Throughout Pregnancy Is Not Assured.**

Certain critics have asserted that no abortion right could be established by passage of the RFRA without an abortion-neutral amendment because the Supreme Court would have to establish that there is a compelling interest in protecting unborn human life throughout pregnancy in the process of reversing *Roe v. Wade*. Thus, they urge, there can be no free-exercise abortion right under the RFRA because of this established compelling interest.

This is not so. Examination of the opinions of the *Webster* plurality, together with Justice Scalia's *Webster* opinion, demonstrates that at least four Justices believe that there is no fundamental right to abortion. See Bopp & Coleson, *What Does Webster Mean?*, 138 U. Pa. L. Rev. 157, 161-162 (1989); Bopp & Coleson, *Webster and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271, 278, 281-294 (1990). Thus, in any case expressly overturning and reversing *Roe v. Wade*, these four are likely to vote that there is no fundamental right to abortion and thereby overrule *Roe*. Justice O'Connor does not recognize a general fundamental right to abortion but assumes a fundamental right to abortion in cases where a statute would impose an "undue burden" on abortion. Further, in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), these five Justices applied the rational-basis, low-scrutiny test — not a heightened level of scrutiny required for a fundamental right — in reviewing laws restricting abortion. See Bopp, Coleson & Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule Roe v. Wade*, 1 Seton Hall Const. L. J. 55, 56-58, 76-82 (1990). Thus, when a majority of the Justices agree to overrule *Roe* in a future abortion case, a likely scenario would be that these five Justices would declare there is no general fundamental right to abortion and, therefore, *Roe* would be expressly overruled on that basis.

Under this scenario, the Court would not proclaim a compelling state interest in restricting abortion, but the "fundamental right to abortion" would be removed, and, therefore, it would no longer be necessary to demonstrate a compelling interest in restricting abortion. Protective abortion laws would be upheld under the easily met "rational basis test."

If Congress meanwhile enacts the RFRA, however, laws restricting abortion will again face the formidable "compelling state interest" barrier, this time erected not by the Constitution but by the RFRA itself.

## 2. The Jurisprudential Philosophy of the New Majority on the Court Makes Them Deferential to Congress on Statutory Matters.

It has been urged that the new majority on the Supreme Court believes that important societal matters, such as abortion, should be handled by state legislatures. 2/21 McConnell et al. Memo at 4. McConnell et al. stated this jurisprudential philosophy thus:

If the Court overrules *Roe*, it will be because of a fundamental jurisprudential judgment that the abortion issue is not appropriately resolved by judges — that 'the answers to most of the cruel questions posed are political and not juridical.'

*Id.* (quoting *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring)).

However, it is precisely this jurisprudential philosophy — a deferential attitude toward the judgments of legislatures — which *also* makes this Court majority deferential to the actions of Congress and concerned to abide by the Congressional intent in enacting a statute such as the



RFRA. This majority will likely ask whether Congress intended, by passage of the RFRA, to subject protective abortion laws to the stringent compelling state interest test. As already discussed, the answer would likely be "yes" (with the understanding that Congress could act to change matters if it did not agree with the Court's interpretation). This leaves the matter sufficiently uncertain to warrant excluding an abortion right under the RFRA.

The recent decision of the United States Supreme Court in the case of *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America et al. v. Johnson Controls*, 111 S. Ct. 1196 (1991), underscores this point. In *Johnson Controls*, the Court considered whether a corporate policy of barring fertile women from jobs where they could be exposed to lead violated Title VII of the Civil Rights Act because it constituted sex discrimination. In striking down the policy, the Court declared:

Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the Pregnancy Discrimination Act.

*Id.* at 1207. Justice White authored an opinion, concurring in part and concurring in the judgment, joined by Chief Justice Rehnquist and Justice Kennedy, and Justice Scalia wrote separately, concurring in the judgment. A quote from Justice Scalia's opinion illustrates the judicial philosophy of these conservative Justices:

I think it irrelevant that there was 'evidence in the record about the debilitating effect of lead exposure on the male reproductive system.' Even without such evidence, treating women differently 'on the basis of pregnancy' constitutes discrimination 'on the basis of sex,' because Congress has unequivocally said so.

*Id.* 1216 (Scalia, J., concurring) (emphasis added) (citations omitted).

This sort of analysis applied to a future attack by the ACLU and/or RCAR on a protective abortion statute could readily result in a holding that if a state law burdens conduct motivated by religion, in this case abortion, it cannot be enforced, because Congress said so. If Congress did not intend to include abortion as a form of protected conduct within the RFRA, the court opinion would read, Congress could have said so.

***C. Even if a Compelling Interest Is Recognized, Because There Are a Number of Ways in Which a State Can Legislatively Favor Childbirth Over Abortion, the Problem Would Remain of Whether a Statute Barring Abortion Would be the Least Restrictive Means to Achieve the State's Objective.***

Critics of the the opponents of the RFRA have argued that an abortion-exception amendment to the RFRA is not needed because (1) the Supreme Court will establish at some point that there is a compelling interest in unborn life (an assertion demonstrated to be debatable, *supra*) and (2) that a protective abortion statute barring abortion in most circumstances would be "the least restrictive means" to effect the state's recognized compelling interest. This second point may not be so easily assumed.

First, it should be noted that this least-restrictive-means test, employed in First Amendment analysis, is a more rigorous test than the narrowly tailored test employed in Fourteenth Amendment analysis. There may be a number of ways in which a state could assert a compelling interest which would be no wider than the interest itself. These would all be narrowly tailored. However, not all of these would be equally restrictive. Among those narrowly tailored possibilities, a state would have to assert its interest in protecting unborn human life in the least restrictive way possible.

There are a variety of ways in which a state could seek to assert an interest in protecting unborn life, most of them less restrictive than barring abortion. For example, a state could promote its interest in protecting unborn human life by passing laws promoting adoption by simplifying legal procedures, providing financial assistance and incentives, and so on. Likewise, the state could provide various incentives to carry a child to term and disincentives for abortion falling short of a ban. The state could establish a network of homes for unwed mothers. It could launch state-wide education programs in schools and advertising programs to promote childbirth and adoption over abortion. Under the RFRA, pro-abortion groups will argue that these (and other state actions which may be imagined) are among the many less restrictive ways in which a state could assert its interest in protecting unborn human life. It is entirely conceivable that some court could find that barring abortion would weigh too heavily on women seeking abortion and that the state must employ less restrictive means to promote its interest.

**IV. THE LONG HISTORY OF ABORTION LITIGATION AND THE MERITS OF ITS UNIQUE STATUS MAKE IT AN APPROPRIATE EXCEPTION TO BE SPELLED OUT IN THE RFRA.**

William Bentley Ball, one of America's foremost litigators for religious freedom, has made two important points in arguing that the RFRA needs "an express reservation, in the text of the act, which would exclude from the scope of the act any cause of action challenging an abortion-restrictive statute" Letter from William B. Ball to Marc Stern at 3 (Mar. 26, 1991). These are: (1) that we must take into account the political context of the current support for the RFRA and (2) that abortion is specially qualified to be an exception to the RFRA. Concerning the first point, he writes:

The problem . . . [is] with the RFRA as it appears likely to be used. I feel that it is unrealistic to ignore the context in which the bill is appearing. The chief promoter of RFRA is the Coalition For the Free Exercise of Religion. Also favoring the measure is the Religious Coalition for Abortion Rights. You have seen the latter group's passionate plea on behalf of RFRA. . . . Let us suppose that an otherwise adequate piece of legislation is being expressly backed by [the Ku Klux Klan and several other white supremacist organizations]. I wonder if we would not both feel that we could not ignore the factor of those promoters when we would come to consider the bare texts of the proposed legislation. *It is unrealistic to view legislation apart from its political context.*

*Id.* at 1-2 (emphasis added).

As to the unique status of abortion, making it appropriate for special treatment in the RFRA, Mr. Ball writes:

I am not bothered by the making of this extremely important exception. I know that you had said that, if one exception is made, all may be made. . . . I believe that the abortion exception is one not remotely like any other which can be conceived. You will recall the statement in the Mormon cases that human sacrifice does not lie within the scope of religious liberty. If a cult were flourishing, on a widespread basis in our country, which practices human sacrifice, I am sure that you would not refuse an exception being made to the RFRA to exclude their "rights." Let me tell you that abortion on demand in the United States today dwarfs, in the opinion of millions of Americans, the horrors of human sacrifice.

*Id.* at 3-4.

**V. IT IS HIGHLY UNLIKELY THAT ANY PROTECTIVE ABORTION STATUTE WOULD BE ENACTED WITHOUT AN EXCEPTION TO PRESERVE THE LIFE OF THE MOTHER, SO THAT RELIGIONS REQUIRING LIFE SAVING ABORTIONS WOULD HAVE THEIR CONCERNS MET EVEN WITH AN RFRA WHICH EXCLUDES ABORTION.**

Some members of the RFRA coalition, such as Agudath Israel of America, have argued that their religion compels them to seek an abortion in a case where the life of the mother is at risk. Therefore, Agudath Israel urges that an abortion-exemption amendment not be added to the RFRA because the RFRA would then not allow a free-exercise claim to be excepted from a protective abortion statute. Letter from David Zwiebel, Director for Government Affairs and General Counsel to Agudath Israel, to Douglas Johnson at 1 (Jan. 24, 1991). Forest Montgomery has opposed an abortion-exemption amendment because he believes that such claims ought to be allowed under the RFRA. Letter from Forest Montgomery to Representatives Solarz and Henry at 1 (Mar. 1, 1991).

It should be noted that these positions concede that the RFRA would allow free-exercise-of-religion abortion claims. Indeed, Montgomery and Agudath Israel have taken the position that such claims are proper and opportunity to raise them should be preserved.

NRLC has long maintained the public policy position that an exception to protective abortion statutes to preserve the life of the mother is permissible. This has been the uniform position of the American states in their abortion statutes for most of American statutory history and in the common law before that. We would include such an exception in both federal and state proposals to restrict abortion. Therefore, we do not take issue with Agudath Israel's desire for a life-of-the-mother exception to protective abortion statutes. We do differ as to how this ought to be achieved. Allowing free-exercise claims to an abortion right under the RFRA would result in much broader claims than just for the life of the mother. What principled line could be drawn to say that one religious claim (for the life of the mother) is more legitimate than another religious claim (for the right to make a free choice without any "burden" on the choice)? None is possible. Therefore, by defending the right of persons to have a recognized free-exercise claim to life-saving abortion under the RFRA, one holds open the door to a host of other claims.

The way to achieve a life-of-the-mother exception is through the legislative process, and not through the RFRA with the accompanying flood of other religious claims that could be made if one is recognized. The state legislatures have a long history of recognizing, at a minimum, an exception for the life of the mother. Therefore, the concerns of religious organizations which would impose a religious duty to obtain an abortion to preserve the life of the mother are already provided for.

**VI. CONCLUSION**

In sum, the RFRA without an amendment excepting abortion poses grave dangers to protective abortion laws. Efforts to protect religious liberty must not come at the expense of the lives of innocent unborn children. The Religious Freedom Restoration Act of 1991 needs an abortion exception amendment.

Mr. EDWARDS. The last member of the panel to testify is Prof. Robert Destro, who has already been introduced by Mr. Hyde. Mr. Destro, in addition, was for a number of years a very valued Commissioner of the U.S. Commission on Civil Rights and rendered a great service. We are delighted to see you, Professor. You may proceed.

**STATEMENT OF ROBERT A. DESTRO, ASSOCIATE PROFESSOR OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA**

Mr. DESTRO. Thank you, Mr. Chairman. It is a pleasure to be back in this committee again. I am very pleased to be here today. I find myself in much the same position here today that I found myself in many of the discussions when I was on the Civil Rights Commission, in coming in and saying, yes, I am in favor of making some changes in the law that I think are necessary for the protection of civil rights in this country, but I don't like the way you are doing it. And I am not, as my friend and colleague, Dean Gaffney, has suggested, arguing for the perfect bill here.

I think we need to understand, as we deal with laws, as Congress makes laws affecting the first amendment, the framers of the constitution had something in mind. They had a good idea when they said Congress shall make no law. They knew that making laws about religious liberty or about religion would be incredibly divisive. I think that this bill has shown quite clearly that that danger still exists, because we all want, all of us here want religious liberty to be protected in the most substantial way possible.

We disagree on how that should be accomplished. I think we all agree that *Smith* is the reflection of a bad trend.

I agree with that. I don't agree, though, that *Smith* is the problem. I think that you can take that problem all the way back to our country's legacy with establishments of religion, and this country has a very, very long and sordid history of discrimination on the basis of religion, and treating people who disagree on matters of public policy with respect to religion as effective heretics. I think some of the discussions about this bill have treated the dissenters from it in that way as if they are opposed to religious liberty, and they are not.

I think that *Smith* is the reflection of a trend which goes back over 100 years to the U.S. Supreme Court cases that dealt with the issue of Mormon polygamy. I know Dr. Oaks was here yesterday and testified with respect to the history of this community on that topic. But I think if you go back and you read, and I have added it in my written testimony, and I would ask that it be submitted for the record, that the test the Supreme Court has supplied pretty significantly since the Mormon polygamy cases has been that "The state has the right to prohibit all offenses against the enlightened sentiment of mankind, notwithstanding the pretence of religious freedom by which they might be advocated or practiced."

That is the back board against which the Supreme Court has been deciding free exercise cases since basically 1890. And I think the list that Judge Noonan has in his case is a reflection of the judiciary's view of what the enlightened sentiment of mankind will allow and what it will not allow. I also think that *Smith* is signifi-

cant and the debate after *Smith* is significant in that nobody got as upset after *Goldman v. Wineburg* as they did after *Smith*.

A poor Jewish captain wasn't allowed in the course of litigation to wear his yarmulke. Congress responded to that allowing it to happen as long as it was not inconsistent with a military mission. What was it about *Smith* that has caused the uproar? I think what is wrong with *Smith* is that it went after the compelling State interest test, which is the key to all the substantive due process analysis in constitutional law.

It also happens to be the centerpiece of the current *Casey* case. If the Supreme Court messes with the standard of review for abortion, everybody recognizes that the abortion right falls.

But the connection that I want to make here is a little different, and that is the connection between free exercise, freedom of speech, equal protection, due process, and all the other constitutional rights we hold dear. This discussion has not addressed those questions. I recognize that Professor Laycock is going to talk about this and I won't try and preempt his testimony, but I think the problem with this bill is it does not make any attempt, because it is so divisive, to deal with the connections between those issues.

I think if we look at *Smith*, which was a case involving a religious exemption from peyote laws which would have cost the State of Oregon some money, and you compare it with another case, *Texas Monthly* against *Bullock*, which was a tax case involving a tax exemption which would have cost the State some money, which was decided on establishment clause grounds, you find Justice Scalia, who was the author of the *Smith* case dissented in that case. He said, I think this is an exemption which is required by the free exercise clause. And basically he told the Court, this is going to come back to haunt you.

He said, if you are going to throw out religious exemptions on the grounds that the establishment clause prohibits them, basically you have turned religious liberty into a very narrow realm. He called it between *Scylla* and *Charybdis*, and he said, you have set a ceiling and a floor. You have turned the religious freedom issue into exactly the same kind of issue we have in race discrimination cases about quotas.

Are quotas a ceiling or a floor? Basically we are talking about what is the room that the State has to maneuver in recognizing the legitimate rights of both minorities and majorities to equal protection and nondiscrimination on the basis of religion.

You can look in the cases. Even the Civil Rights Commission, when it was asked to look at the issue of religious discrimination, took almost 15 years to look at it. All they did, and this was Jimmy Carter's Civil Rights Commission, not the one that I was on, was read the cases. However, if they had read the cases in light of the history that Professor McConnell and Professor Laycock have written about, what they would have recognized is that there are a lot more connections with discrimination on the basis of race, national origin, culture, multiculturalism, you name it, all the issues are connected, and this bill tries to take the free exercise and take it out and treat it special.

Now, I think that religious liberty is special. I think it deserves to be treated specially. And I think that that is where, if Congress

is going to invoke the engine of its power under section 5 of the 14th amendment it has the obligation to give us something more than a vague, compelling State interest test that nobody understands precisely what it means.

You can dress it up with all the adjectives or adverbs that you want, but nobody knows what it means like they know what clear and present danger in the other part of the amendment means, which is speech. We know what clear and present danger of imminent harm to the public means. I want to see religious liberty treated the same way we treat freedom of speech. I don't want, and I confound all my students in my common law class when I tell them there is a necessary relationship between the understanding of the liberty and the test which is used to effectuate it.

I don't think that this country has had since *Reynold* a clear understanding of what free exercise means. As I said in my testimony, and I will end with this point, sure, we all have a right to believe. Big deal. If we don't have the right to say anything about it, we don't have a right to freedom of speech, and if we don't have the right to do and act on those beliefs in a way which is not going to destroy the public wheel, then we don't have a right to free exercise, either. Thank you.

Mr. EDWARDS. Thank you very much, Professor Destro.

[The prepared statement of Mr. Destro follows:]



PREPARED STATEMENT OF ROBERT A. DESTRO, ASSOCIATE PROFESSOR OF  
LAW, THE CATHOLIC UNIVERSITY OF AMERICA

Mr. Chairman, I would like to thank the Committee for the opportunity to share my views on the "Religious Freedom Restoration Act of 1991" (H.R. 2797). I am currently an Associate Professor of Law and Director of the Interdisciplinary Program in Law and Religion at the Columbus School of Law of the Catholic University of America. I teach Constitutional Law, a seminar on the First Amendment, Conflict of Laws, and two courses in which involve substantial constitutional questions: Professional Responsibility and Bioethics. In addition, I have spent most of my career dealing with civil rights issues related to religious liberty, discrimination on the basis of national origin and ethnicity, and bioethics. The perspective I bring to my analysis of the Religious Freedom Restoration Act is influenced by my experience as a litigator, by my service as a Commissioner on the United States Commission on Civil Rights from 1983-1989, and as a scholar who continues to speak and publish in these fields.

**Summary**

I oppose the enactment of "The Religious Freedom Restoration Act of 1991" (RFRA) in its present form, but I would support Congressional action which is clearly designed to protect and accommodate religious practices such as those involved in *Employment Division v. Smith*. My reasons for opposing RFRA may

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

be summarized as follows:

1. Though the freedom to exercise one's religious beliefs without penalty or hindrance from the government is a fundamental right, I do not believe that constitutional law has either a robust vision of what conduct that right includes, or a strong sense of its place in the life of a pluralistic democracy.
2. Though most commentary on *Employment Division v. Smith* has focused on the majority opinion's rejection of the "compelling state interest test," I believe that the true importance of *Smith* can be understood only in light of the debate among the Justices concerning both the nature of religious liberty itself, and the role the courts should play in defining and protecting it.
3. As a result, I believe that there are serious problems with the "Religious Freedom Restoration Act of 1991":

*First*, it compounds the error which led to the result in *Smith*: the Court's narrow understanding of the meaning of the Free Exercise Clause, and its relationship to other constitutional guarantees.

*Second*, the title is misleading. A more accurate description might be "The 'Compelling State Interest Test' Restoration Act of 1991."

*Third*, implicit in Section 7 of the RFRA is the position that the "restoration" of "religious liberty" under the Free Exercise Clause can be accomplished without regard to the non-establishment guarantee of the First Amendment and the equal protection guarantee of the Fourteenth. Not only is this wrong as a matter of theory, it is dangerous to religious liberty.

*Fourth*, critical terms are left undefined. Among these are: "burden," "compelling state interest," and "exercise of religion." Because the Congress gives no guidance on these issues, I believe that RFRA may be unconstitutional for the following reasons:

- 1) it is unconstitutionally vague;
- 2) Notwithstanding the express language of the First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the exercise thereof . . .", Section 3(b) purports to authorize some government burdens on a person's exercise of religion.

- 3) Section 7 purports to break the link between the Establishment and Free Exercise provisions of the Religion Clause; and
- 4) Assertion of Congressional power to set standards of review applicable in constitutional litigation raises important Separation of Powers questions.

Let me now address each of these point in turn.

**Point One: "The Religious Freedom Restoration Act of 1991" Does Not Address the Central Issue: The Meaning of the Free Exercise Clause**

Free exercise cases arise only when religiously-motivated action falls outside the "community standard" for acceptable conduct. In some instances, such as the use of peyote involved in *Smith*, the racial discrimination involved in *Bob Jones University v. United States*,<sup>2</sup> and the practice of polygamy involved in *Reynolds v. United States*,<sup>3</sup> this "community standard" is both well-defined in the statutory and case law, and clearly understood by the individuals involved. In other cases, the line drawn between acceptable and unacceptable conduct motivated by religious belief is less clear. Several of the "Draft Law Cases" provide useful examples of this type of situation.<sup>4</sup> In still a third set of cases, the conduct is generally acceptable, but for reasons specific to that community, regulations are imposed which

<sup>2</sup>. 461 U.S. 574 (1983).

<sup>3</sup>. 98 U.S. 145 (1878).

<sup>4</sup>. See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971); *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943); *United States v. Seeger*, 390 U.S. 163 (1968); *Hepp v. Larson*, 401 U.S. 437, 91 S.Ct. 636, 28 L.Ed.2d 164 (1971); *Arver v. United States*, 245 U.S. 264, 389-390 (1918).

have either the purpose or the effect of limiting religious practice.\*

In all of these cases, the authorities, perceiving the religiously motivated conduct to be a threat to some important governmental interest, take legal steps to abate it. Let me illustrate by drawing a comparison between freedom of speech and freedom of religion.

I believe that free exercise is not taken as seriously as freedom of speech and press, even though both are part and parcel of the First Amendment. The standard of review actually applied in Free Exercise cases (as opposed to the standard of review arguably applicable) is really quite different from that applied in free speech and press cases. Can you imagine, for example, the outcry if the constitutional norm for freedom of the press were stated as follows:

"[t]he state has a perfect right to prohibit . . . all . . . open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of [press freedom] by which they may be advocated and practiced."

Substitute the words "religious conviction" for "press freedom" in the quoted reference and you have precisely the formulation

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\* See, e.g., *Board of Education of Westside Community Schools v. Ammann*, 110 S.Ct. 3086 (1990) (student religious activity in public schools under the Equal Access Act, 20 U.S.C. § 6071(A)); *Occupation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Iann*, 483 U.S. 327 (1987) (limits on religious discrimination in employment by religiously-affiliated employers); *Bowen v. Boy*, 476 U.S. 693 (1986) (Social Security regulations); *Allocca v. Fodor*, 406 U.S. 285 (1977); *Branford v. Board*, 344 U.S. 809 (1961) (Sunday-closing laws); *St. Bartholomew's Church v. City of New York*, 814 F.2d 310 (2d Cir. 1986) cert. denied, 111 S.Ct. 1143 (1991) (historic preservation laws); *Brundon v. Board of Education of Guilford Central School Dist.*, 635 F.2d 971 (2d Cir. 1981), cert. denied, 454 U.S. 1120 (1981) (student-initiated prayer on premises of public school).

the Supreme Court utilized to define the scope of religious liberty in *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*.<sup>6</sup> The tests for freedom of speech and press are far more robust and well-developed.<sup>7</sup>

Thus, if *Smith* is bad constitutional law, it is not because the majority rejected the sort of multi-factor balancing which has come to characterize much of the case law in the field of substantive due process, but because the precedents upon which rests are defective. The Supreme Court's understanding of the extent of religious liberty -- quoted above -- has been a crabbed one since the late 1800s.

The only thing the Court is willing to concede with respect to religious liberty is that belief is absolutely protected.<sup>8</sup> Some concession. Just as the text of the First Amendment contemplates that I may speak or print what is on my mind, it also contemplates that I may act on my religious beliefs. That is what "free exercise" means. The task is to determine what forms of conduct are so unacceptable that the government may abate them without fear of running afoul of the First Amendment.

This is why I believe that the Court in *Smith* was actually on the right track, even though, in the end, it took a wrong turn.

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<sup>6</sup>. 136 U.S. 1, 10 (1890).

<sup>7</sup>. See generally Neville B. Nimmer, "On Determining the Limits of 'the Freedoms' Guaranteed by the First Amendment" in *Nimmer on Freedom of Speech* (Matthew Bender, 1984) (Chapter 2).

<sup>8</sup>. *United States v. Reynolds*, 98 U.S. 145 (1878).

Both Justice Scalia's opinion for the majority in *Smith* and Justice O'Connor's concurring opinion correctly focus first on the nature of the conduct to be regulated. Justice Scalia wrote:

[Respondents] assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "1600 "ABRIDGING THE FREEDOM ... OF THE Press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. [citations omitted]

The distinction between the nature of the conduct involved and the motivation which prompts the state to regulate it is further highlighted by Justice Scalia's explicit reliance on the reasoning of the *Norman* polygamy cases to reach its result:

There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since [United States v.] *Reynolds* plainly controls." (emphasis added)

The RFRA makes no attempt whatever to build on the Court's attempt in *Smith* to make some sense of the law of the Free Exercise Clause. The Court indicated its willingness to apply the same sorts of standards which govern the Speech and Press Clause, and to defer to the legislature in cases where special

exemptions are thought to be necessary. What it did not do, however, was to make clear when religious motivation is irrelevant to the First Amendment inquiry.

Rather than undertake the challenge of discerning what an appropriate role for religious motivation might be, however, the sponsors of the RFRA have taken what appears to be the easy way out: immunize all religiously motivated conduct, and let the courts grapple with the tough issue of what makes an interest "compelling."

In *Smith* the majority of the Justices did answer that question: when the conduct is a crime the interest in compelling. Justice O'Connor took a more activist position: the state's interest in the uniform enforcement of its criminal law is "compelling" when she believes that there are important social benefits to be gained from uniform enforcement.<sup>9</sup> For the dissenters, the State's interest is "compelling" only when there is evidence that the religious conduct is harmful.<sup>10</sup> To its credit, therefore, the Court did attempt to grapple with the difficult issues. The RFRA avoids them.

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<sup>9</sup> *Smith*, 110 U.S. at 1614 (O'Connor, J. concurring in the judgment).

<sup>10</sup> *Id.* 110 S.Ct. at 1618 (Blackmun, Brennan & Marshall, JJ. dissenting).

**Point Two: The compelling state interest test, standing alone, provides insufficient protection for religious liberty. More important, RFRA would not relieve practitioners of Native American religions of the burdens imposed by laws such as that involved in *Smith*.**

There is no question that the Congress and the States can exempt the religious use of peyote from the reach of general criminal law if they so desire. Many of the States have done so, and it is arguable that Congress did so too when it adopted the American Indian Religious Freedom Act [AIRFA].<sup>11</sup> Regrettably, however, the plaintiffs in *Smith* never argued that AIRFA provided them with a statutory exemption.<sup>12</sup>

What is notable about RFRA is that it contains no guarantees whatever that the plaintiffs in *Smith* would have won their case. Justice O'Connor's vote with the majority to affirm Oregon's decision to deny unemployment benefits rests on her view that

<sup>11</sup>. 42 U.S.C. §1996, P.L. 95-341, § 1, 92 Stat. 469.

<sup>12</sup>. The State of Oregon's brief in *Smith I* indicates that Oregon was

not clear whether claimants also [were] urging that they [were] entitled to exemption under the American Indian Religious Freedom Act (AIRFA). They refer to the Act, but they have not developed an argument based on it or asserted directly that it somehow preempts state law.

Reply Brief for the State of Oregon, *Employment Div. v. Smith*, 495 U.S. 660 (1990) at n.7, citing Brief of Respondents *Smith and Black* at 24-26.

Though it is also arguable that Justice O'Connor's opinion for the Court in *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), had effectively rendered AIRFA a nullity by the time the case reached the Supreme Court in *Smith II*, this was not the case when *Smith* was argued and decided in the Oregon courts. The Supreme Court of Oregon did not view *Lyng* as controlling, even after the initial remand, and Oregon Court of Appeals specifically noted that AIRFA might require reconsideration of *State v. Soto*, 21 Cr. App. 794, 537 P.2d 148, rev. den. (1975), cert. denied, 424 U.S. 988 (1975), which had refused to allow a criminal defendant charged with criminal possession of peyote to present evidence of his religious beliefs as a defense. *Black v. Employment Division*, 75 Cr. App. 735, 744 & n. 9, 707 P.2d 1274 (1985).



there is no "serious[] dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens[,] and that "a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens."<sup>33</sup> RFRA does nothing to change that characterization.

Thus, if practitioners of Native American religions are to be protected from generally applicable laws which have the effect of prohibiting or burdening their ability to participate in their traditional rituals and practices, Congress must act to provide specific protection. A bill such as that introduced by Senator Inouye provides a useful starting point for the discussion.<sup>34</sup> RFRA does not.

More devastating to the RFRA, however, is the inherent plasticity of the "compelling state interest test" itself. As actually applied in free exercise cases (and it has not been applied in all such cases, or applied consistently), it has become little more than a multi-factor balancing test. No one really knows what makes a state interest "compelling."<sup>35</sup> When First Amendment rights are concerned, vagueness which engenders

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<sup>33</sup>. *Smith*, 110 S.Ct. at 1614 (O'Connor, J. concurring in the result)

<sup>34</sup>. S. 110, 102nd Cong., 1st Sess.

<sup>35</sup>. See generally Laurence Tribe & C. Dorf, *Levels of Generality in the Definition of Rights*, 37 U. Chi. L. Rev. 1176 (Fall, 1969); Steven Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 S.O.L. Rev. 917 (1994).

unfettered discretion in the decision-maker renders the regulation unconstitutional.

Is it not relevant that multi-factor balancing was condemned in *Dunaway v. New York* as providing inadequate protection for Fourth Amendment rights? In *Dunaway*, Justice Brennan wrote that "protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases."<sup>14</sup> Isn't that precisely what happened in *United States v. Lee*, *Goldman v. Weinberger*, and *Lyng v. Northwest Indian Cemetery Protective Ass'n*?

So why, I ask the Committee, does RFRA rely on a "test" which Justice Brennan himself rejected as inadequate to protect constitutional rights in Fourth Amendment cases? There are only three possible responses: 1) that the Committee has not thought about the issue (which is the most likely answer); 2) that the authors of the RFRA are comfortable with the decision to allow judges nearly unfettered discretion in cases arising under the Religion Clause (which is doubtful); or 3) that the Congress believes that the Free Exercise Clause of the First Amendment is not as "fundamental" as the Search and Seizure Clause of the Fourth (again unlikely).

Two years before the Supreme Court entered judgment in the

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<sup>14</sup> 442 U.S. 200, 211 (1979). Compare *Larochere v. N.L.R.B.*, — F.3d —, 112 S.Ct. 846, 848 (1992) (rejecting multi-factor balancing of interests in property rights under the N.L.R.A.).

second round of the Smith litigation, Judge John Noonan, of the United States Court of Appeals for the Ninth Circuit and a First Amendment scholar in his own right, criticized the Supreme Court's unwillingness to enforce the Free Exercise Clause according to its terms.

Remarkably and regrettably when Congress has found a national interest to be of sufficient importance to be incorporated into federal legislation and that legislation has conflicted with the free exercise of religion, the Supreme Court of the United States has uniformly found the national interest to outweigh the claims of conscience and permitted Congress to prohibit the free exercise of religion in conflict with the legislation. This bleak record is mitigated because the Court has sometimes reinterpreted a federal statute to accommodate the Free Exercise claim. E.g. *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965); *Girouard v. United States*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 (1946). But where the Free Exercise claim has been pressed and the federal statute not glossed, the result has not been good for Free Exercise. School boards, municipalities, states have been subjected to the standard set by the Religious Clauses. When Congress has legislated, the legislative objective has overborne the claims of conscience. The Amish have been forced to contribute to Social Security despite their contention that their religion proscribed other ways of caring for the community. *United States v. Lee*, 455 U.S. 252, 103 S.Ct. 1051, 71 L.Ed.2d 127 (1982). Conscientious objectors to war have been compelled to serve in the armed forces contrary to their most deeply held principles. *Negre v. Larsen*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). The property of the Mormon church has been confiscated by congressional command in order to force conformity contrary to the religious principles of the afflicted church. *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 478 (1890). In all, in nineteen cases the court has

<sup>17</sup> See, e.g., J.F. Noonan, Jr., *The Believer and the Powers That Are* (Macmillan 1967).

<sup>18</sup> *R.S.O.C. v. Townley Engineering & Manufacturing Co.*, 459 F.2d 610, 622 (9th Cir., 1971) (Noonan, J. dissenting)

upheld congressional legislation in the face of the Free Exercise Clause. The courts of appeal have followed suit.<sup>10</sup>

The same criticism will apply with equal force to this Congress should it enact the RFRA.

Point Three: Implicit in Section 7 of the RFRA is the position that the "restoration" of "religious liberty" under the Free Exercise Clause can be accomplished without regard to the non-establishment guarantee of the First Amendment and the equal protection guarantee of the Fourteenth.

Not only is this implicit assumption wrong as a matter of theory, it is dangerous to religious liberty. It bears noting here that the current standard of review for Establishment Clause cases is not a "balancing test." The "three-pronged" test enunciated in *Lemon v. Kurtzman*<sup>11</sup> is a set of constitutional rules which has long been understood by both the Court and commentators as confining the scope of the Free Exercise guarantee.<sup>12</sup>

A useful "reality check" in this regard is Section 7 of the RFRA. Justices Goldberg and Harlan, concurring in *Abington School District v. Schempp*, noted that

The First Amendment's . . . two prescriptions are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and

<sup>10</sup> *Id.*, 229 F.2d at 624. Judge Brown's dissent in *Townley Engineering* includes an appendix which summarizes (current to August 1968) the state of the Free Exercise case law in the Supreme Court and federal courts of appeal. I have attached that dissent for the Committee's information.

<sup>11</sup> 403 U.S. 602 (1971).

<sup>12</sup> *See, e.g.,* *Pune Monthly v. Bullock*, 109 S.Ct. 880, 103 L.Ed.2d 1 (1989)

to nurture the conditions which secure the best hope of attainment of that end.<sup>20</sup>

No one seriously disputes the verity of this observation, yet the RFRA purports to "restore" religious liberty without regard to the extensive law and literature on the Establishment Clause. Why? The short answer is that it would be too politically explosive. All one need ask is whether the sponsors of RFRA would be willing to delete RFRA Section 7 and apply the "compelling state interest" to all cases which arise under the Religion Clause. I doubt they would, and refer this Committee to the debate over the Equal Access Act if it has any doubts.<sup>21</sup>

I might add in closing that, as one of the attorneys who represented the students involved in *Brandon v. Board of Education of Guilderland Central School Dist.*<sup>22</sup>, it is comforting to know that students who wish to form religiously-oriented groups on campus during their non-class hours will no longer need to worry about the strictures of the Equal Access Act if RFRA is passed. Under RFRA it is arguable that they need not show that "non-curricular" groups have been admitted to the school forum before they can demand equal access: they will be able to raise their Free Exercise Clause claims directly! See Section 6(a) of RFRA.

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<sup>20</sup>. 374 U.S. 203, 208-06 (Goldberg & Harlan, JJ. concurring)

<sup>21</sup>. That debate is recounted at some length in *Board of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990).

<sup>22</sup>. 635 F.2d 971 (2d Cir. 1981), cert. denied, 454 U.S. 1127 (1981).

**Point Four: Critical terms are left undefined, thus raising both First Amendment and Separation of Powers questions.**

I have addressed some of these issues in the course of my prior testimony and will not repeat those points here. Let me summarize the substance of point four by noting that if one reads the RFRA's "Purpose" section together with Section 7, while keeping in mind that most of its critical terms are left undefined, the following message is implicit:

- 1) Religious liberty is very important because it is a matter of individual, private choice.
- 2) So important, in fact, that government cannot be permitted to define it, or question the substance of religious claims; for attempts to do either would necessarily limit the freedom itself.
- 3) So, whatever religious liberty is, it is the purpose of the Free Exercise Clause alone to protect it because,
- 4) whatever the Establishment Clause does, RFRA (which is designed to "restore" religious liberty) should not affect its interpretation.

RFRA, in short, covers quite a lot of constitutional territory. As a result, I submit to you that the concerns of those who object to the breadth of its language are not unfounded. Other witnesses have spoken about the RFRA-abortion connection. I will not cover that territory in my written remarks other than to note that I share their concerns. Professor Lupu has indicated to me that he will address some of the Separation of Powers issues raised by RFRA. I too have concerns in this regard, and would simply ask the Committee's permission to address those issues by way of response to his testimony, should I disagree with it.

Thank you for your attention.

Mr. EDWARDS. Mr. Kopetski, the gentleman from Oregon.

Mr. KOPETSKI. Thank you, Mr. Chairman. I have a question for Mr. Bopp. A couple of items. Number one, abortion opponents claim that the general language of the constitution does not say anything about abortion, and therefore the right does not exist. Similarly, this bill before us, 2797, says nothing about abortion, but then you say that this legislation is a tool for those who favor prochoice. Do you see any inconsistencies there?

Mr. BOPP. No, I don't, Congressman. This bill doesn't say anything about wearing yarmulkes or smoking peyote, but this bill is about wearing yarmulkes or smoking peyote, because if it is claimed that there is a religious motivation to do so, then this bill would require that any restriction on doing so would be subject to a compelling interest. And we know that people are making a very expansive claim that they have a religious motivation to have an abortion. And therefore, when they make that claim under this bill, it will be subject to a compelling interest test, which we know historically has shown that abortion restrictions will not survive.

Mr. KOPETSKI. Could I have another question? It is a policy issue.

Mr. GAFFNEY. May I comment on Mr. Bopp's reply? I think part of the problem with Mr. Bopp's reply is that it is almost innocent of the reality of the change that happened since Ronald Reagan was elected President. As I understand the count, the Federal judiciary is now composed of approximately 60-some-odd percent of appointees of either Mr. Reagan or Mr. Bush. It certainly is the case that the Supreme Court of the United States is a result of the appointment power which is obviously one that the executive branch does not exercise unilaterally, but does so in consultation with the other bodies that are not mentioned in this committee.

The fact is that we now have a court that is not likely to find in the 14th amendment the specific guarantee that those who want a policy of abortion on demand to be sustained. And for them to turn to the legislation that is before this committee and use that as the basis for a policy of abortion on demand strikes me as highly implausible.

Mr. BOPP. Are you going to guarantee that that is going to continue forever, that we are going to have appointees by Reagan, Bush, Quayle, and every other political person that you might support that you think might ignore what is the legislative intent for this bill, which is to provide a claim for abortion?

Mr. GAFFNEY. No, I can't guarantee who is going to sit on the Court any more than any member of the Senate or someone on the staff of the White House would do. I am merely pointing out that the current climate of the consideration of this bill is one of the things that has been brought into the controversy.

Mr. KOPETSKI. I want Mr. Destro to comment, but I wanted to say that I don't think the Supreme Court on this issue is going to—they are going to put social engineers on this issue. They are going to make a political decision, not a decision based on law. That is where I come from and everybody in the United States has all kinds of opinions, I hope, on this issue, because we certainly have been talking about it a lot. Mr. Destro, would you like to comment as well?

Mr. DESTRO. Sure, I would, but I would like to again bring up kind of the middle between the two positions here. I think that there is a danger of relying, as Professor Gaffney suggests, on the percentages of Reagan and Bush appointees, in the sense that a Reagan appointee, Justice O'Connor, in the *Smith* case found a compelling State interest to uphold the State of Oregon's views against native Americans chewing peyote. I don't think that is going to change.

This bill would not have changed the results in *Smith*, and what you have is a deference to the legislature by those Justices, and it seems to me that taking that with the legacy of religious discrimination in this country, that is why Judge Noonan's list is so interesting and useful, that it seems to me what you are going to wind up with is lists like that after this case.

It is going to be a signal. You are not going to change these Reagan and Bush appointee judges. They are still going to defer to legislatures and find compelling State interest in areas where I don't think they ought to be finding them. So my position is let's have Congress spell out what the compelling interest will be. That way you can find their discretion both ways.

Mr. KOPETSKI. Mr. Bopp, I would like a policy statement. I don't know if you had the benefit of yesterday's hearing or not.

Mr. BOPP. Yes.

Mr. KOPETSKI. Good. I was interested in the issue of a choice in terms of what is more important. Sometimes we have to make difficult choices in our society, and as legislators between close calls, if you will. If untested—or if not changed, do you see the potential for continued erosion of religious freedom rights in the United States?

Mr. BOPP. Well—

Mr. KOPETSKI. This is a yes or no question.

Mr. BOPP. As an attorney who handles private cases and who has handled cases regarding religious freedom, I think we have a legitimate concern about the adequacy of protection of religious freedom in our country, both by courts, by legislatures, by Congress for that matter—

Mr. KOPETSKI. By city council, school boards—

Mr. BOPP. And by private organizations who show animosity against various religious groups, try to exclude them from the political process, as the ACLU is constantly criticizing the involvement of Catholics and others in the political process. I think we have a serious problem of religious intolerance. But I think the nature of your responsibility and Congress' responsibility is, when you have difficult things to reconcile, that they, your job is to reconcile them. Religious—

Mr. KOPETSKI. I want you to answer the question, though.

Mr. BOPP. I thought I was.

Mr. KOPETSKI. Well, let's back up, then and start over. Is there a significant threat to the exercise of religion in the United States today?

Mr. BOPP. I thought I answered that. Yes, I believe there is.

Mr. KOPETSKI. Do you think that legislation is necessary to protect free exercise of religion?



Mr. BOPP. National Right to Life has no position on that. As a private litigator, I think that legislation would be appropriate in this area. I don't think—I don't think that legislation protecting religious liberty should be held hostage by those that demand further protection for abortion. I think that is what is happening here. I think some people have bought into that as a necessary precondition to restoring religious liberty. I think that should be rejected.

Mr. KOPETSKI. So you don't think—I am trying to—you don't think that the threat to the exercise of religion and individual religious practices is so great as to say that in this value judgment, that maybe, maybe there will be some cases where people will argue the abortion issue in terms of a religious exercise, that is so great therefore to overcome that issue?

Mr. BOPP. I think that the threat to religious liberty is serious. I think this bill poses an equally serious threat to protecting unborn children from abortion. And I also believe that if you don't have life, as the Supreme Court said in 1972, the right to life is the right to have rights. When the unborn is killed, the unborn is not only deprived of their right to life but their right to religious liberty, the right to equal protection, the right to free speech, to all other legal protections, and therefore it is a serious proposition when we are talking about ending a person's life.

Mr. KOPETSKI. I am trying to get a value judgment out of you. What is more important to you, the issue, the right to life issue as you represent it, or religious freedom in America?

Mr. BOPP. I wouldn't want a society without both. And, you know, that is the difficult task that we have here in—

Mr. KOPETSKI. If it gets down to that choice, which do you choose?

Mr. BOPP. That is absurd. If you are being required to choose, you should turn to those who are requiring you to choose between liberty and life and tell them you won't choose. Because without both—I mean, what is the point of one without the other? There is no point.

Mr. KOPETSKI. Well, see, I am not able to walk over and tell the Supreme Court to quit slowly eroding the religious freedoms of Americans. I don't want a—across the street and do that. I do it in this hearing room through legislation.

Mr. BOPP. That is right. And therefore you do have the choice. You will be voting on this legislation. You will be voting for or against an amendment which would exclude abortion. You will be assisting in defining what it is this bill does. And if you vote to exclude life but to support only religious freedom, then you have made a choice. And as far as I am concerned, who wants to live in a society in which government can take your life, but if they allow you to live, then you can have religious freedom? That is not the kind of society we should be required to live in.

Mr. KOPETSKI. I appreciate your comments. Thank you very much.

Mr. GAFFNEY. If I could, again, just respond briefly, like Mr. Bopp I cherish a republic in which both life and liberty are protected, so I don't think that divides us. What divides us is a prac-

tical judgment about whether or not this legislation would have the effect that Mr. Bopp imagines it would.

We heard the principal sponsor of the legislation say that the claims that have been put forward, which he has presented, Mr. Bopp has presented in his extensive memorandum, which is before the committee, have no substance. That was Mr. Solarz' testimony this morning. Getting that statement out of the principal sponsor of the legislation, I think, was very important.

In the colloquy with Mr. Hyde, it then developed around the difficult issue of whether or not compelled or motivated was the appropriate language to define it. With Mr. Destro, I also applauded the effort to get sharper definition and clarity into the definition section.

I am not trying to say this bill can't be revised in the markup. You all have been around the hill long enough to know that is exactly what a committee does and that any witness who comes before you to tell you you can't do that is just a little bit naive.

But let me just say that part of the reason why compelled won't work, Mr. Hyde, is that perhaps there was a moment in your life or mine when, as Roman Catholics, we would have prayed the rosary. It might also be the case that maybe you say it every day, maybe you don't. But it is totally irrelevant as to the centrality of that practice in our religious faith and our religious life as to whether or not that practice is compelled by some teaching of our church. We may do it out of devotion, out of desire, that doesn't really fit some formalistic legal definition of the verb to compel.

We do lots of things in our religious exercise that are not compelled. We need to find language that is appropriate to take care of the concerns that this committee has. But whether we will do it on the basis of simply characterizing our opponents as those who are holding legislation hostage, and this kind of war-like military imagery that has arisen is, I think, implausible, it is not likely.

There are five Justices in the Supreme Court who have already articulated at one time or another their personal view that there is a compelling governmental interest in the protection of life. I don't think that Mr. Kopetski is put to a hard choice between life and liberty by the legislation that has been introduced by Mr. Solarz. It simply is a way of telling not simply the courts, but all the bureaucrats of the land that religious liberty needs to be defended with greater vigor.

Mr. EDWARDS. Thank you very much. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. I am not as confident as Dean Gaffney is in the personae of the U.S. Supreme Court at all. There was a case, *Johnson Controls*, that involved a company which did not want its women employees who were pregnant working around battery acid, because they didn't want to get sued for deformed children being born. And they had what I thought made a lot of sense, a regulation against that. But some women thought that was a violation of title 7.

They were being discriminated against because of their gender. And they sued. By God, they won. And the Supreme Court, with Justice Scalia on it, upheld title 7. They didn't find in the recesses of their souls concern for the unborn, being born as a thalidomide

child. They said Congress has told us what to do. We are going to do what Congress said.

Now, why wouldn't that same cast of characters, I don't mean that pejoratively, feel the same way about this bill, where we tell them, you ain't going to mess with a right to abortion with any of your restrictions unless there is a compelling State interest, and we haven't found a compelling State interest. And in *Webster* they found it a liberty interest. So you have a confidence that I don't begin to share.

Mr. EDWARDS. If the gentleman will yield, that would be decided under compelling interest standard.

Mr. HYDE. If you quote Justice Rehnquist, where is the—

Mr. EDWARDS. That was decided before *Smith*, though.

Mr. HYDE. Of course it was. But they talk about *Roe v. Wade* not in terms of compelling State interest, but in terms of a liberty interest. Let me just quote from the decision. This is 09 Supreme Court 305 A, Justice Rehnquist, announcing the judgment of the court.

"The experience of the Court in applying *Roe v. Wade* to later cases suggests to us there is wisdom in not attempting to elaborate the fundamental differences between a fundamental right to abortion, a limited fundamental right, or a liberty interest protected by the due process clause, which we believe it to be."

Now, that is far from a compelling State interest. If Dean Gaffney doesn't have a comment, I am sure you do, Professor Destro.

Mr. DESTRO. I am sure he does have a comment, but I think there is something else here, too. During the oral arguments in *Casey*, Justice Stevens put the Solicitor General through his paces on the issue of where do you find a compelling State interest in the protection of fetal life.

Mr. HYDE. You dare not call it a person, because the Supreme Court in *Roe* said whatever it is, it is not a person within the meaning of the 14th amendment. So it is already devalued, at least if *Roe* has any salience today.

Mr. DESTRO. The whole question of how you extract a compelling State interest on this question is really the reason why, I think, people are having problems with this with respect to abortion, not with respect to—I think you can deal with it by changing the language of the test. But I am going to go back to Dean Gaffney, because the question was aimed at him.

Mr. GAFFNEY. What I said, Mr. Hyde, is that there are five members of the Court before the addition of Justice Thomas, and I believe my count is correct, before the addition of Justice Souter, who had in a variety of places, not in any single majority opinion for the Court, intimated that Justice's own view, that the Government does have a compelling interest in the protection of life.

Mr. HYDE. Notwithstanding what Justice Rehnquist says in *Webster*, where he says there is a liberty interest protected by the due process clause which we believe it to be. Notwithstanding that.

Mr. GAFFNEY. Notwithstanding that. Notwithstanding that. The liberty interest that is articulated is with respect to the woman who is attempting to terminate the pregnancy. In *Webster*, the Justices who joined the plurality opinion were Rehnquist, White and

Kennedy. The citation is at 492 U.S. at 519 and the language is as follows.

“The State’s interest, if compelling after viability, is equally compelling before viability.” Those three Justices, Rehnquist, White and Kennedy.

Scalia, concurring in—sorry, in—also in *Webster*, said that that part of the plurality opinion alone should have overridden *Roe*, to get back to Mr. Kopetski’s comment. There is forming a coalition of some Justices who would depart from that and overrule that precedent.

The fifth Justice is Justice O’Connor who reflected her view in Thornburg. That is found in 476 U.S. 747. Her concurring opinion, “The State has compelling interest in ensuring maternal health and in protecting potential human life, and these interests exist throughout pregnancy.” That is without adding Justice Souter—

Mr. HYDE. Where was the compelling interest to protect fetal life in *Johnson Controls*?

Mr. GAFFNEY. I think the *Johnson Control* case cuts quite the other way, Congressman Hyde. In that case, there was very specific statutory language that the Congress had put into title 7 with respect to the BFOQ exception, the bona fide occupational qualification exception.

The language most naturally referred to the ability to do a job. That is to say, for example, if Mama’s Pizza wants to have a very Italian looking woman presenting a pizza, I presume Congress would have no difficulty with that.

On the other hand, if it was raw sex discrimination or racial discrimination, note there is no BFOQ for race, there we get a lot clearer about what was meant by compelling State interest. I think it is perfectly clear if you go back to *Brown* and the board, Right to Loving in Virginia in the Warren Court system, it meant that no interest that the Government could articulate that could justify some of the shameful episodes of Jim Crow would be sustained by the Court. We haven’t had that kind of commitment for religious freedom. That is what I think is the problem.

There are, I agree with Bob Destro, that we have a huge educational task to persuade people that religious convictions are every bit as entitled to protection in this country as what the secular views of life might be as well. I would not agree to a situation or an interpretation in which only nonreligious views are the ones which prevail in court, but that we should have a standard that approximates the obliteration of Jim Crow is exactly what I think we ought to be heading for.

Mr. HYDE. All I know is the Court did not find any State interest sufficient to—

Mr. GAFFNEY. If wasn’t called upon to do so.

Mr. HYDE. The argument of the business—women of childbearing age. Well, Mr. Bopp, you have a comment?

Mr. BOPP. The claim that we don’t have to worry about abortion statutes because in separate opinions certain justices have ventured their opinion that there is a compelling interest in unborn life is simply wholly inadequate and unsatisfactory. I am first amazed. My 15 years of litigating abortion cases counsels me to be

careful about predicting what the Supreme Court will do in a future case.

It is remarkable how definitively we hear predictions by people who should know about what a court is going to hold in a future case. But I have been litigating this question. I helped coordinate the amicus briefs that were filed in the *Casey* case. And what we are telling the U.S. Supreme Court is to decide—is to overturn *Roe* not by finding a compelling interest, but by saying that there is not a fundamental right to an abortion.

In other words, the people that are litigating it are urging the Court not to take the tack that some people are so confident they will in some future case, but quite a different tack, one that does not resolve the compelling interest question.

But frankly, all of this is irrelevant, and *Johnson Control* shows how irrelevant all of this discussion is. The question before Congress, when they decide a case under—excuse me. The question before the Court when they decide a case under RFRA is going to be, what did Congress intend when they passed that statute? And when they look in this section about compelling interest, they are going to ask the question, did Congress when they passed this statute think that there is a compelling interest in unborn life when they passed the statute?

And the Court will use the well-established canon of statutory construction in which the Court most recently announced in the *Franklin* case in a decision handed down in February of this year, that, “we evaluate,” that is, the Court, “We evaluate the state of the law when the legislation was passed.” And then they further said, absent any contrary indication in the text or history of the statute, RFRA in this case, we presume Congress enacted this statute with the prevailing traditional rule, in other words, what was legal at that time, in mind.

What is legal right now, not in the future, perhaps, but right now, is the Court’s holding in *Roe* that there is no compelling interest in unborn life throughout pregnancy. It is in the face of *Johnson Controls*, which shows that this Court takes seriously what Congress does. It looks to what Congress is trying to do, not what they would like to do. Five of them would probably like, if they were legislators when Congress passed title 7, to include protection for the unborn, because they have announced that they view that protection to be compelling. But they didn’t look to themselves. They looked to what Congress did.

Did Congress intend to take into account the protection of unborn life when they passed title 7? They didn’t add that to the statute. They took Congress’ intent seriously. And it is seriously a question right now because the state of the law is that there is no compelling interest in unborn life throughout pregnancy. That is what the Court is most likely to look to. Unless that is fixed, then this statute will in effect exclude huge numbers of people from protective abortion laws.

Mr. GAFFNEY. Could I just say—

Mr. EDWARDS. I am sorry, we have two valuable witnesses. It is not fair to them not to hear them with some leisure. The only comment I will make is that we are going to make it very clear that this is neutral, that we are not involved in one way or the other

in this law, and we thought that this bill was a simple bill that returned the law to a previous standard under which *Webster* was ruled by the Supreme Court so far. So that is what we have in mind, and so far nobody has convinced me that there is some hidden part of this bill that is aimed at abortion. But we will see.

Mr. HYDE. Would the chairman yield for just a sentence or two? We won't get into this, and we don't have time, and more is the pity, I am sorry to say, but I am interested in the constitutional question as to whether Congress has the power to set a standard of review for the Supreme Court, whether we can tell them, compelling State interest, any of the other standards, rational basis, whether we as a coequal branch can project our power into the judiciary and tell them what standard review on constitutional questions, first amendment interpretation, they shall exercise.

Mr. EDWARDS. We are going to have a shot at that with the next two witnesses. Thank you very much.

Mr. HYDE. Mr. Chairman, the panel that will testify before us now is a very distinguished one composed of Prof. Douglas Laycock, who holds the Alice McKean Young regents chair in law at the University of Texas at Austin. Professor Laycock has studied, taught and written about religious liberty for 15 years.

Pro. Ira Lupu is a professor of law at the George Washington University. Professor Lupu has written extensively on the religion clauses of the first amendment, including an article entitled, "Statutes Revolving in Constitutional Law Orbits." That will be published by the Virginia Law Review.

Mr. EDWARDS. We welcome both witnesses. Will you please raise your right-hand?

[Witnesses sworn.]

Mr. EDWARDS. Thank you. We will hear from Professor Laycock first. Without objection, the full statement will be made a part of the record.

#### STATEMENT OF DOUGLAS LAYCOCK, PROFESSOR OF LAW, UNIVERSITY OF TEXAS, AUSTIN, TX

Mr. LAYCOCK. Thank you, Mr. Chairman. I think the committee understands by now why this bill is needed and I am not going to review all of that. The Court's decision in *Smith* creates enormous problems for people of faith. The key thing to understand is that legislators cannot solve those problems with individual exemptions enacting one statute or religious claim at a time. That path leads to an endless series of battles at every level of government.

Professor Lupu has written that in that sort of process, legislators will always favor mainstream faith. He concludes that exemptions in individual statutes are always discriminatory. I agree, and even unconstitutional. I don't think they are unconstitutional, but they will turn out to be discriminatory and they will leave out lots of groups that need protection. That is why the Religious Freedom Restoration Act is the solution.

It will legislate across the board a right to argue for religious exemptions. RFRA treats every faith and every government interest equally. It subjects every claim to the same rule of decision, the compelling interest test, and that equal application of a uniform

principal to all faith and government interests is the intent of the bill.

The competing bill violates that principle. It takes three sets of claims, puts it outside the compelling interest test. Those three exceptions inject into the bill the three most divisive issues of our time. If I had set out to draft amendments that would prevent the enactment of any bill, I could not have done better than these three amendments. I am not sure I would have been smart enough to think of them. But I could not have done better.

Now, for all practical purposes, the free exercise right to abortion was rejected in *Harris v. McCray*, which is not going to be overruled in this bill. It may be overruled on one issue, but certainly not on other important issues. The standing rule in *Harris* precludes any broad-based religious challenge to abortion laws. Any RFRA challenge would have to proceed one woman at a time with judicial examination of her individual beliefs.

Harris holds that organizations cannot present a religious claim to abortion. Now, what would the woman have to show about her individual religious beliefs? She has to say that her desire for abortion is compelled by or at least motivated by her religion. Now, what does motivated mean? It means because of her religion. It is not enough to say permitted by her religion. It is not enough to say abortion is consistent with her religion. Religion has to be the reason for her abortion. It has to be the motive, not nudged by, not a lot of personal reasons and a little bit of a religion reason, not I wanted a career so I talked to my minister and he said go ahead.

Courts have dealt with this problem of mixed motive in cases of mixed religious and political and religious motive, and the dominant motive has to be religious. Let me review the impact of putting in this bill—the impact on religious liberty generally on restricting protection simply to religious compulsion.

There is a case in the second circuit that says prayer is not the exercise of religion, because people aren't compelled to pray at any particular time or place. The Court said maybe Muslim prayer was free exercise because they have to pray five or six times a day but Christian prayer is not protected.

There is a case in the Supreme Court in Washington that says becoming a minister isn't protected because no one is required to become a minister. A case in Kentucky that a leading reform group inside the church is not compelled because no one is compelled to do so.

In Boston, the Boston Landmarks Commission argued there was no free exercise right to decide where the altar should be and whether the priest should face the people or serve the mass with his back to the people, because he wasn't compelled to do it either way. Therefore the Landmark Commission compelled him where to put the altar. The Supreme Court decided it under the State constitution and avoided the terrible body of law that the U.S. Supreme Court has created.

Those are extreme cases but real ones; what you will end up with if you start down this road. So you have to protect practice that is motivated by religious belief. But the compelling interest test is a balancing test. The core of pretext is for religious compulsion and ritual. If the practice is only motivated by religion, it is going to

be easier to outweigh that. It will be easier to show a compelling interest in it.

If it is only nudged by, it would probably not be considered at all, but certainly very easy to override with a compelling interest.

We are not making these claims in Utah into free exercise claims, but it would be a terrible mistake and a terrible blow to religious liberty to confine this bill only to compulsion.

Now, the important point is that none of this matters unless the Supreme Court overrules *Roe v. Wade*, and in a world where *Roe* has been overruled, the State's interest in preserving unborn life will be a compelling interest, and a compelling interest will be a complete defense to any claim under RFRA. And interest in unborn life will be compelling even if *Roe* is overruled on the ground that the constitutional right to privacy does not extend to abortion.

Why doesn't the right to privacy extend to abortion? How is abortion any different from the right to marry or have children or the right of a grandmother in east Cleveland to live with her grandchildren? It is different because the life of the unborn child is at stake. There is no other difference. If the Court draws the line, the unborn child is the only reason for the line.

Successful abortion claims under RFRA are imaginary. But St. Agnes Hospital is not imaginary. Congressmen, even if abortion is the only issue you care about, you need this bill, and if you also care about anything else that churches do, you need this bill. Catholic money supporting gay rights groups in Georgetown is real. Unwed mothers suing for the right to teach in schools is real. Mother Theresa's shelter for the homeless being shut down is real.

On the way to Washington, I thought of some more. I would like to complete that list and submit it for the record as an appendix to my testimony, Mr. Chairman. Thank you. I simply don't understand why elements of the prolife and traditional values movement have allied themselves of people who are suspicious of all religious exemptions. Conservatives need this bill as much as liberals. Mainstream churches need it as much as minority faith. Legislators who don't want their bills to become unintended instruments of persecution need the bill. Fight out public funding and tax exemptions, but fight them out in single bills.

Let me say a little bit about some of the questions that came up in the last panel. It was suggested the prochoice people are holding this bill hostage and that is simply the reverse of the truth. The prochoice people would have said, the right to abortion is protected by this bill. They didn't get that clause. They sort of floated it at one point. They asked the drafting committee to put it on. Nobody in the drafting committee took it seriously. They accepted a bill that doesn't say anything about abortion and applies the same standard to all claims.

It is Mr. Bopp who is holding the bill hostage to inject abortion into a bill that is about religious liberty. Mr. Bopp said, legislative intent will control. That is what the Court looks at. You heard the chief sponsor this morning say what the legislative intent is. This is not an abortion bill. This bill is neutral on abortion. People can make their arguments about it, but we know what the compelling interest test is going to produce.



And finally, if the concern is that Congress is somehow codifying the law of *Roe v. Wade* because it hasn't quite been explicitly overruled yet, and the five Justices who say unborn life is a compelling interest haven't yet said it all in the same opinion, we can deal with that. We can put a clause in this bill that says nothing in this act shall be construed to express a congressional opinion on whether any particular governmental interest is compelling. That is consistent with the principle of the bill because it is universal. But we can't institute an abortion claim because nobody has succeeded in drafting language that the wide disparity of opinions in this body will agree is abortion neutral. Silence is neutral.

The clause they want to draft is not neutral. The red light is not on, but can I say a word about *Johnson Controls*?

Mr. EDWARDS. Thank you very much, Professor.

Mr. HYDE. Can he speak about *Johnson Controls*?

Mr. EDWARDS. I thought he said gun control. Yes, of course you can. As long as it is not gun control.

Mr. LAYCOCK. The key to *Johnson Controls*, Mr. Hyde, is that the compelling interest test wasn't in the statute. *Johnson Controls* was under title 7, which had a very specific provision, no person shall be denied a job because of her sex. And exactly what *Johnson Controls* was saying was, no woman can work in this plant. So the provision is squarely applied. It was quite specific language. And the defense was not nearly so general.

Picking up all important countervailing interest as the compelling interest test, the defense used very specific language about bona fide occupational qualification. I believe the Court could have stressed bona fide qualification and said, it is not just the ability to do the job. Occupational qualifications could be understood more broadly and the Court didn't do that. They took the natural meaning of the language.

But they couldn't say protecting the unborn child is a compelling interest and therefore this title 7 claim fails, because compelling interest was not a defense under the statute before the Court in *Johnson Controls*. Compelling interest will be a defense under the statute before this committee, under RFRA.

Mr. EDWARDS. Thank you, Mr. Laycock.

[The prepared statement of Mr. Laycock follows:]

**Statement of Douglas Laycock**  
Professor of Law, The University of Texas  
May 14, 1992

My name is Douglas Laycock, and I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin. I have studied, taught, and written about religious liberty for fifteen years. I am testifying in my individual capacity as a scholar; The University of Texas takes no position on these bills.

I appear to urge adoption of H.R. 2797, the Religious Freedom Restoration Act. This bill is urgently needed to protect the free exercise of religion from the Supreme Court's decision in *Employment Division v. Smith*.<sup>1</sup> That case held that federal courts can not protect religious exercise from formally neutral and generally applicable laws. In effect, the Court held that every American has a right to believe his religion, but no right to practice it. Religion cannot be singled out for discriminatory regulation, but religion is fully subject to the entire body of secular regulation.

In a pervasively regulated society, *Smith* means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. In a nation that sometimes claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience.

The Religious Freedom Restoration Act would greatly ameliorate these consequences. The bill would enact a statutory replacement for the Free Exercise Clause. The bill can work only if it is as broad as the Free Exercise Clause, enacting the fundamental principle of religious liberty and leaving particular disputes to further litigation.

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<sup>1</sup> 494 U.S. 872 (1990).

In this statement I review historical and contemporary examples that illustrate the need for this bill, describe the dynamic of interest group politics that is the greatest threat to religious liberty under *Smith*, explain the compelling interest test that is central to the bill, explain why RFRA is far superior to the competing bill, and explain why the bill is within the power of Congress to enforce the Fourteenth Amendment.

I also urge the Committee to make specific findings of fact in support of the bill: that formally neutral, generally applicable laws have historically been instruments of religious persecution, that enacting separate religious exemptions in every statute is not a workable means of protecting religious liberty, and that litigation about governmental motives is not a workable means of protecting religious liberty.

### **I. Some Relevant History**

The founding generation of Americans had a vision of a society in which religion would be entirely voluntary and entirely free. People of all faiths and of none would be welcome. Minority religions would be entitled not merely to grudging toleration, but to freely and openly exercise their religion. Even in their largely unregulated society, the Founders understood that the free exercise of religion sometimes required religious exemptions from formally neutral laws.<sup>2</sup> Guarantees of free exercise and disestablishment were written into our fundamental law in state and federal constitutions. The simultaneous American innovation of judicial review made those guarantees legally enforceable.

The religion clauses represent both a legal guarantee of religious liberty and a political commitment to religious liberty. The religion clauses made America a beacon of hope for religious minorities throughout the world. The extent of religious pluralism in this country, and of legal and political protections for religious minorities, is probably unsurpassed in

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<sup>2</sup> Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990).

human experience. Religious liberty is one of America's great contributions to civilization.

But a counter-tradition also runs through American history. We have not always lived up to our ideals. There has been religious intolerance in America; there have even been religious persecutions in America. The New England theocracy expelled dissenters, executed Quaker missionaries who returned, and most infamously, perpetrated the Salem witch trials. Colonial Virginia imprisoned Baptist ministers for preaching without a license. American slaveowners totally suppressed African religion among the slaves, in what one historian has called "the African spiritual holocaust."<sup>3</sup>

Hostility to Catholics produced anti-Catholic political movements, mob violence, and church burnings in the 19th century. Catholic children were beaten for refusing to read the Protestant Bible in public schools. In the 1920s, the Ku Klux Klan and other Nativist groups pushed through a law in Oregon requiring all children to attend public schools; the effect would have been to close the Catholic schools.

The Mormons fled from New York, to Ohio, to Missouri, to Illinois, to Utah. They were driven off their lands in Missouri by a combination of armed mobs and state militia. Their prophet was murdered by a mob while in the custody of the state of Illinois. The federal government prosecuted hundreds of Mormons for polygamy, it imposed test oaths that denied Mormons the right to vote, and finally it dissolved the Mormon Church and confiscated its property. The Supreme Court upheld all of these laws in a series of cases in the late nineteenth century.<sup>4</sup>

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<sup>3</sup> Jon Butler, *Awash in a Sea of Faith* 129-63 (1990).

<sup>4</sup> *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

From the late 1930s to the early 1950s, towns all over America tried to stop the Jehovah's Witnesses from proselytizing. These towns enacted a remarkable variety of ordinances, most of which were struck down. The Court's decision in *Minersville School District v. Gobitis*,<sup>5</sup> upholding the requirement that Jehovah's Witnesses salute the flag, triggered a nationwide outburst of private violence against the Witnesses. Jehovah's Witness children were beaten on American school grounds.<sup>6</sup>

This thumbnail sketch of religious tolerance and intolerance in American history is relevant to the Religious Freedom Restoration Act for two reasons. Most obviously, history shows that even in America, government cannot always be trusted to protect religious liberty. Judicial enforcement of free exercise is not foolproof either, but it is an important additional safeguard.

This history of religious intolerance is also relevant in a more specific way. The law that would have closed all the Catholic schools in Oregon was a formally neutral, generally applicable law. The polygamy law that underlay much of the Mormon persecution was a formally neutral, generally applicable law. The flag salute law invoked against Jehovah's Witnesses was a formally neutral, generally applicable law. These formally neutral, generally applicable laws were central to three of the worst religious persecutions in our history.

The Court upheld the polygamy law in *Reynolds v. United States*.<sup>7</sup> It upheld the flag salute law in *Gobitis*, although it later struck down a similar law under the Free Speech Clause.<sup>8</sup> *Reynolds* and *Gobitis* are the two precedents principally relied on in *Smith*; the Court was simply oblivious

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<sup>5</sup> 310 U.S. 586 (1940).

<sup>6</sup> Peter Irons, *The Courage of Their Convictions* 22-35 (1988).

<sup>7</sup> 98 U.S. 145 (1878).

<sup>8</sup> *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

to the shameful historical episodes of which these cases were a part. The law closing Catholic schools was struck down in *Pierce v. Society of Sisters*,<sup>9</sup> a decision cast in serious doubt by *Smith*. If *Pierce* survives, it rests on an unenumerated right of parents to educate their children, and that is a precarious base indeed.

In only one of these three episodes was the formally neutral law originally enacted for the *purpose* of persecuting a religious minority. The law closing private schools in Oregon was enacted to get the Catholics. But the polygamy law was not enacted to get the Mormons, and the flag salute laws were not enacted to get the Jehovah's Witnesses. They were originally enacted for legitimate reasons, but when they were enforced against religious minorities, they fanned the flames of persecution.

This Committee can find as a fact that formally neutral, generally applicable laws have repeatedly been the instruments of religious persecution, even in America. Formally neutral laws can lead to persecution for a simple reason: Once government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point to that demand. Conscientious resistance by religious minorities sometimes inspires respectful tolerance and exemptions, but sometimes instead it inspires religious hatred and determined, systematic efforts to suppress the religious minority.

## II. Some Contemporary Examples

I mention the history of religious persecutions because that possibility cannot be assumed away. But deliberate persecution is not the usual problem in this country. Churches and religious believers can lose the right to practice their faith for a whole range of reasons: because their practice offends some interest group that successfully insists on a regulatory law with no exceptions; because the secular bureaucracy is indifferent to their needs; because the legislature was unaware

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<sup>9</sup> 268 U.S. 510 (1945).

of their existence and failed to provide an exemption. Some interest groups and individual citizens are aggressively hostile to particular religious teachings, or to religion in general. Others are not hostile, but are simply uncomprehending when confronted with religious needs for exemption. But whether regulation results from hostility, or indifference, or ignorance, the consequence to believers is the same.

All of these problems are aggravated by the reaction to *Smith* in the lower courts, in government bureaus, and among secular interest groups. Many judges, bureaucrats, and activists have taken *Smith* as a signal that the Free Exercise Clause is largely repealed, and that the needs of religious minorities are no longer entitled to any consideration. Let me briefly review a few contemporary examples:

Culturally conservative churches, including Catholics, conservative Protestants, Orthodox Jews, and Mormons, are under constant attack on issues related to abortion, homosexuality, ordination of women, and moral standards for sexual behavior. The most aggressive elements of the pro-choice, gay rights, and feminist movements are not content to prevail in the larger society; they also want to impose their agenda on dissenting churches. Sometimes they succeed. For example, St. Agnes Hospital in Baltimore had a residency program in obstetrics and gynecology. That program lost its accreditation, because it refused to perform abortions or teach doctors how to do them.<sup>10</sup> There has been recurring litigation between churches and gay rights organizations, with mixed results. But the opinion in *Smith* is reasonably clear: any well-drafted gay rights ordinance is a facially neutral law of general applicability, and the Free Exercise Clause does not exempt churches or synagogues. These recurring conflicts over sexual morality are the most obvious example of interest group attacks on religious liberty.

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<sup>10</sup> *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

The problem of bureaucratic inflexibility is illustrated by one of the saddest cases since *Smith*, a case involving an unauthorized autopsy. The Committee heard about this case yesterday from one of the victims. Several minority religions in America have strong teachings against the mutilation of a human body, and they view autopsies as a form of mutilation. Faith groups with such teachings include many Jews, Navajo Indians, and the Hmong, an immigrant population from Laos. The Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free.

In *You Vang Yang v. Sturner*,<sup>11</sup> a distressed district judge held that *Smith* left him powerless to do anything about an unnecessary autopsy performed on a young Hmong man. The judge movingly describes the deep grief of the victim's family, the obvious emotional pain of the many Hmongs who came to witness the trial, and his own deep regret at being forced to uphold a profound violation of their religious liberty. He describes an autopsy done largely out of medical curiosity, with no suspicion of foul play, with no authorization in Rhode Island law, and without the slightest regard for the family's religious beliefs. But under *Smith*, the state does not need a good reason, or even any reason at all. There simply is no substantive constitutional right to religious liberty any more.

An example of old-fashioned religious prejudice is *Munn v. Algee*,<sup>12</sup> a suit for the wrongful death of Mrs. Elaine Munn. Mrs. Munn was killed in an automobile accident in which the other driver admitted fault. In accord with her Jehovah's Witness faith, Mrs. Munn refused a blood transfusion; the doctors disagreed sharply over whether a transfusion would have done any good. The other driver's insurance company successfully argued that she was responsible for her own death, because she refused the blood transfusion. Citing *Smith*, the

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<sup>11</sup> 750 F. Supp. 558 (D.R.I. 1990).

<sup>12</sup> 924 F.2d 568 (5th Cir. 1991).



court of appeals held that she had no right to refuse a blood transfusion.

Even worse, the insurance company was permitted to attack a wide range of other Jehovah's Witness teachings as unpatriotic, narrow-minded, or strange. The insurance company forced her husband to testify about the Jehovah's Witness belief that Christ returned to earth in 1914, their belief that the world will end at Armageddon and that only Jehovah's Witnesses will be spared destruction, their belief that there is no hell, and their conscientious refusal to serve in the military or salute the flag. This case was tried to a mostly white Mississippi jury at the height of the political controversy over flagburning. The Munn family is black, and the insurance company had successfully excluded all but one of the black jurors. The jury awarded no damages for Mrs. Munn's death, and only token damages for Mr. Munn's injuries and for Mrs. Munn's pain and suffering prior to death.

Astonishingly, the court of appeals upheld the jury's verdict. One judge thought the attack on Jehovah's Witness teachings was relevant and entirely proper. A second judge thought these attacks were so obviously irrelevant that they could not have affected the jury's deliberations. For these wholly inconsistent reasons, the Munns were left with only token compensation. This trial was surely unconstitutional even after *Smith*, but the Supreme Court denied certiorari. The case illustrates the symbolic consequences of *Smith*: there is a widespread impression that religious minorities simply have no constitutional rights any more.

These cases also illustrate another important point. The Munns were black; the Yangs were Hmong. Racial and ethnic minorities are often also religious minorities. The civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice.

Not even mainstream churches can count on sympathetic regulation. Cornerstone Bible Church in Hastings, Minnesota was zoned out of town, left with no place to worship. The

district court upheld the exclusionary zoning, applying *Smith* and equating the zoning rights of churches with the zoning rights of pornographic movie theatres.<sup>13</sup> The court of appeals said that Cornerstone is entitled to a new trial, but that opinion did not solve either Cornerstone's problem or the zoning problems of other churches. The *Cornerstone* case says that cities need only have a rational basis for excluding churches from town; even with clear evidence of discrimination against churches, the court refused to restore the compelling interest test.<sup>14</sup>

Cornerstone's problem with hostile zoning is not unique. Restrictive zoning laws are often enforced with indifference to religious needs and sometimes with outright hostility to the presence of churches. Zoning laws have been invoked to prevent new activities in existing churches and synagogues, to limit the architecture of churches and synagogues, to exclude minority faiths such as Islam and Buddhism, and to prevent churches and synagogues from being built at all in new suburban communities.<sup>15</sup> Most major American religions teach some duty to feed the hungry, clothe the naked, and shelter the homeless, but when a church or synagogue tries to act on such teachings, it is likely to get a complaint from the neighbors and a citation from the zoning board.

Note that in the zoning cases, the problem is not that the church has a doctrinal tenet or moral teaching that directly conflicts with the policy of the law. Rather, the problem is simply that the law restricts the church's ability to carry out its mission. Religious exercise is not free when churches cannot locate in new communities, or when existing churches cannot

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<sup>13</sup> *Cornerstone Bible Church v. City of Hastings*, 740 F. Supp. 654, 663 (D. Minn. 1990).

<sup>14</sup> *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 n.13 (8th Cir. 1991).

<sup>15</sup> For accounts of these cases, see R. Gustav Niebuhr, *Here Is the Church: As for the People, They're Picketing It*, Wall St. J. Nov. 20, 1991, p. A1, col. 4.

define their own mission. The exercise of religion must be understood to include the churches' management of their own internal affairs and the churches' definition and pursuit of their religious missions.

### III. The Dynamic of Interest Group Politics

The Supreme Court says that legislatures may exempt religious exercise from formally neutral laws. If those exemptions must be obtained piecemeal, one statute at a time, they are not a workable means of protecting religious liberty. In every such request for a legislative exemption, churches are likely to find an aroused interest group on the other side, and they will be trying to amend that interest group's statute. These battles can be endless; the fight over student gay rights groups at Georgetown University has so far resulted in ten published judicial orders and two Acts of Congress.<sup>16</sup>

Churches have to win these fights over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissioners, by the city council, and by the administrative agencies at each of those levels. They have to avoid being regulated this year and next year and every year after that. If they lose in any forum in any year, they have lost; their religious practice is subject to regulatory interference. That is not a workable means of protecting religious liberty.

It is important to understand that every religion is at risk. Every church offends some interest group, and many churches offend lots of interest groups. No church is big enough or tough enough to fight them all off, over and over, at every level of government.

The situation is even more hopeless for individual believers with special needs not shared by their whole denomination. Consider the case of Frances Quaring, a

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<sup>16</sup> The judicial and legislative history is summarized in *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990).

Pentecostal Christian who studied the Bible on her own and understood the Commandment against graven images with unusual strictness.<sup>17</sup> Mrs. Quaring would not allow a photograph in her house. She would not allow a television in her house. She removed the labels from her groceries or obliterated the pictures with black markers. For Mrs. Quaring, it was plainly forbidden to carry a photograph on her driver's license. When the legislature required photographs, she could not get a driver's license.

It is impossible for a legislature to know about a believer like Mrs. Quaring and enact an exemption for her. The Mrs. Quarings of the world cannot hire lobbyists to monitor the legislature and protect their religious liberty from any bill that might interfere with their little known belief. The only way to provide for such unforeseeable religious claims is with a general provision guaranteeing free exercise of religion. The Free Exercise Clause was such a provision, but *Smith* says that it is not. The Religious Freedom Restoration Act would restore such a provision to the United States Code.

RFRA would solve the problem of perpetual religious conflict with interest groups and also the problem of religious minorities too small to be heard in the legislature. It would do so by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions. RFRA has a chance to work because it is as universal as the Free Exercise Clause. It treats every religious faith and every government interest equally, with no special favors for any group and no exceptions for any group. That is the only hope to rise above the paralysis of interest group politics and restore protection for religious liberty.

Religious liberty is popular in principle, but in specific applications it quickly gets entangled in other issues. No

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<sup>17</sup> *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided court*, 472 U.S. 478 (1985).

government bureaucrat admits that he is against religious liberty, but almost every government bureaucrat thinks his own program is so important that no religious exception can be tolerated. Few interest groups admit that they are against religious liberty, but almost every interest group thinks its own agenda is so important that no religious exception can be tolerated. The religious community itself is divided on many issues raised by secular interest groups, and denominations sometimes find it hard to speak out when a bill pits their commitment to religious liberty against their commitment to some other cause. RFRA's across-the-board feature attempts to cut through all this special pleading.

In most of these conflicts between religious liberty and secular interest groups, an exemption for religious liberty does little or no damage to any legitimate secular goals. The interest group that succeeds in enacting a bill gets its way in 95 or 98 or 99.9% of the cases, and the religious exemption creates a small enclave of conscience for religious dissenters. But to get those exemptions statute by statute requires legislative battles that can be enormously divisive and expensive.

Congress is the greatest expert on the legislative process; Congress knows these problems far better than I do. This Committee can find as a fact that specific exemptions enacted one statute at a time are not a workable means of protecting the free exercise of religion.

#### **IV. The Compelling Interest Standard**

RFRA would permit religious liberty to be burdened only when that is the least restrictive means to serve a compelling interest. The compelling interest test takes meaning from the Court's earlier cases, and especially from the Congressional purpose in § 2(b)(1) "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." That statement of purpose is important to the bill. It should not be left to legislative history, because the Court is increasingly resistant to even reading legislative history.

Even before *Smith*, the Court had been criticized for excessive deference to governmental agencies. But most deferential decisions were not decided under the compelling interest test at all, either because the Court found no burden on religious exercise,<sup>18</sup> or because the Court created exceptions to the compelling interest test.<sup>19</sup> These cases cast no light on the meaning of the compelling interest test.

It is not every or even most legitimate government interests that are compelling. "Compelling" does not merely mean a "reasonable means of promoting a legitimate public interest."<sup>20</sup> Compelling does not merely mean "important."<sup>21</sup> Rather, "compelling interests" include only those few interests "of the highest order,"<sup>22</sup> or in a similar formulation, "[o]nly the gravest abuses, endangering paramount interests,"<sup>23</sup> The Supreme Court explains "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served,"<sup>24</sup> if "no alternative forms of regulation would combat such abuses,"<sup>25</sup> if the challenged law is "the least restrictive means of achieving" the compelling interest,<sup>26</sup> and if the government pursues its alleged interest uniformly across the full range of

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<sup>18</sup> *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986).

<sup>19</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisons).

<sup>20</sup> *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

<sup>21</sup> *Thomas v. Review Board*, 450 U.S. 707, 719 (1981).

<sup>22</sup> *Smith*, 494 U.S. at 888; *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

<sup>23</sup> *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>24</sup> *Yoder*, 406 U.S. at 215.

<sup>25</sup> *Sherbert*, 374 U.S. at 407.

<sup>26</sup> *Thomas v. Review Board*, 450 U.S. at 718.

similar conduct.<sup>27</sup> Even *Smith* cautions against watering down the test: "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in other fields where it is applied), many laws will not meet the test."<sup>28</sup>

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*, invalidating Wisconsin's compulsory education laws as applied to Amish children.<sup>29</sup> The education of children is important, and the first two years of high school are basic to that interest. But the state's interest in the first two years of high school was not sufficiently compelling to justify a serious burden on free exercise.

The unemployment compensation cases also illustrate the point. The government's interest in saving money is legitimate. But it is not sufficiently compelling to justify refusing compensation to those whose religious faith disqualified them from employment.<sup>30</sup>

Moreover, it is not enough for government to point to unconfirmed risks or fears. Defending its compulsory education law in *Yoder*, Wisconsin relied on the plausible fear that some Amish children would "choose to leave the Amish community" and that they would "be ill-equipped for life."<sup>31</sup> The Court rejected that fear as "highly speculative," demanding "specific evidence" that Amish adherents were leaving and that they were "doomed to become burdens on society." Similarly, various states have feared that a combination of false claims and honest adoption of religious objections to work would dilute

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<sup>27</sup> *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>28</sup> 494 U.S. at 888.

<sup>29</sup> 406 U.S. at 219-29.

<sup>30</sup> *Sherbert*, 374 U.S. 398, 406-09 (1963).

<sup>31</sup> 406 U.S. at 224.

unemployment compensation funds, hinder the scheduling of weekend work, increase unemployment, and encourage employers to make intrusive inquiries into the religious beliefs of job applicants. Some of these fears were plausible; some were not. But the Supreme Court rejected them all for lack of evidence that they were really happening.<sup>32</sup>

The lesson of the Court's cases is that government must show something more compelling than saving money, more compelling than educating Amish children. That is the compelling interest test of *Sherbert* and *Yoder*.

The Supreme Court has found a compelling interest in only three free exercise cases. In each of these cases, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, *and* the laws at issue were essential to national survival or to express constitutional norms: national defense,<sup>33</sup> collection of revenue,<sup>34</sup> and racial equality in education.<sup>35</sup>

The stringency of the compelling interest test makes sense in light of its origins: it is a judicially implied exception to the constitutional text.<sup>36</sup> The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be "no law" prohibiting free exercise. The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. RFRA makes the exception explicit rather than

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<sup>32</sup> *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

<sup>33</sup> *Gillette v. United States*, 401 U.S. 437 (1971).

<sup>34</sup> *United States v. Lee*, 455 U.S. 252 (1982).

<sup>35</sup> *Bob Jones University v. United States*, 461 U.S. 574 (1983).

<sup>36</sup> Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights* (Book Review), 99 *Yale L.J.* 1711, 1744-45 (1990).



implicit, but the standard for satisfying the exception should not change.

### V. The Competing Bill

H.R. 4040 is an alternative to RFRA. The important difference between the two bills appears in §3(c)(2) of H.R. 4040, which states that the bill would create no cause of action to challenge laws restricting abortion, the use or disposition of public funds or property, or the tax status of any other person. These amendments inject into the bill highly divisive and mostly irrelevant controversies over abortion, public funding of religious institutions, and tax exemptions for religious institutions. These amendments should be rejected. If I had deliberately set out to draft amendments that would prevent the enactment of any bill, I could not have done better than these three amendments.

The principle of RFRA is that it enacts a statutory version of the Free Exercise Clause. Like the Free Exercise Clause itself, RFRA is universal in its scope. It singles out no claims for special advantage or disadvantage. It favors no religious view over any other, and it favors no state interest over any other. It simply enacts a universal standard: burdens on religious exercise must be justified by compelling interests.

Limiting the bill to enactment of the standard is a principled solution to the practical problem of disagreement over particular claims. If we try to resolve every possible religious claim and governmental interest in RFRA, we will be caught up in the same morass of endless political conflict that we will face if RFRA is not enacted. A bill limited to a statement of universal principle is neutral on all possible claims, including claims about abortion, tax exemption, and public funding. It leaves all such claims just where they would be under the Free Exercise Clause if *Smith* had not so greatly reduced protection for religious practice. It leaves each side to make the arguments they would have made if *Smith* had never happened.

H.R. 4040 takes a very different approach. H.R. 4040 says that *Smith* was a good decision insofar as it cut off the last

shred of argument for certain claims that the sponsors of H.R. 4040 do not like. H.R. 4040 says that most religious claims are restored to where they would have been under the Free Exercise Clause, but that three sets of claims are left subject to *Smith*. Whatever the merits of these amendments, they cannot be defended on the ground that they are neutral toward the three excluded sets of claims.

These three amendments are enormously divisive, but the divisions are almost entirely symbolic. Each of the three amendments relates to an issue that has always been litigated and decided under some other clause of the Constitution. The right to abortion has been principally litigated under the Due Process Clause; most challenges to church tax exemption and to public funding for churches have been brought under the Establishment Clause. In each case, free exercise theories have been around for a long time, but the Supreme Court has rejected them.

As the Court has become more and more conservative, challenges to abortion laws, church tax exemptions, and public funding for religious agencies have gotten an increasingly hostile reception under any clause. The litigants who bring these challenges are increasingly desperate, they are experimenting with alternative legal theories, and they are unwilling to give up on any theory, however long its odds of success. But the reality is that changing the legal theory in their pleadings is not going to make the Court any more receptive to their claims. With or without *Smith*, putting a free exercise label on a warmed over abortion claim or Establishment Clause claim is quite unlikely to make any difference.

The tax exemption issues are largely resolved by cases already decided; the public funding issues will continue to be litigated under the Establishment Clause with or without RFRA; and abortion is being fought out in pending litigation and in legislative debate over the pending Freedom of Choice Act. If

the Court overrules *Roe v. Wade*,<sup>37</sup> it will be because of a fundamental jurisprudential judgment that the abortion issue is not appropriately resolved by judges -- that "the answers to most of the cruel questions posed are political and not juridical."<sup>38</sup>

### A. Abortion

With respect to abortion, parts of the pro-choice movement have persistently asserted that restrictions on abortion violate the religion clauses of the First Amendment. Of course these arguments are of limited significance so long as there is a general right to abortion under *Roe v. Wade*. But the sponsors of H.R. 4040 fear that the Court might overrule *Roe*, and then re-create abortion rights as a matter of free exercise under the Religious Freedom Restoration Act. For several reasons, I believe that these fears are groundless.

First, religion clause objections to restrictions on abortion are not new. They were presented to the Supreme Court in *Harris v. McRae*.<sup>39</sup> The Court rejected the claim that abortion laws that coincide with religious teachings violate the Establishment Clause. It also held that no plaintiff in that case had standing to assert a free exercise claim, because no plaintiff alleged that her religious beliefs compelled or motivated her desire for an abortion. The Court also held that a free exercise claim to abortion would depend on the religious beliefs of individual women, and that such a claim could not be asserted by an organization.

In the twelve years since *Harris*, there has been no judicial movement toward a free exercise right to publicly funded abortions. If free exercise were a viable route for evading decisions upholding restrictions on abortion, someone should have come forward with plaintiffs who could satisfy the

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<sup>37</sup> 410 U.S. 113 (1973).

<sup>38</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring).

<sup>39</sup> 448 U.S. 297, 318-21 (1980).

standing requirements laid down in *Harris*. Even though *Harris* does not formally resolve the free exercise issue, it has effectively resolved the larger issue: the Court does not recognize any constitutional right to public funding for abortions. A decision overruling *Roe* would just as effectively resolve the larger issue of any right to abortion.

The standing rule in *Harris* is also a major victory for pro-life forces and a serious obstacle to pro-choice forces. The rule that organizations lack standing to bring free exercise claims would logically apply to RFRA claims, and it would preclude broad-based RFRA challenges to abortion laws. Any RFRA challenge would have to proceed one woman at a time, with judicial examination of her individual beliefs.

Second, a decision overruling *Roe* would almost certainly preclude a right to abortion under the Free Exercise Clause or the Religious Freedom Restoration Act. *Roe* will be overruled on the ground that government may assert a compelling interest in protecting unborn life; five justices have already said that the state's interest in unborn life is compelling from the beginning of pregnancy.<sup>40</sup> If the state's interest in protecting unborn life is compelling under the Due Process Clause, I believe that interest will be equally compelling under the Religious Freedom Restoration Act. Thus, even if the Court were to hold that abortion can sometimes be religious exercise, the states' compelling interest would override that right.

It makes no difference if the Court says that the Constitution simply does not protect the right to choose abortion, thus distinguishing abortion from other constitutionally

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<sup>40</sup> *Webster*, 492 U.S. at 519 ("the State's interest, if compelling after viability, is equally compelling before viability") (plurality opinion of Justices Rehnquist, White, and Kennedy); *id.* at 532 (this part of the plurality opinion "would effectively overrule *Roe*," and I "would do it more explicitly") (Scalia, J., concurring); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'") (O'Connor, J., concurring).

protected choices about family, reproduction, or bodily integrity. The basis for such a distinction could not be that abortion has nothing to do with reproduction or bodily integrity. Rather, the only plausible reason for distinction is that the state's interest in unborn life changes everything.

It has been suggested that the Court might read the Religious Freedom Restoration Act as codifying *Roe's* rule that the interest in unborn life is not compelling, on the ground that was the law at the time Congress acted. This outcome is implausible as well. The bill takes no position on whether any particular government interest is compelling. This silence is appropriate; Congress should not attempt to resolve particular controversies in a bill about religious exercise generally.

If Congress is going to codify anything about abortion, it will be in the Freedom of Choice Act. The Court knows full well that Congress is divided over abortion just as the American people are divided. It would be absurd to read a statute that never mentions abortion as somehow codifying the law of abortion. That RFRA has both pro-life and pro-choice sponsors would make it even more absurd. A bill supported by a broad range of pro-life groups cannot sensibly be read as creating a right to abortion.

If I were a pro-life Representative, I would turn out the largest possible pro-life vote for RFRA, and the largest possible pro-life vote against the Freedom of Choice Act, and in that way I would unambiguously make the record that the two bills are very different -- that one takes a position on abortion and the other does not. And in working to turn out the pro-life vote on RFRA, I would emphasize one simple point: *St. Agnes Hospital* is a real case.<sup>41</sup> Pro-life doctors and nurses and even whole hospitals are being forced out of OB-GYN. That is real, and RFRA would protect those people. Successful abortion claims under RFRA are imaginary. They are a theoretical possibility

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<sup>41</sup> *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

that depends on an extraordinarily unlikely combination of circumstances.

Pro-life Representatives must also understand that not all resistance to these amendments comes from the pro-choice side. Agudath Israel, the Orthodox Jewish group that has been an active part of the pro-life movement, insists that Jewish teaching mandates abortion in certainly narrowly defined and exceptional cases. Any state prohibitions of abortion likely to be enacted will have exceptions for the cases that matter to Agudath Israel; they do not expect to rely on RFRA. But neither can they accept Christian coalition partners dismissing their sincere religious teachings as officially unworthy of respect. Their loyal support for the pro-life movement, over the objection of most other Jewish organizations, entitles them to consideration in return from pro-life Representatives. Their counsel has done a careful analysis identifying other ways in which the three amendments might be counterproductive even to their intended purposes, and I commend that analysis to the Committee.

Even though I believe that there is little merit to claims of a free exercise right to abortion, there are pro-choice groups supporting the bill. They cannot be forced to accept language precluding their argument, any more than they can force pro-life groups to accept language precluding pro-life arguments. The way for the bill to be abortion-neutral is not to mention abortion at all. The legislative history should simply say: 1) that the pro-life side can make its arguments that no abortions are religiously motivated, and that in a post-*Roe* world, protecting unborn life is obviously a compelling interest; 2) that the pro-choice side can make its arguments that at least some abortions are religiously motivated, and that protection of potential life is not a compelling interest; and 3) that Congress has merely enacted the standard for decision and has not codified either set of answers. I have no doubt who will win those arguments in a post-*Roe* world. But neither side should be able to say that Congress codified its position. The bill as drafted is abortion neutral, and I urge you to keep it that way.

#### **B. Tax Exemption**

With respect to tax exemption, the law is relatively settled. Religious organizations cannot be given tax exemptions

exclusively for religion, but they can be included in broader tax-exempt categories, such as the religious, charitable, scientific, and educational organizations mentioned in the Internal Revenue Code.<sup>42</sup>

With respect to any particular organization's eligibility for a tax exemption, I think it a safe generalization from the cases that no plaintiff has standing to litigate the tax liability of another taxpayer.<sup>43</sup> Cases challenging tax exemptions of churches, schools, and hospitals have had multiple plaintiffs with resourceful lawyers; if none of them could find a plaintiff with standing, I do not think it can be done. The Second Circuit's opinion in *U.S. Catholic Conference* holds out the possibility of an exception some day,<sup>44</sup> but that theoretical possibility would not be a free exercise exception and it is not relevant to RFRA. The *U.S. Catholic Conference* litigation imposed an enormous burden on the Catholic Church; Dean Gaffney and I filed an amicus brief supporting the Church; and I fully support the Church's desire never to repeat that experience. But the fact is that the Church won, and there is no need to refight that war. The opinions that so burdened the Church in that litigation relied on the Establishment Clause and the Equal Protection Clause; no court at any stage of that litigation relied on the Free Exercise Clause. RFRA would not be a basis for litigation over tax exemptions.

### C. Public Funding

Challenges to public funding of religious institutions have always been litigated under the Establishment Clause. The Establishment Clause directly addresses that issue, and the Court has created a special standing rule for Establishment Clause claims to facilitate that litigation.<sup>45</sup> An occasional litigant has

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<sup>42</sup> *Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

<sup>43</sup> *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989).

<sup>44</sup> 885 F.2d at 1031.

<sup>45</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

asserted in the alternative that such expenditures also violate the Free Exercise Clause, and the Supreme Court has twice summarily rejected those claims.<sup>46</sup> The Court considered an analogous claim at greater length in *United States v. Lee*, and held unanimously that the Free Exercise Clause gives taxpayers no right "to challenge the tax system because tax payments were spent in a manner that violates their religious belief," and that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax."<sup>47</sup> This conclusion was based on the compelling interest test, the same defense that is written into RFRA.

The argument for a public funding amendment is therefore even more bizarre than the argument for an abortion amendment. The Court has repeatedly limited public funding to religious bodies under the Establishment Clause; it has squarely rejected Free Exercise complaints about the expenditure of tax funds to support religion or any other program to which a taxpayer has religious objections. The fear is that the Court will change its mind -- on both issues -- in opposite directions. Maybe the Court will overrule its Establishment Clause cases and permit more public funding for religious bodies, and also overrule its Free Exercise cases and say that RFRA forbids the public funding that the Court just permitted under the Establishment Clause. It is hard to imagine a less plausible pair of doctrinal developments.

#### **D. The Establishment Clause Proviso**

There is one other difference between the two bills. H.R. 4040 has no equivalent to RFRA's § 7, which provides that nothing in the bill "shall be construed to affect, interpret, or in any way address" the Establishment Clause. The reason for this proviso is the same as the reason for not saying anything about particular free exercise claims. The supporters of the bill agree on the principle of free exercise, but disagree on particular applications, and disagree even about the basic principle of the Establishment Clause. Those disputed issues are carefully

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<sup>46</sup> *Tilton v. Richardson*, 403 U.S. 672, 689 (1971); *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968).

<sup>47</sup> 455 U.S. 252, 260 (1982).



excluded from a bill designed simply to enact the one fundamental principle on which nearly everyone agrees.

All sides to Establishment Clause disputes can continue to argue their position. Those so inclined can continue to argue that the Establishment Clause is merely a redundant appendage to the Free Exercise Clause. This bill does not reject that argument any more than it rejects the argument of strict separationists. This bill is quite explicit; it says nothing about the Establishment Clause.

The fear that this proviso will codify current interpretations of the Establishment Clause borders on the irrational. That is plainly not what § 7 says; a bill cannot codify something that it neither affects, interprets, or addresses. The key verbs were drafted by Mark Chopko, who is now opposing the bill. When it became publicly known that Mark had drafted this language, he wrote me that the real problem was with the object of the verbs: with the phrase "that portion of the First Amendment prohibiting laws respecting the establishment of religion."

I cannot imagine that it makes any difference how the bill refers to a clause that it is not affecting or addressing. But if it would help pass the bill, I think the Committee should be willing to accept any plausible means of referring to the Establishment Clause. I have suggested that the reference be put in quotation marks, amending § 7 to read:

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment that reads: "Congress shall make no law respecting the establishment of religion."

## **VI. Congressional Power**

Congress has power to enact this bill under section 5 of the Fourteenth Amendment. Repeated majorities of the Supreme Court have upheld analogous exercises of Congressional power to enforce the reconstruction amendments. I have reviewed the cases interpreting section 5 in some detail in the record of last

year's hearings, and I refer the Committee to that analysis.<sup>48</sup> I summarize the most important points again here.

Section 5 gives with respect to the Fourteenth Amendment "the same broad powers expressed in the Necessary and Proper Clause" with respect to Article I.<sup>49</sup> Power to enforce the Fourteenth Amendment includes power to enforce the Free Exercise Clause and other provisions of the bill of rights that are applied to the states through the Fourteenth Amendment. Congress has enacted other legislation to enforce the provisions of the bill of rights, most obviously in 42 U.S.C. §§ 1983 and 1988, and these provisions have been used to enforce the First, Fourth, Fifth, and Eighth Amendments, as incorporated through the Fourteenth, in thousands of cases. The Supreme Court has routinely decided these cases, usually without noting the source of Congressional power. It did note the source of Congressional power in *Hutto v. Finney*,<sup>50</sup> an Eighth Amendment case in which the Court relied on Congress's section 5 power to override state sovereign immunity.

The express Congressional power to "enforce" the amendment is independent of the judicial power to adjudicate cases and controversies arising under it. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."<sup>51</sup> Thus, Congress may sometimes provide statutory protection for constitutional values that the Supreme Court is unwilling or unable to protect on its own authority. The Court agreed unanimously on that point in *Metro Broadcasting, Inc. v. FCC*.<sup>52</sup>

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<sup>48</sup> *Religious Freedom Restoration Act of 1990*, Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary 72 (Serial No. 150; Sept. 27, 1990).

<sup>49</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

<sup>50</sup> 437 U.S. 678, 693-99 (1978).

<sup>51</sup> *Katzenbach*, 384 U.S. at 659.

<sup>52</sup> 110 S. Ct. 2997 (1990).

The most familiar illustration of this power is the various Voting Rights Acts, in which Congress has forbidden discriminatory practices that the Supreme Court had been prepared to tolerate. Similarly, much of the law of private racial discrimination depends on Congress's analogous powers under section 2 of the Thirteenth Amendment.

RFRA is well within the three limits on section 5 power. First, Congress may not "restrict, abrogate, or dilute" the protections of the bill of rights in the guise of enforcing them.<sup>53</sup> Second, section 5 does not necessarily override other express allocations of power in the Constitution.<sup>54</sup> Third, Congress may not assert its section 5 powers as a sham to achieve ends unrelated to the Fourteenth Amendment. That is, Congress may not act under section 5 where neither Congress nor the Court believes that a constitutional right is at stake. "Congress may act only where a violation lurks."<sup>55</sup>

The Religious Freedom Restoration Act does not run afoul of these limitations. First, there is no plausible claim that the Act would violate the Court's interpretation of the Free Exercise Clause or any other right incorporated into the Fourteenth Amendment. *Smith* reaffirms that legislative exemptions to protect religious exercise are "expected . . . permitted, and even . . . desirable."<sup>56</sup> The Court unanimously rejected an Establishment Clause challenge to legislative exemptions in *Corporation of the Presiding Bishop v. Amos*.<sup>57</sup>

Second, the Act would not interfere with any other express allocation of power in the Constitution. The federal Constitution does not recognize or preserve any specific state

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<sup>53</sup> *Katzenbach*, 384 U.S. at 651 n.10.

<sup>54</sup> *Oregon v. Mitchell*, 400 U.S. 112, 124-31, 154-213, 293-96 (1971) (three opinions joined by Justices Black, Harlan, Stewart, Burger, and Blackmun).

<sup>55</sup> *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (1983) (dissenting opinion of Burger, Powell, Rehnquist, and O'Connor).

<sup>56</sup> 494 U.S. at 890.

<sup>57</sup> 483 U.S. 327 (1987).

power to regulate religion. The state regulatory powers that would be affected by the proposed Act are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

Third, the Act does not assert Fourteenth Amendment power where there is no plausible Fourteenth Amendment claim. For some members of Congress, this is a critical distinction between RFRA and the proposed Freedom of Choice Act. If you believe that the Constitution properly interpreted protects a woman's right to choose abortion, then both RFRA and the Freedom of Choice Act are within Congressional power under section 5. But if you believe that the Constitution properly interpreted simply says nothing about abortion, or that the Constitution protects the unborn child's right to life, then you believe that there is no Fourteenth Amendment violation lurking for Congress to address in the Freedom of Choice Act. Thus, pro-life Congressmen can with complete intellectual consistency support the Religious Freedom Restoration Act and oppose the Freedom of Choice Act on constitutional grounds.

There is a constitutional violation to be remedied by the Religious Freedom Restoration Act. RFRA would enforce the constitutional rule against laws prohibiting the free exercise of religion. Congress can act on the premise that the exercise of religion includes religiously motivated conduct. Even the Supreme Court recognizes that much. The Court interprets the Constitution of its own force to protect religiously motivated acts from regulation that discriminates against religion and from regulation motivated by hostility to religion in general or to a particular religion. "[T]he exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts."<sup>58</sup>

From the perspective of a believer whose religious exercise has been prohibited, it makes little difference whether the prohibition is found in a discriminatory law or in a neutral law of general applicability. Either way, he must abandon his faith or risk imprisonment and persecution. Either way, it is

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<sup>58</sup> *Smith*, 494 U.S. at 877.

undeniably true that his religious exercise has been prohibited. RFRA would protect the right to free exercise against inadvertent, insensitive, and incidental prohibitions as well as against discriminatory and hostile prohibitions.

Thus RFRA parallels important provisions of the Voting Rights Acts under section 5. The Supreme Court construed the constitutional protection for minority voting rights to require proof of overt discrimination or racial motive on the part of government officials. Congress dispensed with the requirements of overt discrimination or motive, and required state and local governments to justify laws that burden minority voting rights. Similarly here, the Court requires proof of overt discrimination or anti-religious motive to make out a free exercise violation; RFRA would dispense with those requirements and require government to justify any burden on religious practice. RFRA is within the scope of Congressional power under section 5 for the same reasons that the Voting Rights Acts are within the scope of Congressional power.

This Committee can find as a fact that judicial review of legislative motive is an insufficient protection against religious persecution by means of formally neutral laws. Legislative motive is often unknowable. Legislatures may be wholly indifferent to the needs of a minority faith, and yet not reveal overt legislative hostility. When a religious minority opposes a bill, or seeks an exemption on the ground that a bill requires immoral conduct, it is hard to distinguish religious hostility from political conflict. Even when there is clear religious hostility, courts are reluctant to impute bad motives to legislators. Religious minorities are no safer than racial minorities if their rights depend on persuading a federal judge to condemn the government's motives.

In the Voting Rights Acts, Congress found that facially neutral laws could be used to deprive minorities of the right to vote or to dilute their vote, and that legislative motives were easily hidden so that proof of discriminatory motive was not a workable means of protecting minority voting rights. Similarly here, Congress can find that facially neutral laws are readily used to suppress religious practice, that at times such laws have been instruments of active religious persecution, that proof of

anti-religious motive is not a workable means of protecting religious liberty, and that legislating individual exemptions in every statute at every level of government is not a workable means of protecting religious liberty.

The Supreme Court's reason for not requiring government to justify all burdens on religious practice is institutional. The opinion in *Smith* is quite clear that the Court does not want final responsibility for applying the compelling interest test to religious conduct. The majority does not want a system "in which *judges* weigh the social importance of all laws against the centrality of all religious beliefs."<sup>59</sup> To say that an exemption for religious exercise "is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned *by the courts*."<sup>60</sup>

These institutional concerns do not apply to the Religious Freedom Restoration Act. Congress, rather than the Court, will make the decision that religious exercise should sometimes be exempted from generally applicable laws. And Congress, rather than the Court, will retain the ultimate responsibility for the continuation and interpretation of that decision.

Of course the courts would apply the compelling interest test under the Act, and these decisions would require courts to balance the importance of government policies against the burden on religious exercise. But striking this balance in the enforcement of a statute is fundamentally different from striking this balance in the independent judicial enforcement of the Constitution. Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.

Thus, the Act would protect the religious exercise that the Court felt unable to protect on its own authority, and the Act would solve the institutional problem that inhibited the Court from acting independently. The difficulties the Court identified in *Smith* are a perfect illustration of why there is need for

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<sup>59</sup> 494 U.S. at 890 (emphasis added); *see also id.* at 889 n.5.

<sup>60</sup> *Id.* at 890 (emphasis added).

independent power to enforce the bill of rights in both the judiciary and the Congress.

By creating judicially enforceable statutory rights, Congress can call on the powers of the judiciary that the Court feared to invoke on its own. Because the rights created would be statutory, Congress can retain a voice that it could not have retained if the Court had acted on its own. By legislating generally, for all religions, instead of case-by-case for particular religions, Congress can reduce the danger that it will not respond to the needs of small faiths. If Court and Congress cooperate in this way, then the oppression of small faiths need not be, as the Court feared, "an inevitable consequence of democratic government."<sup>61</sup> One function of section 5 of the Fourteenth Amendment is to provide for just such interbranch cooperation.

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<sup>61</sup> *Id.* at 890.



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June 2, 1992

Hon. Don Edwards, Chair  
Subcommittee on Civil & Constitutional Rights  
House Committee on the Judiciary  
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Washington, DC 20515-6220

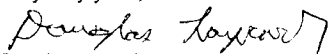
Dear Representative Edwards:

I enclose two appendices to my testimony of May 14 in support of H.R. 2797. Appendix 1 is the list of recent cases involving the religious liberty of Roman Catholics, discussed in my oral testimony. Appendix 2 lists the cases, also discussed in my oral testimony, that show the dangerous consequences of limiting protection to religious compulsion.

I ask that both appendices be printed with the record of my testimony. You have already approved the printing of Appendix 1.

If I can be of any further assistance in the deliberations over this bill, please feel free to call.

Very truly yours,

  
Douglas Laycock  
Alice McKean Young Regents Chair in Law  
and Associate Dean for Research



## Appendix 1 to Testimony of Douglas Laycock

### Recent Cases Involving Religious Liberty of Roman Catholics

In my oral testimony, I mentioned some two dozen recent cases involving the religious liberty of Roman Catholics alone. This Appendix lists those cases. The religious liberty claim won in a few of these cases without RFRA, and it would lose in some even with RFRA. But RFRA would make a difference in many of these cases. These cases illustrate the range of government interference with religion, even in a mainstream faith.

These cases reveal government intrusions into liturgy, worship, prayer, and confidential records; government demands that both the institutional church and individual believers perform or support acts they consider deeply immoral; government attempts to control the employment of theologians, priests, teachers, and other church personnel; government attempts to close religious missions; and punitive tort liability against churches for either removing or failing to remove employees engaged in misconduct.<sup>1</sup>

#### Regulation of the Church (Not Including Employment or Gay Rights Cases)

*Society of Jesus v. Boston Landmarks Commission*, 409 Mass. 38, 564 N.E.2d 571 (1990). The Commission landmarked the interior of the Jesuit chapel and forbade the Jesuits to reorient the altar so the priest could face the people. The Commission argued that the landmark laws were neutral and generally

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<sup>1</sup> Most of these cases have been decided since *Smith*, when the Coalition for Religious Liberty began collecting cases. There has been no search for cases before *Smith*; the cases from before 1990 are simply cases I happen to remember.

applicable, so that the Church had no claim after *Smith*. The Jesuits won under the state constitution, which the Massachusetts court interpreted to require religious exemptions. In states that follow *Smith*, the Jesuits would have needed RFRA.

*St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990). The state discredited a residency program in OB-GYN in a Catholic hospital that refused to perform elective abortions. The court upheld the discreditation. The case was post-*Smith*, but relied on a flagrant misapplication of the compelling interest test. Cases like *St. Agnes* depend on RFRA specifying that the compelling interest test is the test of *Sherbert v. Verner* and *Wisconsin v. Yoder*, and not the watered down deference to every bureaucrat that some lower courts now apply.

Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, N.Y. Times, Sept. 17, 1990, at B1, col. 1. Mother Teresa's shelter for the homeless was permanently closed because it lacked an elevator. The elevator was prohibitively expensive and at odds with the order's religious practice of not using modern conveniences. The city's interest was in access for the handicapped. The nuns said they would carry the handicapped up the steps. The city said that was undignified; better the homeless should sleep in the streets. No lawsuit was filed; after *Smith*, the nuns had nothing to argue. RFRA should provide a defense.

*Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This case is not recent, but I include it because of its great historical importance. An Oregon law, supported by the Ku Klux Klan, would have required all students to attend public schools, thereby closing all religious schools in the state. The Supreme Court struck the law down. After *Smith*, there would be no free exercise claim. The Court in *Smith* suggests that there would still be a hybrid claim of free exercise and parental rights. Thus, the right to Catholic schools now depends on an unenumerated right -- on the same jurisprudential base as the

right to abortion. RFRA would give the right to Catholic schools a clear textual basis.

### **Gay Rights Within the Church**

*Dignity Twin Cities v. Newman Center & Chapel*, 472 N.W.2d 355 (Minn. App. 1991). The Minneapolis Human Rights Commission ordered the Church to provide subsidized office space to gay rights groups, and ordered it to pay punitive damages for discriminating against the gay rights groups. The court of appeals reversed, in an opinion that ignores *Smith* and is irreconcilable with *Smith*. The Church cannot count on all judges defying the Supreme Court, even in appealing cases. RFRA should provide a principled defense.

*Gay Rights Coalition v. Georgetown University*, 536 A.2d 1 (D.C. App. 1987). Georgetown was ordered to give student gay rights groups access to university facilities and student activity funds. RFRA should provide a defense, although there would be an argument about whether Georgetown has become too secularized to qualify for protection.

*Under 21 v. City of New York*, 65 N.Y.2d 344, 482 N.E.2d 1 (1985). The Mayor of New York issued an executive order requiring all city contractors to hire employees without regard to sexual orientation, and to state that policy in every solicitation or advertisement for employees. The order applied to Roman Catholic and other religious social service agencies providing services in cooperation with the City. The court struck down the order on the ground that such a policy could be imposed only by an act of the City Council; it declined to reach the religious liberty issues. Under *Smith*, the Church would have little defense to such an ordinance; RFRA should make the difference.

## Restrictions on the Religious Practice of Individual Catholics

*Donahue v. Fair Employment & Housing Commission*, 1 Cal. App. 4th 387, 2 Cal. Rptr. 2d 32 ((1991), review granted, 5 Cal. Rptr. 2d 781, 825 P.2d 766 (Cal. 1992)). The Commission ordered the owners of a five-unit building to rent an apartment to an unmarried couple. The owners are devout Catholics who believe that sex outside marriage is a mortal sin, and that it is a sin to assist someone else's sin. Under *Smith*, the owners probably have no federal defense. The owners won in the trial court under the state constitution. The Attorney General of California is arguing that *Smith* should be state law too.

*Ryan v. U.S. Department of Justice*, 950 F.2d 458 (7th Cir. 1991). Ryan was an FBI agent with a distinguished record, ordered to investigate a pacifist religious group. He asked not to be assigned to the investigation, citing the bishops' pastoral letter on war and peace. He said he was willing to investigate violent war protestors, but not non-violent ones. The Bureau fired him, nine months before he would have been eligible to retire. The court upheld the discharge. He obviously had no claim under *Smith*, and the Bureau had only minimal duty to accommodate him under Title VII. RFRA would force the FBI to show that the discharge was necessary.

*Friend v. Kolodziejczak*, 923 F.2d 126 (9th Cir. 1991). The court upheld the prison bureau's ban on possession of rosaries or scapulars. The Bureau's only reason for the ban was fear that other prisoners might perceive favoritism toward Roman Catholics. The court applied the reasonableness standard announced for prison cases in *Turner v. Safley*, 482 U.S. 78 (1987), noting that the standard of *Smith* might be even lower. RFRA would apply the compelling interest test.

*Hinrichs v. Whitburn*, 772 F.Supp. 423 (W.D. Wis. 1991). A Roman Catholic mother believes it is her religious duty to home school her children, including secular subjects and pre-Vatican II religious instruction. The state threatened to cut off her AFDC payments because she was not working. The court held her suits unripe because she had not exhausted state remedies. Plainly she has no claim under *Smith*. She has an argument under RFRA and *Sherbert v. Verner*.

*Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. 1990). A trial court ordered a divorced Catholic father not to take his children to Mass when they visited him. The Superior Court reversed, holding that even after *Smith*, this was a hybrid free exercise/parental rights claim. Courts should reach the same result under RFRA, freeing religion from reliance on the unenumerated rights of parents.

### **Regulation of Church Employment**

*National Labor Relations Board v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991), *cert. filed*, 60 U.S.L.W. 3631 (Feb. 27, 1992). The court enforced collective bargaining for child care workers and other non-teaching personnel at a Catholic school, thus forcing the Church to share control of the school with a union and the NLRB. Citing *Smith*, the court said that regulation of church schools simply raised no constitutional issue. In an earlier case involving Catholic school teachers, the Supreme Court had found the National Labor Relations Act inapplicable. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). But the Ninth Circuit limited that case to teachers, and it held that child care workers are not teachers. RFRA should make a difference, but it might not, because judges have a hard time seeing what is at stake in these collective bargaining cases. Thus, the court also said it would have rejected the claim under pre-*Smith* law.

*Hill-Murray Teachers v. Hill-Murray School*, 471 N.W.2d 372 (Minn. App. 1991), appeal pending in Minnesota Supreme Court. The court held Catholic schools exempt from the state labor code, so that the school did not have to bargain with a teacher's union. The court distinguished *Smith* on the ground that the Minnesota law carried no criminal penalties. This distinction has been rejected by other courts and may not stand up on appeal; if it does, the legislature could change the result by simply adding criminal penalties to the statute. Under RFRA, the claim would not depend on the civil/criminal distinction.

*Lukaszewski v. Nazareth Hospital*, 764 F.Supp. 57 (E.D. Pa. 1991). This was an age discrimination suit against a Catholic hospital; the court let the suit proceed. The court said that *Smith* precluded any free exercise issue, and it distinguished *Catholic Bishop* because the employee was not a teacher. RFRA could make a difference, although it might not because the court viewed the employee's job as secular.

*Inter-Community Center for Justice & Peace v. Immigration and Naturalization Service*, 910 F.2d 42 (2d Cir. 1990). This case refused to exempt orders of Catholic nuns from the law requiring them to verify the immigration status of all their employees. The nuns believed that this converted them into government agents, actively enforcing the immigration laws, and violating their religious duty of love and charity for all. The court said that *Smith* precluded any constitutional issue; RFRA would apply the compelling interest test. The tone of this case is very different from the Supreme Court's interpretation of an earlier immigration regulation as implicitly exempting church employment of ministers. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

*Curran v. Catholic University*, No. 1562-87 (D.C. Sup'r 1989). Father Curran sued to force Catholic University to retain him as a professor of theology, despite the Vatican's determination that his teachings were seriously in error. Curran alleged that the University had promised him academic freedom; the University won on contract grounds. The court interpreted the contract in light of the Church's right to religious liberty. After *Smith*, and without RFRA, the contract would be interpreted without a background of religious liberty, and the case could come out either way. The American Association of University Professors has censured the University because of this case; if accreditation authorities seek to penalize the University, it will need RFRA to provide a defense.

*O'Connor Hospital v. Superior Court*, 195 Cal. App. 3d 546, 240 Cal. Rptr. 766, *review denied and deleted from official reports* (Cal. 1987). A Catholic hospital discharged its chaplain and he sued for wrongful discharge. The Court of Appeal held that secular courts could not interfere with the employment relation between the church and a priest performing religious functions. The California Supreme Court let the judgment stand, but withdrew the opinion. Under *Smith*, the Church would have to argue the establishment clause, or a hybrid free speech claim. RFRA should provide a defense.

*Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 728 P.2d 794 (1986). This was a suit for wrongful discharge by a Catholic teacher against a Catholic school; the court dismissed the suit on the ground that the church was entitled to religious liberty in its selection of teachers because the teachers speak for the church. The case would probably come out the other way after *Smith*, although the Church could argue a hybrid free speech claim. RFRA should provide a defense.

*Catholic High School Association v. Culvert*, 753 F.2d 1161 (2d Cir. 1985). This case ordered collective bargaining under state law for teachers in Catholic high schools, finding a compelling government interest in improving conditions inside Catholic schools. This case is like *St. Agnes Hospital*; it depends on RFRA restoring the full rigor of the compelling interest test.

*Dolter v. Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980). A Catholic school dismissed an unmarried pregnant teacher. The court ordered a trial to determine whether she was fired only because she had sex outside marriage, or in part because she was pregnant. It is hard to know how you would try that issue, and no further proceedings are reported. It is a reasonable interference that the case settled, i.e., that the school paid a sum of money to remove this negative role model from the classroom. RFRA should provide a defense.

### **Burdens on the Church Arising Out of the Misconduct of Individual Employees**

*Hutchison v. Luddy*, 1992 WL 30025 (Pa. Super. 1992). The court ordered the Church to produce records from "secret archives," records open only to the bishop under canon law. Plainly the Church had no claim under *Smith*; under RFRA, the case would likely depend on whether the need for the documents was compelling. RFRA should at least protect against fishing expeditions and against requests for duplicative evidence.

*Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. App. 1992), appeal pending in Minnesota Supreme Court. The jury awarded \$2.7 million in punitive damages against the Church for failure to remove a priest who was engaged in sexual misconduct; the trial judge reduced that



amount to \$187,000. The judgment also included \$855,000 in compensatory damages.

The issue here is punitive damages against churches. No one defends what the priest did, and everyone concedes that laws against sex offenses serve a compelling interest. But punitive damages are a different matter. The commercial press is largely immune from punitive damages for First Amendment reasons; municipalities are immune from punitive damages under both Minnesota and federal law. Churches need a similar immunity. But the court said that punitive damage law is generally applicable, so the Church had no claim after *Smith*. The court expressly rejected the argument that the existing exemptions for other favored defendants show that punitive damages law is not generally applicable. RFRA would give churches an arguable defense.

*Anonymous v. Unnamed Catholic High School* (settled 1988). *Mrozka* must be understood in light of another case that I am not free to name. I helped represent a Catholic school that fired a teacher for sexual misconduct. That teacher sued for wrongful discharge. The school had strong evidence to support the discharge; when the plaintiff's lawyer saw that evidence, he dropped his request for reinstatement or a recommendation. Even so, the school paid \$80,000 to settle the case. Without clear protections for religious liberty, the Church pays when it does the right thing, and it pays when it fails to do the right thing. Either way, the financial burden falls on the faithful and not on the wrongdoer.

## **Appendix 2 to Testimony of Douglas Laycock**

### **Cases Rejecting Free Exercise Claims for Lack of Religious Compulsion**

In my oral testimony, I said that an amendment limiting the bill to conduct that is religiously compelled would impose serious costs on religious liberty. I mentioned four cases to illustrate that point. Many other cases would also illustrate the point; these are the four that came to mind as I testified. Here are citations and additional detail on those four cases:

*Society of Jesus v. Boston Landmarks Comm'n*, 408 Mass. 38, 564 N.E.2d 571 (1990). The Jesuits wanted to reorient their altar so the priest could face the people; the Landmarks Commission said the altar was architecturally important and could not be moved. The Commission argued that the location of altars is of no First Amendment significance unless a church's specific religious beliefs forbid it to put the altar where the state wants it. Brief of Defendant-Appellant 28, 36-37. This was a plausible argument under existing federal case law. The Supreme Judicial Court of Massachusetts avoided the issue by protecting the Jesuits under the state constitution.

*Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1123 (1989). Witters was entitled to a state scholarship for the blind, and wished to use that scholarship to enroll at a seminary. The Supreme Court of Washington ruled that this use of the scholarship would violate the Establishment Clause of the state constitution. Witters could use the scholarship to attend any other university and train for any other occupation, but seminaries and the ministry were precluded. Witters argued that this rule discriminated against religion and thus violated the Free Exercise Clause. But the court held that there was no free exercise issue, because no one is required to become a minister.

*Dorr v. First Kentucky National Corp.*, (unreported, W.D. Ky.), *rev'd*, 41 Fair Empl. Prac. Cases. 421 (6th Cir.), *vacated*, 42 Fair Empl. Prac. Cases 64 (6th Cir. 1986). Dorr was President of Integrity, an Episcopal gay rights organization working for change within the church. His employer demanded that he resign the position, and fired him when he refused. He sued for religious discrimination under Title VII. The district court held that leading Integrity was not a religious practice, because Episcopalians were not required to do it. The panel of the court of appeals reversed, but the full court granted rehearing en banc, thus vacating the panel's opinion and reinstating the district court's opinion. No further proceedings are reported; the case apparently settled.

*Brandon v. Board of Education*, 635 F.2d 971, 977 (2d Cir. 1980). Brandon led an unsponsored student prayer club that wanted to meet on campus before school. The school board refused to let the club meet. The court held that the club was not protected by the free exercise clause, because Christian prayer is not required at any particular time or place. The court noted that Muslim prayer would be different, because Muslim prayer is mandated at particular times.

Mr. EDWARDS. Professor Lupu.

STATEMENT OF IRA C. LUPU, NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY

Mr. LUPU. Thank you. Mr. Chairman, members of the subcommittee, as Mr. Hyde said when he introduced me earlier, I teach at the George Washington University, but of course like professor Laycock, I am here on my own, not on behalf of the university or any other organization. I am here as a citizen, and as a teacher and student of constitutional law.

I must say that sitting through the testimony this morning has made me feel sad and uneasy in many respects about the matters that are before you. Sad because of the way in which I have heard abortion politics disfigure our constitutional discourse.

I do consider this hearing and our contemplation of H.R. 2797 part of our constitutional discourse. This body can engage in that just as courts and other government bodies can. And while I full well understand people's strongly felt views about abortion, that will have to be worked out in one form or another, I think it is very sad that on a matter on which I think, I sense, there is otherwise a great deal of cooperation and common spirit to do something about the Supreme Court's opinion in *Smith* and to do something to restore religious liberty, that the issue of abortion is tearing it apart and I am not going to make a judgment on which side is holding which side hostage. I don't think it matters.

What matters is that is what dominated this morning's discussion. I wasn't here yesterday so I don't know the extent to which it dominated it yesterday. But as someone who cares about constitutional law, I found that sad.

Now, I am uneasy because like many people who appeared here yesterday, as I understand it, and today, I think *Smith* is a very bad decision. I think its reasoning is bad; I think its result is bad. I think people who want to do something about it are acting out of a proper, appropriate, and commendable impulse. But I do not think that the Religious Freedom Restoration Act is a good and sound response to the problem. And I think that for two main reasons.

Number one, I don't think it is a restoration of the law of religious freedom. I think the act goes well beyond the most extreme form of protection of religious freedom we have ever had in our law. And I will elaborate on that in 1 minute. I also think, and I think the second point is more serious, I think the act as drafted, as it is designed to rest on Congress' power to enforce the 14th amendment, is unconstitutional as applied to the States. I think Congress can instruct various agencies and instrumentalities of the Federal Government to protect religious liberty above and beyond what the free exercise clause or the Supreme Court's view of the free exercise clause might require. But I do not think that Congress has a—has constitutional authority to tell State governments and State administration that they must go in a direction that is opposite to what the Supreme Court has held in *Smith* in respecting religious liberty, so that whatever you do, if you rest on your power to enforce the 14th amendment, I fear it will not survive very long in the courts.

Now, let me go back briefly over the first point about the extent to which the act protects religious liberty and then spend a few more minutes, I hope, on the constitutional point.

Certainly, this act is not designed to restore the law of free exercise as of the eve of *Smith*. It would be a waste of time to restore the law of free exercise as of the eve of *Smith*. As of the eve of *Smith*, the Supreme Court had gutted the compelling interest test, watered it down, diluted it so the Government almost always won and religion almost always lost, and the Supreme Court had simply ignored or avoided the compelling interest test in a number of important contacts, claims in the military, claims in prisons.

So the Restoration Act would restore or put the test across the board. It would strengthen it and put it into the law across the board. That is part of what Professor Laycock says commends it, and I think he is right. But you would not be restoring the law as of the eve of *Smith* if you enacted it. You might be, depending on how the act was construed, restoring the law as of 1972, which I view as the high water mark for religious liberty in the constitutional law in the United States. That is the time when *Wisconsin v. Yoder* was enacted.

What troubled me was reading section 3 of the act, the operative section about forbidden burdens on religion and the exception to forbidden burdens on religion. And the ladies and gentlemen in section 3 about the exception to forbidden burdens on religion says that—is a particular version of the compelling interest test.

It says government has to demonstrate application of a burden and it is essential to furthering governmental interest and is the least restrictive means of furthering that interest.

Will you not find language that strenuous in *Wisconsin v. Yoder*, in any other case about free exercise of religion and perhaps not in any other case about anything that I am aware of, though I wouldn't want to hold myself to that. That language is a very stressful one. I have in my written testimony an example about Abraham ordered by God to sacrifice Isaac to prove his faith. And I won't run through it now, but in my written testimony I discuss the problem government would have in doing anything to stop Abraham in that setting under a test as strenuous and extreme as this one.

Now, let me turn briefly to the constitutional point, because this point, that the statute goes too far in its protection of religious liberty at the expense of competing interests. This point can be fixed by this body. The statute could be backed up a little bit, moderated a little bit, and I would recommend that. The constitutional problem is much more serious. I don't believe that Congress has the authority in its application of the act to the States to say, even though the Supreme Court is going right in its treatment of religious liberty, we now say in enforcing the 14th amendment to go left.

The Supreme Court says, "no exemptions for religious exercise from generally applicable laws." We say, "exemptions for religious exercise for generally applicable laws."

The cases that elaborate Congress' power to enforce the 14th amendment do not go nearly so far. In fact, *Oregon* and *Mitchell* said that Congress could not extend the vote in State elections to

people between 18 and 21 years old. Congress has been able to enforce post Civil War amendments when it was going in the same direction of the Court, when it wasn't going too far, and it was resting its judgment on legislative facts within its competence to find. That is not the Religious Freedom Restoration Act.

Congress would not be going in the same direction as the Court. The Congress would be going very far in the opposite direction. And the judgment would be based on constitutional values, commendable ones, but not the values that the Supreme Court has expressed.

I have suggested in my written statement a slightly narrower version of this that rested on Congress' power to spend for the general welfare and that conditioned religious freedom on acceptance of State expenditures might be a sound and constitutionally acceptable way to achieve some of these purposes. Thank you for your time.

Mr. EDWARDS. Thank you.

[The prepared statement of Mr. Lupu follows:]

STATEMENT BY PROFESSOR IRA C. LUPU CONCERNING H.R. 2797  
THE RELIGIOUS FREEDOM RESTORATION ACT  
BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY  
THURSDAY, MAY 14, 1992

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to testify on a matter of great constitutional significance. I am a professor of law at The George Washington University, but I am not here on behalf of the University or any other organization. I am here as a citizen and constitutional scholar,<sup>1</sup> concerned about the matter before you.

At the outset, I want to state my position on the issue of the legal restoration of religious freedom in America. I believe that Oregon Employment Division v. Smith, 494 U.S. 872 (1990), is a very bad decision, both in its reasoning and its result. I also believe, however, that the proposed Religious Freedom Restoration Act (hereafter "RFRA") is seriously flawed. As I will explain in what follows, the Act is 1) constitutionally perverse in its treatment of the states as compared to its treatment of the federal government, 2) misleading in its claim to be restorative, 3)

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<sup>1</sup> I have written widely about constitutional law, with an emphasis on the Religion Clauses of the First Amendment. I discuss the Religious Freedom Restoration Act in particular, as one of a genre of enactments designed to implement constitutional norms, in an article entitled "Statutes Revolving in Constitutional Law Orbits," 79 Virginia Law Review, No. 1 (forthcoming, February, 1993).

drafted in ways that are likely to undermine its proclaimed purpose in some respects and overachieve it in others, and 4) probably unconstitutional in its application to the states.

I. THE ACT OBLIGES THE STATES TO RESPECT RELIGIOUS FREEDOM TO A GREATER EXTENT THAN THE FEDERAL GOVERNMENT

The Free Exercise Clause, as part of the Bill of Rights, originally applied only to the federal government. The strictures of the Clause became applicable to the states thereafter, through the doctrine of incorporation, Cantwell v. Connecticut, 310 U.S. 296 (1940), by virtue of which many provisions of the Bill of Rights have been absorbed in the fourteenth amendment and thereby imposed on states and localities.

Section 6 of the proposed Act opens with what appears to be parity between state and federal law; section 6(a) asserts that the Act would apply 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." In section 6(b), however, that parity quickly disappears. Post-Act federal law would be made "subject to this Act unless such law explicitly by reference to this Act excludes such application." By contrast, the coverage of state law by the Act is mandatory; legislators and executive officials at the state and local level would not be able to exclude their actions from its force.

Because Congress cannot bind its successors to maintain the scope of an earlier enactment, Congress cannot prevent future Congresses from escaping the force of the Act, by total or partial



repeal, or by exclusion of particular statutes from it. Congress can, however, bind the Executive Branch and the administrative agencies of the federal government to respect religious liberty. Federal regulators, and the administrators of federal institutions, such as prisons, should not be free to exclude some or all of their policies from the operation of the Act, while state officials performing analogous functions cannot.

The Act's failure to achieve federal and state parity, insofar as it can without diluting its protection of religious liberty, may well provoke a cynical response to the federal government, which will be saying to the states in effect "Do as we say, though not necessarily as we do." Although it is imaginable that courts will construe section 6(b) to exclude federal administrative agencies from the power to avoid the Act,<sup>1</sup> the only safe way for Congress to treat states and the federal government with maximum constitutional parity is to make that explicit in the Act. (This could be done simply by inserting in section 6(b) the word "statutory" immediately preceding each of the two appearances of the word "law.")

## II. THE ACT IS NOT TRULY RESTORATIVE.

As all lawyers who follow religion clause decisions well know, Smith was not a bazooka blow to the head of a healthy organism; rather, it was a final nail in a coffin that the Supreme Court had

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<sup>1</sup> This possibility rests precariously on the Supreme Court's opinion in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), and is further explored in the forthcoming article cited in note 1, supra.

for years been building for the Free Exercise Clause. Except for Wisconsin v. Yoder, 406 U.S. 205 (1972), and a series of pre-Smith cases involving unemployment compensation, the Court had been consistently unsympathetic to Free Exercise claims for relief from generally applicable laws. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Goldman v. Weinberger, 475 U.S. 503 (1986); Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983); United States v. Lee, 455 U.S. 252 (1982). In some of these decisions, particularly in the tax field (Bob Jones University and Lee), the Court had applied a watered down version of the compelling interest test; in a number of others, including free exercise claims in the military (Goldman), in prisons (O'Lone), and in the context of public lands (Lyng), the Court had not applied the compelling interest test at all.

Because the Act would apply an extremely stringent version of the compelling interest test to all burdens on religious liberty, the Act cannot be viewed as truly restorative of the law of religious freedom as of the day before the Supreme Court handed down its decision in Smith. Smith represents the low water mark for religious freedom in the past thirty years, but the Act at the very least purports to return the law to its high water mark, one that we last saw in the 1972 decision in Wisconsin v. Yoder. Indeed, as suggested in Part III immediately below, a literal construction of section 3(b) of the Act would place religious liberty in a more protected position than it has ever before been.

III. THE ACT MAY PRODUCE UNWISE, UNBALANCED AND UNINTENDED RESULTS

It is impossible to know precisely what the Act's consequences would be before courts have examined it. Questions concerning its proper construction and its constitutionality are deeply intertwined. For the moment, however, I wish to defer consideration of the Act's constitutionality, upon which I focus explicitly in Part IV, below, and to take up issues of the Act's meaning and force.

The most striking feature of the Religious Freedom Restoration Act is the way in which it tracks judicially crafted language, drawn from opinions construing the Free Exercise Clause. First, the Act in section 3(a) limits itself to government acts which "burden" a person's exercise of religion. This seems innocuous enough, until one recalls that the Supreme Court has construed the concept of burden very narrowly. In the Lynn decision, the Court excluded from the concept all Native American Indian claims that the public lands were being used or developed in ways that defile tribal holy places. Codifying the concept of burdens will put the Congress squarely behind religious insensitivity to Native American tribes.

Second, the Act adopts a highly stringent standard of review, and references that standard to particular, named decisions of the Supreme Court. In section 2(a)(5), the Act expresses a finding that "the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder is a workable test for striking sensible balances between religious liberty and competing

governmental interests." In section 2(b)(1), the Act declares its purposes to include the codification of "the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." Section 3(b) of the Act would require that government demonstrate that burdening an individual's religious practice

"(1) is essential to further a compelling governmental interest; and

(2) is the least restrictive means of furthering that governmental interest."

Sections 2(a)(5), 2(b)(1) and 3(b) work together strangely. You will search the Supreme Court's opinions in *Yoder* and *Sherbert* in vain for the language proposed in section 3(b). Although both decisions require the state to serve important interests in order to overcome free exercise claims, neither adopts a standard as stringent as the Act proposes. See *Sherbert*, 374 U.S. at 403 (burdens on free exercise may be justified by a "compelling interest," citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)); 374 U.S. at 406 ("We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."); *id.* at 407 (government must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."); *Yoder*, 406 U.S. at 215 ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *id.* at 221 (" . . . we must searchingly examine the [state] interests and the impediment to those

objectives that would flow from recognizing the claimed . . . exemption").

The standard proposed in section 3(b) of the Act goes well beyond those set forth in Sherbert and Yoder. If the Act's standard is construed straightforwardly, virtually every religious exercise claim will prevail; put the other way, the government will almost always lose. The requirements that the government's choice of means, as applied to the person claiming a religious burden, be both "essential to" and the "least restrictive means of furthering" a compelling interest will be extremely difficult for government to meet. When the Act's provisions on attorneys fees (sec. 4(a)) and burden of proof (sec. 5(3)) are added to the mix, the brew is toxic for any government policy that happens to bump into religious practice. Application of these requirements will produce an imbalance in favor of religious liberty and against competing governmental interests. (No wonder the Act's drafters want to give the federal government an escape hatch!)

For example, imagine a modern-day version of the Biblical story in which Abraham believes that God has asked him to prove his faith by sacrificing his son Isaac. Government officials, having learned of Abraham's plan to heed this message, seek a court order granting them custody of the child. Abraham invokes the Religious Freedom Restoration Act as a defense to the legal action.

Granting, as I believe we all would, that the state's end of protecting the child's life is compelling, would an order terminating Abraham's custody, even temporarily, be "essential to

further" the government's interest, and the "least restrictive means of furthering that interest?" Abraham's lawyer will surely argue that subsequent criminal prosecution and punishment if the sacrifice goes forward is an alternative means, and arguably one "less restrictive" of Abraham's religious freedom; unlike the order terminating Abraham's custody, the threat of criminal prosecution, conviction and punishment is designed to deter the sacrifice, but leaves open to Abraham the choice of compliance with his religious conscience. (Of course, if Abraham were prosecuted after sacrificing Isaac, Abraham's lawyer might well argue that temporary termination of custody was the "least restrictive alternative" because the punishment was less severe.)

Unfortunately for Isaac, the Act's requirement that the state use the "least restrictive" means to further its interest may bar both termination of custody and criminal prosecution as well. Other means, completely noncoercive and therefore still less restrictive of religious freedom, also are available to the state. For example, state officials might offer Abraham something of value in exchange for sparing Isaac, or (less restrictive still) simply try to persuade Abraham that human sacrifice is morally wrong. Moreover, because (viewed ex ante) any one of these means might work to achieve the state's interest, none can be deemed "essential" to further it, as the Act would require.

As this analysis shows, a stringent test of "essential" and "least restrictive means" is an engine of destruction for any

policy made subject to it.<sup>3</sup> States will rarely prevail against claims, all of which will be far more reasonable than Abraham's, made under the Act if it is straightforwardly interpreted. This is not a restoration of religious freedom; rather, so construed, the Act creates an unbreakable shield or unstoppable sword against any state policy that incidentally burdens religion. In matters of education, land-use control, state taxation, regulation of charitable solicitation, and elsewhere, religious exercise claims made under the Act will force most state policy to yield.

Courts may not be willing to construe section 3(b) quite so literally, of course. A second possibility for interpretation of the Act's protection of religious exercise is that the reference to Sherbert and Yoder in the Act's findings and purposes will temper a court's judgment regarding section 3(b)'s meaning and force. A court might read the Act as a whole to embody the "compelling interest test" as stated and applied in those two decisions. Neither Sherbert nor Yoder require any infinite regress of less restrictive policy alternatives; both are properly read as requiring a judicial evaluation of tradeoffs between the intrusion on liberty and the relative effectiveness of the intrusion, as compared with other means, for reaching the state's ends.

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<sup>3</sup> As Chief Justice Rehnquist has pointed out in a different context, the search for less restrictive means, "when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 294 (1985) (Rehnquist, J., dissenting).

And, indeed, one can imagine a religion-sensitive and otherwise reasonable judge reaching coherent results under such an approach. In our Abraham-Isaac story, a sensible application of the "test" of Sherbert and Yoder would permit the state to terminate Abraham's custody or, if necessary, to prosecute Abraham for homicidal acts toward Isaac. Our deep respect for human life, and our conviction that allowing Abraham religious liberty in this regard deeply threatens that value, certainly supports that outcome. In light of what is at stake, it would be unreasonable to make the state (and Isaac) take the risk that less restrictive means will also prove to be less effective means.

If, however, the courts are free to elaborate the Act by building upon Sherbert and Yoder, as case law, rather than by construing the language of section 3(b), courts might well repeat the decisional trends of 1972-90, winding up where they were on the eve of Smith. This, presumably, would be the tendency one would expect from the very Court that decided Smith, and other free exercise-limiting decisions, in the first place.

How far courts might go in weakening section 3(b) is open to debate and speculation. Perhaps the Act's requirement that all burdens on religious liberty be justified by some version of a strict constitutional test, even one that has been watered down, will result in a series of decisions less destructive of religious liberty than the pre-Smith case law, though less protective than many of the Act's sponsors would desire. Although such a result is better than nothing, it is impossible to predict how much better



than nothing it will be; once courts get the idea that they can ignore the language of section 3(b), there appears no obvious stopping place in the dilution of the Act.

The range of possible meaning for the Act's principal provisions may thus be much wider than it seems, running all the way from 1) "religion never loses" through 2) some middle ground (represented by Sherbert and Yoder, as they were understood by responsible lawyers in the early 1970's) to 3) "the state may burden religious practices with rules of general applicability unless exemptions for religious practice create only trivial costs to the government" (that is, the state of the law on the eve of Smith). The first version would overprotect religion at government and society's expense; the third version would do little to advance or restore religious liberty; the middle version seems appropriate, but is very difficult to express in hard and fast statutory terms.

IV. CONGRESS MAY LACK CONSTITUTIONAL POWER TO ADVANCE  
RELIGIOUS FREEDOM BY WHOLESALE DISPLACEMENT OF STATE LAW

As all those familiar with our Constitution know, Congress is a legislative body of enumerated powers, and the question arises as to what source of power supports the Religious Freedom Restoration Act. Before turning to the congressional power to enforce the fourteenth amendment, upon which principal emphasis is placed by the Act's proponents, it seems to me worthwhile to pause over other possibilities.

In this context, as in so many others, Congress might try to rest an exertion such as this on the Spending Power in Art. I, sec.

8, cl. 1, or the power to regulate commerce "among the several states" in Art. I, sec. 8, cl. 3. Because the Religious Freedom Restoration Act is so expansive in its programmatic and regulatory coverage, however, the analysis of the extent to which either of these power grants might support some version of the statute must be made case by case. In all likelihood, these two power grants, alone or taken together, will not support the full sweep of the Act in all its applications.

Of the two, the Spending Power is the safer bet; under the broad principles of South Dakota v. Dole, 483 U.S. 203 (1987), Congress might safely condition grants upon the states' accepting a condition of compliance with the Religious Freedom Restoration Act for all state actions related to the use of the federal funds. This would probably not result in coverage as broad as the Act now proposes; for example, state laws of marriage and of burial implicate religious principles, but I know of no federal expenditures linked to state policies on those subjects.

It is somewhat more difficult to assess the validity of the Religious Freedom Restoration Act as an exercise of the power to regulate commerce among the states. The Act would apply in a number of different contexts, each with its own relation to interstate commerce. It is at least arguable that the loose modern tests for which class of transactions affect commerce substantially would support a restriction upon the states' power to burden the religious freedom of state employees. See Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding federal regulation of wages and hours of

state employees in hospitals, schools, and institutions). Because religious liberty issues would be presumably less likely to produce commerce-blocking labor disputes than would wage and hour conflicts, however, this issue may be close. To cite a different example, the Act might result in a new pattern of textbook selection by public schools, and this alteration of book demand might serve to justify the exercise of the Commerce power.

One cannot be sanguine, however, about any of these results; all might be seen as relying on trivial commercial effects as an excuse for highly intrusive federal regulation of state operations.<sup>4</sup> Furthermore, some applications of the Religious Freedom Restoration Act might have virtually no commercial effects at all, or commercial effects that Congress would not want to be promoting. To return to Smith for an example, do you really want lawyers arguing and judges deciding that Congress enacted the Religious Freedom Restoration Act in order to remove impediments to interstate trade in peyote?

Still more ominously for some applications of any Commerce Power theory, this Term's expected Supreme Court decision in New York v. United States, 942 F.2d 114 (2d Cir. 1991), cert. granted 112 S. Ct. 856 (1992) (argued March 27, 1992) may restore the state sovereignty barrier erected in National League of Cities v. Usery, 426 U.S. 833 (1976) and later demolished in Garcia v. San Antonio

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<sup>4</sup> See Maryland v. Wirtz, 392 U.S. 183, 196-97 n.27 (1968) ("[T]he Court [has never] declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.") (Harlan, J.).

Metropolitan Transit Authority, 469 U.S. 528 (1985). Depending on the grounds of such a resurrection, a newly (re)formed doctrine of state sovereignty might bar application to state government operations of the Religious Freedom Restoration Act, at least to the extent the Act rested on the commerce power.

The case for federal power to enact the Religious Freedom Restoration Act is thus thrown back on the scope of congressional power to enforce the fourteenth amendment. Defining the parameters of this power raises questions as deep and difficult as any in our constitutional law. The concerns here include the scope of individual rights, the separation of powers between the Supreme Court and Congress, and the division of authority between nation and states. In particular, questions concerning the scope of congressional power to enforce the fourteenth amendment require reconciliation of our most basic constitutional decisions and precepts -- Marbury v. Madison, 5 U.S. 137 (1803), which claims for the Court the last word on the meaning of the Constitution, and McCulloch v. Maryland, 17 U.S. 316 (1819), which recognizes that Congress must have a broad choice of means for carrying its powers into execution.

In a letter to this Committee several years ago, Professor Laycock offered the opinion that Congress could create a statutory right to religious exemptions from state laws of general applicability even though the Supreme Court in Smith had held there was no such right judicially enforceable under the Constitution. Hearing on H.R. 5377, Religious Freedom Restoration Act of 1990.

Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2nd Sess. 72-79 (App. 3, Letter to Chairman Edwards from Douglas Laycock). He argued that Smith itself invites legislative activity, and that the proposed Religious Freedom Restoration Act is consistent with, rather than in conflict with, the Supreme Court's view of protected religious exercise. Id. at 76-79.

With all due respect to Professor Laycock's learning and judgment, I think the question is much closer and more difficult than his letter suggests. The leading precedent for an expansive view of congressional power, Katzenbach v. Morgan, 384 U.S. 641 (1966), was the product of a Court far more attuned to the expansion of rights and far less concerned with insulating the states from federal power than is the current Court.

Katzenbach, and other decisions on which Professor Laycock relied, involve statutory extensions of voting rights or other anti-discrimination concerns to circumstances beyond those which the Supreme Court had held unconstitutional. In all of these matters, however, the Congress had legislated in a general direction consistent with that taken by the courts. Respected opinions in the leading cases on this subject take the view that Congress can act to outlaw state practices inconsistent with judge-made principles, but cannot refashion judge-made law whole cloth. Oregon v. Mitchell, 400 U.S. 112, 204-09, 294-96 (1970) (Congress lacks power to extend the franchise in state elections to persons under 21 years of age) (opinions of Justice Harlan and Stewart).

Moreover, the principal rationale for permitting legislative revision of the scope of fourteenth or fifteenth amendment rights is the superior fact-finding capability of Congress, as compared to the courts, on broad questions of the true (and invidious) character of certain discriminatory practices.<sup>5</sup>

The limits suggested by the Supreme Court's decisions concerning congressional power to enforce the fourteenth amendment present significant impediments to the Religious Freedom Restoration Act. The Supreme Court in Smith concluded that judicial balancing of religious interests against governmental concerns would produce unprincipled results, and that the free exercise clause would henceforth not support claims to be exempt from state laws of general applicability. If Oregon v. Mitchell retains validity, it is hard to see on what basis Congress can substitute a stringent religion-protective doctrine for the Court's new hands-off approach to the Free Exercise Clause. To do so would be to reject the Court's direction and result, and to substitute a

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<sup>5</sup> The decision in City of Rome v. United States, 446 U.S. 156 (1980) is the strongest precedent for Professor Laycock's view, because it permitted Congress to legislate, pursuant to the fifteenth amendment, against practices discriminatory in effect as well those designed to discriminate, just as RFRA is aimed at policies burdensome in effect to religious exercise. It is likely, however, that the Supreme Court will be more restrictive in recognizing congressional power to enforce the general provisions of the fourteenth amendment, because the implications for federalism are so much broader. (Then-Associate Justice Rehnquist, as well as Justices Powell and Stewart, dissented in City of Rome.) The thirteenth amendment decisions on which Professor Laycock relies in his 1990 letter, see, e.g. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) also do not help his argument much, because they typically involve racial discrimination in commercial settings which Congress may in any event regulate pursuant to the Commerce Power.

highly general and expansive doctrine of religious freedom for a much narrower one chosen by the Court. Moreover, the Act does not rest on any claim, general or particular, of legislative superiority in fact-finding, and thus cannot draw upon that line of reasoning.

Alternatively -- and here I come closer to Professor Laycock -- Smith may represent an entirely institutional rather than substantive judgment about the force of the free exercise clause. A significant portion of the Court's justification in Smith focuses on the difficulties encountered by courts in balancing interests in the fashion required by the pre-Smith law. The opinion suggests that only the political branches possess the requisite competence and authority to make these judgments.

This "institutional" view of Smith creates its own problems for the validity of the Religious Freedom Restoration Act, but they may be more manageable than those produced by the substantive view. The substantive view runs head-long into Marbury v. Madison, as glossed in Oregon v. Mitchell; that is, it suggests that Congress can simply override the Court on matters of substantive constitutional law. The "institutional" view suggests that courts, in the absence of focused legislative judgments about the impact of religious concerns on governmental ones (and vice versa), should not engage in the unpredictable business of assessing incommensurables like religious liberty and government need. The converse proposition, which Smith endorses, is that courts should accept such focused legislative judgments when they in fact are

made.

With the problem so conceptualized, the question the Religious Freedom Restoration Act presents is whether a generalized religious freedom statute, enacted by Congress for the governance of the states, is the sort of enactment the Smith Court envisioned when it rendered its institutional judgment. Statutes exempting religious exercise from rules of general applicability ordinarily are enacted by the same body that enacted the general rule itself, and are narrow and specific. Such exemption statutes single out religion in the context of a particularized prohibition, such as the ban on religious discrimination in employment, in which the costs and benefits of the exemption are usually foreseeable. All courts need do with such enactments is measure them against the Establishment Clause, and, if they survive, apply them according to their terms.

The Religious Freedom Restoration Act would be entirely different. It would be a federal enactment, requiring exemption for religious exercise from state-created rules. The Act is neither narrow nor context-specific. The Act says to courts "Protect religious exercise across the governmental board and pursuant to stringent standards of review." By so (re)delegating Free Exercise decision-making, the Act places the courts back in the position they were in before the erosion of Free Exercise standards in the 1980's, or at least where they were on Smith's eve. Such legislation would represent a congressional judgment that the courts could indeed apply a set of standards that courts had previously applied in the name of the Constitution directly,



but that Smith now rejects.<sup>6</sup>

Such an enactment cannot create for the courts the institutional apparatus to make such judgments, but it can supply the authority of a coordinate branch that the courts should make them in order to facilitate religious liberty. Such an expression by Congress would be analogous to those on which courts at times rely on matters of justiciability; although these doctrines have a constitutional core, rooted in Article III, they also have a prudential component which Congress may be able to overcome by legislation. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring). When this platform of authority is conjoined with recognition that in other areas of constitutional law courts already make judgments involving competing and logically incommensurable interests, the case for the constitutionality of the Religious Freedom Restoration Act is certainly improved.

An improved case is not necessarily a winning one, however. The Supreme Court that decided Smith, and that may be on the verge of (re)protecting states against federal "encroachments" on the operations of state government, can hardly be depended on to adopt an expansive view of congressional power to enforce the fourteenth

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<sup>6</sup> In my own view, which may be idiosyncratic, the return of this task to the judiciary is constitutionally salutary. See generally Ira C. Lupu, "Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion," 140 University of Pennsylvania Law Review 555 (1991) (arguing that the establishment clause prohibits discretionary accommodations, but that the free exercise clause mandates some accommodations and that only courts should provide them.)

amendment in a context which overrides Smith and intrudes on state and local administration. In my view, the Supreme Court would be highly likely to invalidate the Religious Freedom Restoration Act in its present form, or to construe it very narrowly so as to save it from such invalidation. Such a narrow construction -- say, that the Act simply erased Smith and returned the law to its precise condition on Smith's eve -- would, as suggested in Part III above, render the Act a near-empty shell.

#### CONCLUSION

I have three suggestions. First, the Congress should do nothing, pending the outcome in the Supreme Court of New York v. United States, which may restore the doctrine of state sovereignty, and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991), cert. granted, No. 91-948, 1992 U.S. LEXIS 1707 (U.S., March 23, 1992). The City of Hialeah case, which presents Free Exercise issues and which I believe Professor Laycock is to argue, will be heard early in the 1992 Term and may signal a retreat from Smith.

Alternatively, the Religious Freedom Restoration Act might be redrafted to clarify exactly what level of protection is being afforded to religious liberty, and to ensure that such protection is reasonable. Staying away from judicial terms of art may avoid ambiguity and minimize judicial power to revise the statute by interpretation. I would propose something like "Except on a showing of extraordinary good cause, no person acting under color of federal or state law may take any action which seriously injures

any person in his or her religious practice."

Finally -- and I think potentially most fruitful -- the Congress should consider proposing a constitutional amendment rather than enacting a statute to overturn Smith. Such an amendment would presumably bind all levels of government, and, if drafted wisely, would not borrow from pre-existing doctrine coined by the judges whose work you want to overturn.

Restoring religious freedom to its proper place is important and difficult. For the reasons outlined above, however, I believe the proposed Religious Freedom Restoration Act is not a vehicle adequate to the task.

Mr. EDWARDS. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman. I want to thank both of the witnesses, and all the witnesses today. I think this has been a very instructive set of hearings that you have had. And I think that it has been beneficial to review in public some of these very fundamental questions of why we have such a great society based on constitutional government. We really challenge one of the very underpinnings of our society when we step into the whole exercise of religion area so well embedded in our history, and so fundamental to American society as this whole question of governmental interference in a person's right to talk to their God.

I really found instructive Professor Laycock's testimony. I had a number of questions for him, and I think that he has addressed a lot of the concerns, questions that I had about this, and I found his testimony very instructive. I am afraid I have to move along here, so I don't have any questions at this time.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Well, thank you, Mr. Chairman. I want to thank the panel for their long-suffering waiting, because it is a long morning, and I am most appreciative of their testimony. And they have made a contribution to our fuller understanding of this not very simple, but very important legislation.

Everybody has their personal priorities, and I have mine, of course, and I respect people who have different priorities. To me, abortion is important. I can't think of a cause that I am more interested in, because I can't think of a class of members of the human family more vulnerable, weaker, more defenseless, who don't vote, who can't escape, and I think—I think—I am not saying you have to think this way—I think that society, government, owes them protection once they have been created. And I think human life begins at the beginning. And that is my priority. And I don't think it is abortion politics to be concerned when legislation comes along that I think might facilitate the already 1½ million abortions a year in this country.

Now, there are many religious groups who support this legislation who don't like abortion. They are prolife. But they are willing, it seems to me in my flawed reasoning, they are willing to throw the dice and take a chance on the cast that makes up the Supreme Court, that they will still vote the way they have or they will do what they said they would do in the past. They are willing to take that chance. And that is fine. God bless them.

I am not. I am not. I am concerned about saving one life. And more importantly than legislation that satisfies the world, I think if it provides a facility for exterminating—we all talk about terminating a pregnancy. Every pregnancy terminates at 9 months. Exterminate is what we are talking about. I don't think it is sad that Members of Congress concern themselves about innocent human life. I think it is great. I think we have had a great debate here today between people of good will who have a different opinion, a different understanding of the law and of the future and how the law is going to be interpreted in the future, the powers of Congress vis-a-vis the Supreme Court.

I have been pleased, and I have heard lots of debates in the 18 years I have been here, but I do not—I am saddened that a law professor would be saddened that this would be a concern.

You bet it is a concern. It is a concern. And it is not politics. The politics plays the other way. It is pretty tough to be prolife in Congress today. Let me tell you, it is not easy. You don't have an awful lot of media or academe with you. But some people believe in something.

Now, insofar as holding hostage a bill, I can assure you, there is no Republican, there is no conservative, there is no proliferator that can hold hostage even an elevator around this place, much less legislation. The power to move it and to put it on a fast track has always rested with my dear friend and colleague and mentor from California.

Mr. EDWARDS. But it always gets vetoed and it comes back.

Mr. HYDE. In the words of the immortal Barbara Mikulski, tough cookies. I can only say that nothing is held hostage. We have tried to work out something. And I still want to work out something. We need this legislation. The *Smith* case was disastrous, in my judgment, and I would sincerely like to remedy it, if we can, constitutionally. But I am unwilling to throw the dice on abortion. That is my opinion, and that is where I am. And I won't take any more time. It is 10 minutes to 1. We have had all the scholarship I think we can handle for 1 day. At least I have. Thank you.

Mr. EDWARDS. I want to ask Professor Laycock to respond to the constitutional issue that was raised by Professor Lupu, that it is unconstitutional for Congress to define for the States this particular rule.

Mr. LAYCOCK. Thank you, Mr. Chairman. Obviously, the Congress cannot define the constitutional standard. The free exercise clause means, maybe not theoretically but for practical purposes, means what the Supreme Court says it means, and that means *Smith*. But Congress can enact standards and create rights that are statutory rights under any of its enumerated powers, and one of Congress' powers is to enact statutes to enforce rights under the 14th amendment. And the Court has been rather clear that what Congress can do by way of statutes in enforcing the 14th amendment may go beyond what the Court may do under the 14th amendment, and the Court unanimously reaffirmed that just 2 years ago in *Metro Broadcasting v. the Federal Communications Commission*.

The Court was divided 5 to 4, but both the majority and the dissent agreed that if Congress authorized a remedy for a violation of the 14th amendment, it could go beyond what the Court would do on its own, and both sides agreed that Congress had some power to define the scope of protections in the statutes that it enacted to enforce the 14th amendment.

Now, Professor Lupu said basically three things; one, that Congress can't simply reverse the direction the courts have been going in. Well, we will see, but the Supreme Court flatly said literacy tests for voters in the South are permitted, and Congress said they are forbidden, and the Court enforced that statute.

*Oregon v. Mitchell* is the principal case in which the Court has said that an exercise of Congress' section 5 power went too far and

was unconstitutional. That was a 5 to 4 decision, and the key vote was cast by Justice Black for a very specific reason. He found in article 1 an express textual commitment of power over voting qualifications to the States. And as he read section 5, it did not amend that express allocation of power.

There may be some application of RFRA that runs into such an express State power, although I can't think of one. States don't have any express allocation of power under the Federal constitution to regulate or interfere with religion. This is a bill about the general reserve powers of the States, those powers are fully subject to the 14th amendment.

Finally, it has often been suggested in the Voting Rights Acts, which are the principal congressional exercise of section 5 power, part of what made those acts acceptable was that Congress found facts that the Court had not found, and it was the factfinding about the necessity for these laws that made those laws valid.

I am not sure if congressional factfinding is essential to an exercise of section 5 power, but the Voting Rights Act and the cases construing them certainly indicate that finding of fact is helpful. And I have urged in my written statement that this committee and the Congress find three facts that are amply supported by my testimony and by the testimony of others who have appeared before the committee, that we are not—indeed, the Court was oblivious to them. One, that formerly predictable laws been used for active persecution of religious minorities in American history. That is a fact.

Second, Congress is the expert on the political process. This committee can find as a fact that legislating individual exceptions one statute at a time, one religion at a time, which is what the Court suggested in *Smith*, is not a politically workable solution for protecting religious liberty. I think this committee would judge that to be a fact, and this committee can find that.

And three, the committee can find the very same fact it found in the—that Congress found in the voting rights legislation, that litigating the motive of government officials case by case all over the country is not a workable means of protecting minority rights. You can't protect your rights if they depend upon persuading a Federal judge that a particular State official or legislative body had an antireligious motive. Those are three facts, and this committee can find them.

Finally, one other and perhaps more generally applicable example of the Court simply reversing direction in response to congressional legislation under section 5 is the modern voting rights legislation, which wholly reinvigorated cases in the 1982 act when the Court had said multimember districts are mostly OK. You have got to show motive, and Congress said you don't have to show motive. The Court has been vigorously enforcing the Voting Rights Act.

Mr. LUPU. May I have one word in response to some of that? Professor Laycock, he and I should have lunch because we could spend several more hours hashing over the particulars of this debate. A couple of small points.

I agree with Professor Laycock that the kinds of findings that he has just described would buttress the case for constitutionality of the bill under section 5. I don't think it is implausible and impossible that the current Court would sustain it. But I think it is un-

likely and it is made more likely if you go in the direction Professor Laycock suggests in terms of findings.

But I am reminded of two things about the current Court. No. 1, as compared to the Court of 20 years ago, which decided the major cases involving section 5 of the 14th amendment, this Court is much more hospitalable to the interests of States. The Chief Justice of the United States is the author of a major opinion having to do with State sovereignty and immunity from Federal legislation.

There is a case pending this term in which that sort of issue is raised, that is *New York* against *the United States*. There is much more concern about that issue in the Supreme Court now than 20 years ago.

Second, this is the same Supreme Court—well, there is some difference in personnel. We don't know yet what that means—that decided *Smith*, that said, we don't want to apply the compelling interest test across the board to State laws. We are not going to do it under the 1st and 14th amendments. For Congress to turn around and say, oh, yes, you are. We tell you you have to do it, I think will not sit too well with the folks who voted in the majority in *Smith*.

I am urging you not to give them a chance to do something that might be a very salutary piece of legislation if its standard is moderated some by arresting it on section 5. Thank you.

Mr. EDWARDS. I thank both of you and Mr. Hyde. I apologize for the long delay, but you are a very special witness and I did want to hear you.

Mr. HYDE. Mr. Chairman, before I terminate, may I offer for the record some documents that were provided to me, and I request they be made part of the record.

Mr. EDWARDS. Without objection, so ordered.

[See documents in appendix.]

Mr. EDWARDS. The subcommittee is adjourned.

[Whereupon, at 1 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]





# A P P E N D I X

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## MATERIAL SUBMITTED FOR THE HEARINGS PREPARED STATEMENT OF WINTLEY A. PHIPPS, PRESIDENT, INTERNATIONAL INSTITUTE FOR RELIGIOUS FREEDOM

Mr. Chairman and Members of the Committee:

The International Institute for Religious Freedom is pleased to submit this statement in support of H.R. 2797, the Religious Freedom Restoration Act.

I am Wintley Phipps, founder and president of the International Institute for Religious Freedom (IIRF), which was recently established to educate and to provide information and support for the basic concept of religious freedom here in the United States and around the world. The Religious Freedom Restoration Act (RFRA) is of paramount importance to the IIRF.

Religious liberty is the cornerstone of the American way of life. The framers of our constitution created a wall of separation between church and state to protect religious freedom in this country. The First Amendment of the Constitution embraces two key concepts in its religion clauses -- (1) that the State will not endorse or oppose any particular religious viewpoint and (2) that the State will not interfere with its citizens' rights to practice their faiths (i.e. free exercise of religion). These guarantees have been the two pillars which have held up America's shrine of religious freedom.

Recently, however, the U.S. Supreme Court has been less willing to uphold Thomas Jefferson's vision of a wall of separation of church and state and has been chipping away at our religious freedom in this nation. In its 1990 ruling in Oregon Employment Division v. Smith, the Court abandoned the compelling state interest test which has long been the standard applied for

determining whether a governmental action unconstitutionally interferes with a religious practice.

The compelling interest test required the government to demonstrate that any law burdening the free exercise of religion: (1) is essential to furthering a compelling government interest; and (2) is the least restrictive means of furthering that interest. In throwing out this strict scrutiny of governmental interference, the Court essentially did away with any constitutional protection for individuals or religious institutions to freely exercise their religious beliefs if such action conflicts with laws of general application. That is, neutral law of general applicability would be valid whether it burdens religious freedom or not. In essence, the Court validated its assertion that religious liberty is a "luxury" we can no longer afford.

With the fall of Communist regimes, the United States is assuming the world leadership role. Time magazine (July 29, 1991, p. 13) called the United States :the world's remaining superpower." I find it ironic that while Russia, Germany, Yugoslavia, Czechoslovakia and other countries in Europe are enjoying new found religious freedoms, America is at the brink of a religious freedom crisis here at home.

Approximately 91% of free exercise claims have now been lost by various state and federal courts throughout the land because of the Smith decision. Cases of religious expression and laws of general applicability continue to come into conflict. Catholics, Jews, Native Americans, Hmong, Mormons, Jehovah Witnesses, Episcopalians, Seventh Day Adventists, Muslims, Atheists and other

religious minorities have been severely affected by this radical shift in jurisprudence. If any one group loses religious freedom protections in this country, it is a sign that all of us are slowly losing our religious freedoms as well.

Several free exercise claims which had been won prior to the Supreme Court's opinion in Smith, have been remanded back to lower courts which were forced to withdraw earlier opinions and rule according to the confines of the Smith decision.

This Subcommittee will be hearing from one such victim, William Yang, of the Hmong religion. Mr. Yang will testify that an autopsy was performed on his 23-year-old nephew in violation of his family's religious beliefs. The lower court ruled in favor of the Yangs and was to award damages until the U.S. Supreme Court issued the Smith opinion. Subsequently, the lower court withdrew its earlier opinion and reluctantly ruled against the Yangs in favor of the defendant based on Smith.

In view of the case cited above, litigation is clearly not the answer. The IIRF believes strongly that remedial legislation is the only way to restore the high burden of proof which the government must demonstrate in order to justify infringing upon a religious belief.

Just as Congress responded to the promptings of the Civil Rights community to restore preexisting rights, remedies and protections which were stripped by the U. S. Supreme Court in a series of decisions in its 1988-89 term, RFRA was introduced to respond to that same Court's ruling in the Smith decision. If left unchecked, that decision will have a deleterious affect on

religious liberty in this country for years to come.

RFRA would restore the protections for the free exercise of religion to the traditional standard (i.e. compelling state interest test) that applied prior to the Smith decision; would guarantee its application in all cases where there's been an infringement upon the free exercise of religion; and would provide a claim or defense to individuals whose religious expression is burdened by government. Accordingly, H.R. 2797 would impose a strict scrutiny test on all governmental action, whether its Federal, State, or local, which burdens an individual's right to exercise his or her religion.

The IIRF is aware of another bill, H.R. 4040, the Religious Freedom Act (RFA) which would also re-impose the compelling state interest test as a statutory requirement but includes language making it clear that nothing in the bill could be construed to authorize a cause of action by any person to challenge: (1) any limitation or restriction on abortion, on access to abortion services or on abortion funding; (2) a tax status of any other person or (3) the use or disposition of government funds or property derived from or obtained with tax revenues.

The IIRF feels that H.R. 4040 goes to the extreme and that such language is not necessary. Moreover, the IIRF believes that any bill which includes such pro-life language (no matter how well intended) will cripple efforts to restore the free exercise of religion in this country. Religious freedom is a right which must never be abridged, and must be guarded with vigilance. One loses one's religious freedom when he or she is prohibited from

practicing that religion freely. Therefore, I urge the Committee not to let the abortion issue cloud this very important fundamental right, thereby precluding any chance of obtaining remedial legislation this year.

H.R. 2797 (RFRA) has the support of over fifty diverse civil and religious organizations, including pro-life and pro-choice groups alike, which have placed their political and ideological differences aside for the expressed purpose of restoring a bulwark of religious freedom in this country. The IIRF is pleased to join this coalition, the Coalition for the Free Exercise of Religion, in urging prompt and favorable consideration of H.R. 2797 by the 102nd Congress.



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## STATEMENT ON H.R. 2797

## "THE RELIGIOUS FREEDOM RESTORATION ACT"

Submitted to the House Subcommittee on Civil and Constitutional  
Rights of the House Judiciary Committee

by Ruth Flower and Joanna P McMann

May 13 and 14, 1992

The Friends Committee on National Legislation is a Quaker lobbying organization established in Washington, D.C. 49 years ago to reflect the concerns of Friends and like-minded individuals on issues of peace and justice. During this time, one aspect of our work has been to articulate Friends' long-standing tradition of friendship with and concern for Native Americans. While we do not try to speak for all Quakers, our committee processes allow us to be guided by the views of a widely representative body of Friends from all over the country.

We are pleased that this Committee is presently considering H.R. 2797, the Religious Freedom Restoration Act. The Act would restore the "balancing test" that was used in First Amendment religious free exercise cases until the Supreme Court abandoned the standard in the 1990 case of Oregon Employment v. Smith. As a

Don Reeves *Clerk, General Committee*Joe Volk *Executive Secretary*David M. Boynton *Associate Secretary for Administration and Development*Mark Hulbert *Clerk, Executive Committee*Ruth Flower *Legislative Secretary*Edward F. Snyder *Executive Secretary Emeritus*Nancy Nye *Legislative Secretary*Alison D. Oldham *Legislative Action Coordinator*

result of that decision, any government body, from the Congress to a local zoning commission, may adopt and enforce any "religiously neutral" law, without considering the impact on anyone's free exercise of religion.

Our support for H.R. 2797 arises from a concern for our own religious freedom as Quakers, and for the religious freedom of all who seek to practice an active relationship with their God, however that relationship is understood. As Quakers, we have relied historically on the protections of the First Amendment against the will and the misunderstanding of the majority. We join with many other religious colleagues who fear the day when they will have to seek the permission of the majority to continue their unique religious practices.

In addition, our long history of respectful relations with Native Americans prompts us to join in their particular concern for the preservation of their religious practices. To meet this specific need, we believe that additional legislation will be needed to clarify the religious rights of Native Americans under the first Amendment.

In this testimony, we will highlight specifically our concern for the rights of Native Americans and their need for protection under the Religious Freedom Restoration Act and under further legislation.

**THE NEED FOR THE RELIGIOUS FREEDOM RESTORATION ACT**

The rich lore of Native American history is inseparable from the spirit-filled lives of Native Americans. While some Native American religious practices and beliefs are unfamiliar to the majority of Americans, these practices and beliefs are central to the lives of Native American peoples. Native American religious practices have been repressed and maligned by the majority white society for centuries. The remaining glimmer of hope that Native Americans may retain some claim to sacred sites, sacred objects, and sacred ceremonies rests in the protection of the First Amendment.

Rules made by the dominant culture - majority rules - are unlikely to take into consideration religious beliefs and practices that are neither visible nor understood in "mainstream America". Native peoples cannot rely on local county councils, state legislatures and agencies, federal departments and the Congress itself to be aware of each potential clash between sacred beliefs or practices and government programs or policies. Nor, given this nation's history of suppression of native religions, can native peoples rely on the good will of legislative and administrative bodies as these clashes arise.

Native Americans need the protection of the First Amendment for the very reason that the Bill of Rights was written: to protect the minority against the will of the majority. The Bill of Rights



drew fences around certain individual rights and said to the majority: here you may not tread. Religious freedom was at the top of that list of protected "territory." The "acceptability" of a religious practices should never be decided by majority rule in a country that encompasses diverse populations. For this reason among the others we have mentioned, we urge the passage of H.R. 2797.

#### THE NEED FOR FURTHER LEGISLATION

For Native Americans the Religious Freedom Restoration Act is the first step in guaranteeing the protection of their unique religious practices. Additional legislation is necessary to ensure these protections. In 1978 Congress enacted the American Indian Religious Freedom Act (AIRFA). AIRFA stated that it was the policy of Congress to "protect and preserve the inherent right of American Indians to believe, express, and practice their traditional religions." AIRFA was in effect, however, a "policy statement" providing no grounds for Native Americans to pursue legal action should their rights be violated.

In 1988, the U.S. Supreme Court threatened the religious freedom of Native Americans in its Lynq v. Northwest Cemetery decision. In its decision the Court announced that, in the use of its own land, the federal government did not have to consider the religious rights of any other users of the land. This was a major incursion into the guarantees of religious freedom guaranteed to

all Americans in the Constitution. In 1990, the U.S. Supreme Court again weakened religious freedom in its Oregon Employment v. Smith decision.

The 1978 AIRFA was enacted at a time when protections for all religious faiths and practices were secured by the First Amendment of the U.S. Constitution. Fundamental to any amendment to AIRFA is the restoration of First Amendment guarantees. AIRFA builds upon these protections by protecting specific rights and providing a legal cause of action.

The change in the interpretation of the First Amendment free exercise clause is already undermining the public attitude of tolerance toward diverse religious beliefs. We fear for the future, when majority rule may dictate the acceptability of religious practice.

We thank the Committee for hearing this legislation and we urge you to approve H.R. 2797 to restore fundamental protection to the religious rights of Native Americans and all Americans.



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**MEMORANDUM**

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**To:** House Subcommittee on Civil and  
Constitutional Rights

**From:** David Zwiebel, Esq., Director of Government  
Affairs and General Counsel

Abba Cohen, Esq., Director of Washington  
Office

**Date:** May 14, 1992

**Subject:** H.R. 2797, The Religious Freedom Restoration  
Act

On behalf of Agudath Israel of America, the nation's largest grassroots Orthodox Jewish movement, we respectfully submit this testimony in support of H.R. 2797, the "Religious Freedom Restoration Act". We firmly believe that the reaffirmation of this nation's historic commitment to the principle of religious liberty should be a matter of the highest priority for Congress and we urge the Subcommittee to act expeditiously in favorably reporting this major legislative initiative out to the full House Judiciary Committee.

**The "Peyote" Case and the Need for this Legislation**

We in the United States had always assumed that religious freedom was a towering American value, a fundamental right deserving the highest level of protection the law had to offer.

And, indeed, it was so. Religious freedom was given constitutional protection. Like other First Amendment rights, the free exercise of religion could not be denied unless the state showed that infringement on religious practice was absolutely necessary to protect a "compelling interest". Only public concerns of the most profound magnitude --

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national security, health, safety and the like -- could justify the government's trampling of religion. Even then, the intrusion had to be narrowly drawn and the least restrictive means of achieving the "compelling interest" in question.

Thus, under decades of free exercise jurisprudence, religious minorities confronting state laws that interfered with their religious observance were able to go into court, waving the Constitution, and implore the judge for exemptions to the intrusive laws. These exemptions were frequently granted, as the state often had difficulty in meeting its heavy burden of demonstrating that, absent the religious encroachment, a "compelling interest" would be in jeopardy. When the court found, however, that this burden had in fact been met, through the least restrictive means at the government's disposal, the state's "compelling interest" would be sustained. In this manner, both the public interest and the individual interest were served.

All this, however, changed dramatically as a result of the Supreme Court's 1990 ruling in *Employment Division v. Smith* -- commonly known as the "peyote" case -- a decision that all but eviscerated the First Amendment's protection for the free exercise of religion. There, the Court upheld the denial of unemployment compensation on the grounds that an employee's participation in a Native American ritual involving peyote -- a hallucinogenic substance -- constituted "work-related misconduct" and, therefore, reasonable grounds for dismissal.

The plaintiff argued strongly that peyote use was a central tenet of his Church and that he should, therefore, be entitled to a religious exemption based on his constitutional free exercise rights. The Court's majority was unmoved by this claim -- though not because it found that the state had a "compelling interest" in controlling the use and spread of drugs, as Justice O'Connor's concurring opinion would have held, but because it concluded that religious practices that conflict with generally-applicable state laws were not entitled to constitutional protection. In these instances, government will no longer have to prove a "compelling interest" and religious minorities will no longer have the right to go to court, First Amendment in hand, seeking exemptions that would preserve their religious liberty.

Perhaps even more troubling is the attitude manifest in the "peyote" case that religious liberty is somehow less deserving of the law's solicitude than other First Amendment freedoms. Justice Scalia's assertion that we can no longer afford the "luxury" of treating religious liberty on par with other fundamental freedoms is disheartening indeed. Religious minorities can only shudder at

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Justice Scalia's frightening conclusion that the lack of protection for religious practices "not widely engaged in" is an "unavoidable consequence of democratic government".

With these constitutional safeguards lost, religious practices that conflict with general statutes have been made vulnerable to attack. The potential harm to religious life in America is consequently inestimable. Were states to enact statutes that incidentally impinged upon even a religion's most hallowed precepts, the observant could ultimately be left with no legal recourse.

We, at Agudath Israel, have worked closely with Congressman Stephen Solarz and with other religious and civil rights groups, to develop appropriate legislation that would restore the protection of the free exercise of religion to the standards that had previously been enshrined in law and traditionally applied by the courts.

The Religious Freedom Restoration Act is designed to do just that. It creates federal protection for the free exercise of religion and reinstates the framework of analysis by which religious liberty infringements -- even those that are only "incidental" -- are to be judged. The Solarz bill is totally neutral and singles out no particular religious practice for disparate treatment. No religious claim is prejudged and no person is denied his or her day in court. The legislation reaffirms that which has always been assumed prior to the "peyote" decision: religious liberty is a fundamental freedom of the highest order.

H.R. 2797 vs. H.R. 4040

As members of the Subcommittee are aware, a second religious freedom bill has been introduced in the House of Representatives by Representative Christopher Smith of New Jersey and referred to the Judiciary Committee for consideration. However, as detailed below, we have concluded that H.R. 4040 is seriously flawed in several respects.

In introducing his bill, Representative Smith candidly noted that H.R. 4040 is specifically designed to be an alternative to H.R. 2797. The Smith bill, like the Solarz bill, would overrule *Employment Division v. Smith* by making it clear that the protections for free religious exercise apply even in cases where a government action burdens religious freedom only incidentally; and that only a compelling governmental interest, applied through the least restrictive means, can overcome an assertion of free

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exercise of religion. However, unlike H.R. 2797, which is entirely neutral on its face and in no way limits the types of claims that may be entitled to the bill's protections, H.R. 4040 expressly excludes several substantive areas from the scope of free exercise protection.

Thus, section 3(c)(2) of H.R. 4040 provides as follows:

"(2) Nothing in this Act shall be construed to authorize a cause of action by any person to challenge --

- (A) the tax status of any other person;
- (B) the use or disposition of government funds or property derived from or obtained with tax revenues; or
- (C) any limitation or restriction on abortion, on access to abortion services or on abortion funding."

In remarks from the floor, Representative Smith explained that the first two of these exceptions are designed to protect the tax exempt status of religious organizations and the capacity of religious organizations to participate in government benefit programs. The third exception, as is obvious from its face, is designed to preclude an assertion of a free exercise right to abortion or abortion funding. It is this series of exceptions that troubles us so greatly and leads us to oppose H.R. 4040 -- notwithstanding our longstanding support for the right of religious entities to gain access to constitutionally permissible forms of government assistance and our firm opposition to legalized abortion-on-demand.

As detailed below, our objections to section 3(c)(2) of the Smith bill come under three broad headings: (1) the specific claims it inappropriately seeks to exclude from free exercise consideration; (2) its questionable constitutional validity under the First Amendment's Free Exercise and Establishment Clauses; and (3) the dubious strategy of offering a politically divisive alternative to the neutral approach embodied in the Solarz bill.

1. The Specific Claims Excluded From Free Exercise Protection

Sections 3(c)(2)(A) and (B): Tax Exemptions and Government Benefits for Religious Organizations. Agudath Israel's support for the notion that religious organizations should be exempt from taxation, and that they should be able to participate equitably in

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government benefit programs, is longstanding and unequivocal. Thus, for example, we have for many years advocated the rights of religious organizations, and especially religious schools, to receive a full measure of constitutionally-permissible government benefits. We have testified in support of such programs as tuition tax credits and educational vouchers. We have fought to ensure that religious child care providers would be eligible to receive child care grants on an equitable basis with secular providers. We have made our views known in legislative bodies across the country and in the courts, and we are certainly sympathetic to the goals sections 3(c)(2)(A) and (B) are apparently designed to achieve.

But we wonder, quite frankly, how the Smith bill's attempt to shield religious organizations' tax exemptions and receipt of government funds from potential free exercise challenge would afford them meaningful protection in this regard. For even in the absence of a free exercise basis for challenging the ability of religious organizations to retain their tax exemptions and to receive various forms of government benefits, there still remains the problem of the constitutional prohibition against establishment of religion. In order for sections 3(c)(2)(A) and (B) to provide any meaningful protection, one would have to envision a scenario in which a court would reject an Establishment Clause challenge to a religious organization's tax exemption or receipt of government funds, either on standing grounds or on the merits, yet would entertain a similar free exercise challenge. We are aware of not a single judicial ruling that embraces that unlikely legal scenario.

Not only do we have difficulty understanding how H.R. 4040 would provide any practical protection against challenges to a religious organization's ability to retain its tax exemption or gain equitable access to public funds, we are concerned that it could have precisely the opposite effect. If, under section 3(c)(2)(B) of H.R. 4040, "the use or disposition of government funds or property derived from or obtained with tax revenues" is beyond the reach of free exercise challenge, a religious organization (or, for that matter, a religious individual) could never challenge its (or his/her) exclusion from a government assistance program on the theory that the program inhibits its (his/her) free exercise rights.

Consider, for example, the following hypothetical (though by no means far-fetched) scenario: A state decides to award grants to agencies that provide family planning services. It decides further to condition the award of such grants upon a recipient agency's agreement to provide a "full range" of planning services to its clients, including the distribution of condoms to unmarried teens and counseling concerning the availability of abortion as a means

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of birth control. Clearly, that requirement would be religiously objectionable under the tenets of certain faiths, and would indirectly preclude many religiously-sponsored agencies from applying for such grants. Section 3(c)(2)(B) of the Smith bill would make it impossible for a religious agency to challenge such preclusion on free exercise grounds -- despite the fact that the very purpose of that section is to enable religious organizations to participate equitably in government benefit programs.

In short, our view of sections 3(c)(2)(A) and (B) of H.R. 4040 is that they would accomplish little if anything in terms of practical benefit; and that section 3(c)(2)(B), at least, might undermine the very cause it is designed to promote.

Section 3(c)(2)(C): Religious Freedom and Abortion. The other free exercise claim section 3(c)(2) would exclude from consideration under the Religious Freedom Act is any religiously-based abortion claim. Here again, Agudath Israel is essentially sympathetic to the objective of avoiding the creation of a broad new statutory basis for abortion. We have repeatedly voiced our opposition to the Supreme Court's ruling in *Roe v. Wade* and the "pro-choice" agenda of legalized abortion-on-demand, and we would enthusiastically support efforts to declassify abortion-on-demand as a "fundamental right." In fact, as we did in the 1989 *Webster* case, we have submitted an *amicus curiae* brief in *Planned Parenthood v. Casey*, the Pennsylvania abortion case currently under review by the Supreme Court, urging the Court once and for all expressly to abandon *Roe v. Wade*. We further oppose H.R. 25, the "Freedom of Choice Act," which pro-abortion activists are promoting as an eventual legislative replacement for *Roe v. Wade*.

Our opposition to abortion-on-demand notwithstanding, we strongly object to H.R. 4040's effort to foreclose any possibility of a religiously-based claim to an abortion. Such objection reflects a concern that for us is by no means abstract; in certain exceptional cases, our very own constituents may have no choice but to advance a free exercise claim to abortion. Although Jewish law would prohibit abortion in the large majority of cases in which abortions are performed under the pro-choice banner of *Roe v. Wade*, there are extraordinary circumstances in which women of the Jewish faith would be required to terminate their pregnancies as a matter of religious obligation. Are the religious beliefs of such women not worthy even of consideration under the rubric of free religious exercise? That, after all, is the upshot of the Smith bill.

The concern that led Representative Smith to include section 3(c)(2)(C), as we understand it, is that legal protection for the free exercise of religion could provide a new alternative basis for



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broad access to abortion even if *Roe v. Wade* were to be overturned. He is worried, it seems, that many women will "find religion" for the specific purpose of advancing a "religiously-motivated" claim to abortion. We believe this concern is grossly exaggerated. As is true for all free exercise claims, the only persons who could claim religious protection for abortion are those who in good faith are genuinely exercising their sincerely held religious beliefs. Citing this reason and others, the Congressional Research Service has concluded, in a memorandum dated November 18, 1991, that "it is improbable that enactment of [H.R. 2797, the Solarz version of the bill] would lead to the successful presentation of an argument that a religious claim would trump state limitations upon abortion access."

Moreover, even if there is some potential for abuse of the free exercise claim in the abortion context -- just as there is some potential for abuse of the free exercise claim in other contexts -- that is no reason to foreclose consideration of a woman's genuinely-held religious claim in those exceptional cases where abortion is indeed an expression of religious faith. We too would condemn the tragic and offensive misuse of religion to justify the inherently anti-religious agenda of those who would seek to justify abortion-on-demand. But throwing out the baby with the bath water is never an appropriate course; concern for bogus religious claims does not justify callous disregard of genuine religious claims.

We are aware of the argument that the likelihood of a state banning abortion even in those extraordinary cases where Jewish religious law would require an abortion is remote; and that even if a state were to do so, there may be legal grounds other than the statutory free exercise right to challenge that ban. Perhaps. But even if so, our objection to section 3(c)(2)(C) extends beyond the practical legal question of whether the rights of Jewish women to terminate their pregnancies when their religion demands it will likely be preserved. It extends to the far more fundamental question of whether the law of the land should so denigrate this particular expression of religious faith as not even to subject it to the compelling state interest test by which all other expressions of religious faith -- no matter how far they may be from the mainstream -- are measured.

Stated simply, we find this section of H.R. 4040 profoundly offensive. It is most ironic -- to put it charitably -- that a bill carrying the noble title "Religious Freedom Act" would expressly exclude a tenet of the Jewish faith from legal consideration as an expression of free religious exercise.

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## 2. Constitutional Considerations

In the beginning of this memo, we described *Employment Division v. Smith* as a ruling "that all but eviscerated the First Amendment's protection for the free exercise of religion". All but, but not all -- for even in the aftermath of the "peyote" case, the Free Exercise Clause still affords protection in what Justice O'Connor's concurring opinion refers to as "the extreme and hypothetical situation in which [an act of government] directly targets a religious practice." 494 U.S. at 894.

Section 3(c)(2) of H.R. 4040 is precisely such an extreme (though unfortunately not hypothetical) situation. Explicitly and directly, it targets certain religious practices -- abortions motivated by religious faith and religiously based challenges to the tax exemptions and public benefits enjoyed by religious organizations -- for disfavorable treatment under the law. Its very purpose is thus to impose a direct burden on the free exercise of religion. We cannot fathom any compelling governmental interest that would justify precluding consideration of such religious claims by the same standard used to consider other religious claims.

The conclusion, as we see it, is inescapable: Even under *Employment Division v. Smith's* cramped reading of the First Amendment, H.R. 4040 would violate the constitutional protection for free exercise of religion. The Smith bill, ironically, proves that those of us who waxed apocalyptic after the "peyote" ruling about the total demise of the Free Exercise Clause may have been wrong after all.

In addition, section 3(c)(2)(C) raises serious Establishment Clause concerns as well. Jewish religious law, as noted above, mandates abortion in certain extreme circumstances. To the best of our knowledge, other faiths do not share this religious perspective. (The CRS memo cited above makes the same point: "So far as we are aware, only within the Jewish faith is there a religious tenet, under which it would be an obligation compelled by her faith for a pregnant woman whose life would be endangered if she carried her baby to term to have an abortion in order to save her life.") If so, section 3(c)(2)(C)'s exclusion of abortion from the list of claims entitled to statutory free exercise protection favors other religious faiths over the Jewish faith -- a plain violation of the Establishment Clause's insistence "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

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### 3. Strategic Considerations

Even were we entirely to agree with the objectives and the language of H.R. 4040 and even were we to perceive no serious constitutional problem with section 3(c)(2), strategic considerations would still lead us to oppose the Smith bill as an alternative to the Solarz proposal. Given the highly controversial nature of the issues excluded from free exercise protection -- particularly the abortion issue, in an election year in which abortion is likely to be one of the most sharply divisive issues of the campaign -- we think it a fair assumption that H.R. 4040 is likely to do nothing but delay, if not outright sabotage, the eventual legislative overruling of the "peyote" decision. We would regard that as a tragedy of immense proportion.

Indeed, it would be a tragedy not only for the cause of religious freedom generally, but also for some of the very causes section 3(c)(2) of the Smith bill seeks to protect. Religious entities seeking equitable access to public funds and pro-life Americans -- especially health care providers asked to engage in an abortion procedure or any other life-curtailling procedure they find religiously objectionable -- are among the groups who have the greatest stake in a more expansive legal view of free exercise protection. How tragically ironic it would be if the decision in the "peyote" case were to survive, to the substantial detriment of these very groups, as a result Representative Smith's well-intentioned but potentially counterproductive effort on their behalf.

The beauty of H.R. 2797, the Solarz bill, is that it carefully refrains from taking positions on any substantive issue that might arise under the legislation (just as the First Amendment itself refrains from taking any such position). It is indeed a "Religious Freedom Restoration Act" -- restoring the law of free exercise to where it was prior to the Supreme Court's ruling in the "peyote" case. That is why it was able to attract such a broad coalition of supporters, a coalition whose members are frequently on different sides of specific issues arising along the boundaries of church and state.

Each member of the pro-RFRA coalition no doubt has its own list of claims it disfavors and would be happy to see excluded from free exercise protection. But each recognizes that it would be folly to try to improve upon the First Amendment's conceptual general approach, especially in view of the fact that there is no national consensus on many of the specific issues that may come up under this type of legislation; and that the urgency of developing a legislative remedy to the "peyote" case does not permit the

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luxury of waiting until such a consensus develops.

H.R. 4040 takes an approach diametrically opposed to that of the Solarz bill. It is a consensus buster, not a consensus builder. It effectively holds religious freedom hostage to certain irresolvably controversial causes. Important though those causes may be, Agudath Israel firmly believes they do not justify the derailment of the overriding concern of restoring religious liberty to its rightful status in our nation's hierarchy of protected freedoms.

#### Conclusion

Without a federal law to restore the liberties denied by the "peyote" ruling, any religious practice that conflicts with general governmental regulation in this country would be vulnerable to attack. The Court's decision in that case poses a direct challenge to the legislative branch of government: "How high up is religious liberty in the hierarchy of American values?" Representative Solarz's initiative responds to the challenge resoundingly: "At the very pinnacle", as we had always assumed. Agudath Israel of America urges its passage.

D.Z.  
A.C.

**TESTIMONY ON H.R. 2797 AND THE NEED FOR ADDITIONAL  
NATIVE AMERICAN RELIGIOUS FREEDOM LEGISLATION  
SUBMITTED TO  
THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE HOUSE JUDICIARY COMMITTEE  
IN CONJUNCTION WITH HEARINGS HELD IN WASHINGTON, D.C.  
ON MAY 13 AND 14, 1992**

SUBMITTED BY: Americans for Indian Opportunity  
Association on American Indian Affairs  
Church of the Brethren  
Consolidated Salish and Kootenai Tribes  
Cultural Conservancy  
Ecumenical Ministries of Oregon  
Environmental Defense Fund  
Friends Committee on National Legislation  
Friends of the Earth  
General Conference of Seventh-day Adventists  
Hollywood Women's Political Committee  
Hui Malama I Na Kupuna O Hawaii Nei  
Kauffman and Associates  
Keepers of the Treasures: Cultural Council of American Indians,  
Alaska Natives and Native Hawaiians  
National Conference of Christians and Jews, Inc. - Minnesota/Dakotas  
Region  
National Congress of American Indians  
National Council of Churches  
National Indian Education Association  
Native American Church of North America  
Native American Rights Fund  
Native American Religious Freedom Project  
Native American Task Force of the Church Council of Greater Seattle  
Navajo Nation Corrections Project  
Religious Action Center of the Union of American Hebrew  
Congregations  
Seventh Generation Fund  
Society for Applied Anthropology  
Washington Association of Churches  
Ysleta Del Sur Pueblo

**"RELIGIOUS FREEDOM RESTORATION ACT" (H.R. 2797): THE NEED  
FOR ADDITIONAL NATIVE AMERICAN RELIGIOUS FREEDOM LEGISLATION**

This testimony is being submitted by a broad coalition of Indian tribes and organizations and religious, civil rights and environmental organizations to the House Judiciary Committee's Civil and Constitutional Rights Subcommittee. Many members of the coalition have submitted separate testimony specifically supporting H.R. 2797 (the "Religious Freedom Restoration Act"). However, they have joined in this testimony because they believe it is critical that members of Congress understand that H.R. 2797 will not address all critical free exercise problems currently confronted in the United States. For one group of Americans, the First Americans, additional legislation is necessary to ensure their right to continue to exercise their unique religious traditions.

Native Americans, in general, support H. R. 2797, as it is vitally important to restore to all Americans the basic First Amendment freedoms which have been stripped from them by recent Supreme Court decisions. The acceptability of religious practice should never be decided by majority rule in a country that encompasses diverse populations. Indeed, Native American religions, in particular, are not well understood by the majority society.

However, for the reasons expressed below, H. R. 2797 is not enough to protect the religious freedom rights of Native Americans. Additional legislation is necessary if Native Americans are to receive the same degree of protection of their religious practices as that accorded to other religious traditions. Thus, proposals are being developed to amend the

American Indian Religious Freedom Act to ensure the ability of traditional Native Americans to fully and freely practice their own religions. The same moral imperative which makes it urgent for Congress to move rapidly forward on H.R. 2797 is equally applicable to legislation which would amend the American Indian Religious Freedom Act to protect Native American religious free exercise rights. The following testimony explains the reasons why this additional legislation is needed.

#### **Executive Summary**

**In General:** Many Native Americans support H.R. 2797, introduced by Rep. Solarz, as a partial remedy to their Free Exercise problems, but H.R. 2797 does not address unique Native American Free Exercise problems. Thus, there is a need for separate legislation to protect Native American religious freedom (now being developed by the Senate Select Committee on Indian Affairs).

**Background:** In two recent decisions, the United States Supreme Court held that the First Amendment provides no protection to (1) Native American sacred sites which are integral to the practice of traditional religions (Lynx v. Northwest Indian Cemetery, 485 U.S. 439 (1988)), and (2) the ceremonial use of peyote in Native American Church ceremonies (Employment Div. of Oregon v. Smith, 494 U.S. 872 (1990)). For Indians -- who have already suffered a long and troubling history of religious intolerance, including total bans on tribal religious practices by the United States Government as part of its federal Indian

policy -- these decisions were devastating. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, which made it Federal policy to protect and preserve traditional religions of Native Americans. However, that Act was held in Lyg to be judicially unenforceable -- "it has no teeth".

**Rationale for Separate Indian Legislation:**

It is appropriate and critical that additional legislation be enacted to directly address the religious freedom concerns of traditional Indian religious practitioners for a number of reasons:

1. Since the creation of the United States, the treaty relationship between Indian tribes and the United States government has engendered a long-standing political relationship under the Constitution, which includes a federal trust relationship for Indian tribes and voluminous federal 98Xlegislation dealing with all aspects of Indian life. One can look to areas of health, education, religion, economic development, children, employment, language and culture, and a host of other areas, and consistently find separate legislation because of the sui generis legal status of American Indians. Recently, this long-standing rationale served, in part, as a basis for upholding the constitutionality of the Drug Enforcement Administration's rule exempting Native American religious use of peyote from federal drug laws (Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).



2. H.R. 2797 is a reactive bill which relies primarily upon litigation as a check upon government power. But in Federal Indian affairs, where numerous governmental policies so completely pervade Indian religious life, there is a need for proactive legislation to affirmatively change problematic federal and state procedures to accommodate and protect Native religions. When AIRFA was enacted in 1978, Congress mandated a one-year study of federal practices which adversely impacted upon Native religious freedom to identify needed changes and recommendations for administrative and statutory changes. The report identified 522 specific examples of government infringement upon traditional American Indian religious practices involving Indians from 70 Indian tribes in 28 states. It made 11 recommendations to Congress for proposed uniform administrative procedures to correct these problems and 5 legislative proposals. None of these recommendations was ever carried out with the exception of one recommendation pertaining to the theft and interstate transport of sacred objects which was partially addressed in the Native American Graves Protection and Repatriation Act. Thus, there is a detailed and unfinished agenda in the area of Native American religious freedom with specific government actions (or inaction) identified as constituting obstacles to Native religious practice. These obstacles can best be addressed by specific carefully-crafted legislation which affirmatively addresses the needs of Native religions.

3. Traditional Indian religions are of a highly unique nature. Unlike Western religions which are written and based upon theological doctrine, Indian religions are unwritten and dependent upon the ongoing practice of ceremonies and rituals for their

continuing existence. For this reason, they are little understood by courts, land administrators and other governmental officials. For example, the history of litigation over sacred sites reveals courts struggling with the application of the traditional First Amendment balancing test in that context, with the Lyng case holding that governmental land management decisions which would destroy a Native religion did not unconstitutionally infringe upon free exercise and other cases "inventing" novel standards such as requiring a showing of "centrality" before applying the test (Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980)). Thus, it is appropriate that Congress utilize its special expertise in Indian affairs to craft legal standards which will work in the context of Native American religions.

4. Although such efforts have been piecemeal and left enormous holes in the protective fabric, Congress has in the past included in many laws, provisions which address the unique religious needs of Native Americans. Special provisions are present in such laws as the Native American Graves Protection and Repatriation Act, Eagle Protection Act, Archaeological Resources Protect Act and Indian Civil Rights Act. Moreover, on a number of occasions sacred lands have been transferred directly to Indian tribes, e.g., Blue Lake to the Taos Pueblo, Mount Adams to the Yakima Tribe.

The following is an analysis which elaborates on the above issues.

**INTRODUCTION: THE RELIGIOUS FREEDOM CRISIS**

In general, Native Americans support H.R. 2797 as it restores basic religious freedoms to all Americans. However, H.R. 2797 does not address unique Native American Free Exercise problems; and there is a need for additional legislation to protect Native religious freedom. This testimony presents the rationale for additional American Indian religious freedom legislation to meet the First Amendment crisis caused by recent Supreme Court decisions in two American Indian religion cases: Smith (1990) and Lyng (1988).

Though these Indian cases have seriously weakened religious liberty of all Americans, it is important not to forget that they specifically targeted and impacted upon Native Americans. Thus, as Congress addresses the Nation's religious freedom crisis caused by these American Indian religion cases, it must address the specific needs of American Indians and take appropriate steps to safeguard their First Amendment rights.

To date, much congressional attention has been given to H.R. 2797, but very little to American Indians. While H.R. 2797 seeks to redress the Free Exercise problems created by the Indian religion Smith case, Congress and supporters of the bill must also focus upon the serious Free Exercise problems of the very Native people suffering direct harm by that case.

Thus, while Native Americans may support H.R. 2797 as a partial remedy to their Free Exercise problems, it is critical that the paramount need for additional Indian legislation (now being developed by the Senate Select Committee on Indian Affairs) must be clearly understood and supported by sponsors and supporters of H.R. 2797. The pronounced need for Indian legislation was created, discussed, and made self-apparent in Smith and Lyng -- making it morally impossible for policymakers to fail to deal with American Indians in a legislative process to overturn the disturbing trend of those decisions.

There are four reasons why special Indian legislation is necessary to address the Smith and Lyng crisis, even though H.R. 2797 would restore the balancing test discarded in Smith:

1. Congress normally addresses important Indian issues through federal Indian legislation because of the treaty, political and legal status of American Indians under the U.S. Constitution.
2. There is an existing Congressional policy on American Indian Religious Freedom, which establishes the foundation for further legislation to correct adverse impacts of Smith and Lyng.

3. H.R. 2797 does not implement the AIRFA policy established in 1978; and the bill will not solve all of the unique problems previously identified by the Administration and reported to Congress in 1979.
  
4. Congress has legislated **extensively** in the Indian religion field over the years; and has already established -- though it was never fully implemented -- a comprehensive religious freedom policy for Native Americans with the 1978 enactment of the American Indian Religious Freedom Act, 92 Stat. 469, 42 USCA 1996.

**A. Background of the Crisis**

In 1990, American religious freedom was seriously undercut by the Supreme Court in a case involving American Indian religious freedom; Employment Div. of Oregon v. Smith, 494 U.S. 872, 108 L.Ed.2d 876 (1990). For Indians -- who have already suffered a long and troubling history of religious intolerance, including total bans on tribal religious practices by the United States Government as part of its federal Indian policy -- the Court's decision was devastating, particularly in light of an earlier 1988 decision in another Indian religion case, Lyng v. Northwest Indian Cemetery, 485 U.S. 439 (1988), denying First Amendment protection for tribal holy places located on federal lands from being destroyed by federal agencies. Lyng and Smith create a frightening loophole in the First Amendment

for First Americans and a serious human rights crisis on Indian reservations that must be addressed by Congress.

For non-Indians, Smith also caused an outcry, because in excluding Indians from the First Amendment, the court seriously weakened religious liberty for all Americans. Time reported (Dec. 9, 1991, at 68):

For all the rifts among religious and civil-libertarian groups, this decision brought a choir of outrage singing full-voice. A whole clause of the Bill of Rights had been abolished, critics charged, and the whole concept of religious freedom was now imperiled. "On the really small and odd religious groups," said University of Texas' Laycock, "it's just open season."

#### **B. Two Legislative Efforts Address The Crisis**

There are two distinct, but compatible, efforts in Congress to restore basic American religious liberty: 1) One effort is H.R. 2797 to restore the "compelling state interest" test, which is supported by the American church and civil libertarian communities. 2) The other effort is the Native American initiative before the Senate Select Committee on Indian Affairs to amend and put teeth into Congress' existing Indian religious freedom policy of the American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996 ("AIRFA").

H.R. 2797 (introduced on June 26, 1991, by Representative Stephen J. Solarz and other sponsors) was referred to the House Judiciary Committee. It would restore the "compelling state interest test" discarded by Smith. The bill is supported by the COALITION FOR THE FREE EXERCISE OF RELIGION, a broad array of religious groups and civil libertarians. The bill is supported by many Indian people and may help solve some Indian Free Exercise problems; but it does not redress long-standing unique, Indian Free Exercise and religious discrimination problems, nor implement the federal Indian policy initiated by AIRFA, and there remains a need for additional legislation to protect Free Exercise rights of Native Americans.

Many members of the COALITION FOR THE FREE EXERCISE OF RELIGION have acknowledged the need for separate Indian legislation, and have pledged their support for that initiative.

## II. RATIONALE FOR SEPARATE INDIAN LEGISLATION

The following is a rationale for separate Indian legislation in the form of amendments to the American Indian Religious Freedom Act, supra (AIRFA):

#### A. Congress Normally Addresses Indian Issues In Federal Indian Legislation

Since the creation of the United States, the treaty relationship between Indian tribes and the United States government has engendered a long-standing political relationship under the Constitution, which includes a federal trust responsibility for Indian tribes and voluminous federal legislation dealing with all aspects of Indian life. One can look to areas of health, education, religion, economic development, children, employment, language and culture, as well as a host of other areas, and consistently find separate federal legislation. An entire title of the United States Code (25 USC) is devoted exclusively to special Indian legislation.

Because Indians and Indian tribes occupy a *sui generis* legal status in federal law under the U.S. Constitution and enjoy a special political relationship with the United States government, separate Indian legislation has consistently been upheld by the U.S. Supreme Court, as explained in Morton v. Mancari, 417 U.S. 535, 551-55 (1974):

Resolution of the instant issue (validity of a federal Indian employment statute) turns upon the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is



drawn both explicitly and implicitly from the Constitution itself. Article I, Sec. 8, Cl.3, provides Congress with the power to "regulate commerce. . . with the Indian tribes," and thus, to this extent, singles out Indians as a proper subject for separate legislation. Article II, Sec.2, Cl.2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes.

\* \* \* \*

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. [citations omitted] As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgment will not be disturbed.

This long-standing rationale for separate Indian treatment by the federal government was recently applied in the religion area by the Fifth Circuit, at the urging of the Justice Department, in Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir., 1991). Upholding the constitutionality of the Drug Enforcement Administration's rule (in effect since 1966) exempting Native American religious use of peyote from federal drug laws, the Court stated at 1216-17:

We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government's trust relationship with tribal Native Americans.

\* \* \* \*

The unique guardian-ward relationship between the federal government and Native American Indian tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that relationship.

Indeed, the Supreme Court itself in Smith (108 L.Ed.2d at 893, 901) and Lyng (487 U.S. at 452) referred the Indians in those cases to Congress for legislation to protect their tribal religious freedom -- which is an area where Congress has passed many laws, as discussed next.

**B. There is an Existing Congressional Policy on American Indian Religious Freedom, Which Establishes the Foundation For Further Legislation to Correct Adverse Impacts of Smith and Lyn**

In 1978, Congress initiated a comprehensive policy in the Indian religion area with the passage of the American Indian Religious Freedom Act, 92 Stat. 469, 42 USCA 1996 (AIRFA). In the finding clauses of AIRFA, Congress found that "the lack of a clear, comprehensive, and consistent federal policy has often resulted in the abridgement of religious freedom for traditional American Indians." AIRFA established a federal policy:

to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

To implement the policy, Section 2 required a one-year study of federal practices which adversely impacted upon Native religious freedom to identify needed changes and recommendations for administrative and statutory change:

The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws

to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

In the President's Report to Congress, widespread problems were identified, including 522 specific examples of government infringement upon traditional American Indian religious practices involving Indians from 70 Indian tribes in 28 states. The President made 11 recommendations to Congress for proposed uniform administrative procedures to correct these problems (Report at 62-63, 71, 75, 81) -- none was ever carried out. The President also made 5 legislative proposals to:

1. suggest a new type of federal landholding for Native sacred sites or shrines located on federal land (Id. at 63);
2. amend specific laws which prevent Native religious practices on federal lands (Id.);

3. protect information concerning sensitive religious matters and sites (*Id.*);
4. amend tariff schedules, export laws and the Jay Treaty (*Id.* at 75);
5. legislation to protect Indians against theft, export, interstate transportation of sacred objects (*Id.* at 81);

Of the five recommended legislative proposals, only No. 5 has been acted upon (in part) by Congress to date. *See*, Archaeological Resources Protection Act of 1979, *supra*; Native American Graves Protection and Repatriation Act, *supra*. Though none of the other recommended administrative or legislative changes was made, the AIRFA policy and its Section 2 legislative recommendations provide a foundation for separate Indian religious freedom legislation to carry out the 1978 Indian religion policy by putting teeth into it, because, in the intervening 13 years, the Executive Branch has not acted to implement needed administrative changes and the Judicial Branch has tossed the ball back to Congress in *Smith* and *Lyng*.

**C. H.R. 2797 Does Not Carry Out Congress' AIRFA Policy Nor Address Unique Native American Religious Freedom Problems**

A more tailored approach to addressing the Indian religious freedom crisis caused by *Lyng* and *Smith* is needed than that provided by H.R. 2797. H.R. 2797 does not

specifically address any of the complex issues identified by the AIRFA policy, report and recommendations for necessary changes in federal law and policies. Because much government infringement on tribal religion has been identified as the result of insensitive and uninformed enforcement of federal statutes, regulations and policies that were enacted without considering the impact upon little understood and unwritten Native religions, the "compelling state interest" test of H.R. 2797 will not unravel those deeply ingrained problems as well as uniform legislation that: 1) changes specifically identified federal laws, policies, practices and procedures to accommodate Indian religious freedom values; and 2) provides clearer, more refined standards and criteria for protecting indigenous religions.

H.R. 2797 is a reactive bill which relies primarily upon litigation as a check on government power. But in federal Indian affairs, where numerous government policies so completely pervade Indian religious life, there is a need for proactive legislation to affirmatively change problematic federal procedures to accommodate and protect Native religions.

Moreover, because traditional religions of the 500 federally recognized Indian tribes have a highly unique nature, are unwritten, and are little understood religions -- which are vastly different from the Judeo-Christian tradition -- there is a need to ensure that the "compelling state interest" test is refined and made to more adequately "fit" these *sui generis* religions. Undoubtedly, courts have been perplexed in applying the test to sacred sites cases -- which ultimately led to a weakening of religious freedom for everyone in cases such as

Lyng and Smith. For example, Lyng held that no "burden" was placed upon religious freedom within the meaning of the test by the complete physical destruction of the tribes' central holy place by the federal government. Other Indian sacred sites cases show the contorted approaches courts have taken to try to apply constitutional concepts developed with the Judeo-Christian tradition in mind to vastly different tribal religious practices, such as the novel "centrality" standard of Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980).

Yet, if our legal system is to serve all segments of our society, it should ensure that unique needs of indigenous peoples are addressed and incorporated. Thus, more specific criteria should be spelled out so federal judges and officials can understand and fairly apply the "compelling state interest" test in the context of America's unwritten and little understood indigenous religions.

Given the long history of government suppression of tribal religion and the federal trust relationship, Indians are entitled to specific standards and assurances that federal laws and programs do not infringe unnecessarily upon their right of worship -- especially after the AIRFA report to Congress clearly identified widespread problems and made specific recommendations to correct them. Because the Federal Government is so intimately involved with all aspects of Native American life, through the trust doctrine and voluminous federal laws and programs which impact the religious and cultural life of the Tribes, it is important that government take special care that its laws and programs accommodate tribal

religious freedom. This objective can be accomplished through appropriate amendments to the AIRFA as part of Congress' federal Indian policy.

**D. Congress Has Legislated Extensively in the Indian Religion Field Over the Years**

Based upon the above rationale and legal authority, Congress has passed many laws to address unique needs of Native Americans in the religion area. See, e.g.:

--**American Indian Religious Freedom Act, 42 USCA 1996** [federal policy to protect and preserve traditional religions of American Indians, Alaska Natives, Aleuts and Native Hawaiians];

--**Indian Civil Rights Act, 25 USCA 1302** [Imposes most Bill of Rights limitations upon tribal governments, but makes an exception for establishment clause protections because government and religion are interwoven in many tribes];

**Eagle Protection Act, 16 USCA 668a** [permits for Indian religious use allowed]

--**Native American Graves Protection and Repatriation Act, 25 USCA 3001 (1990 Supp.)** [protects Indian graves, allows for return Indian dead to Tribes, and repatriation of sacred objects to be done in consultation with tribal religious leaders];



cf. National Museum of the American Indian Act, 20 USCA 80q-9(a) [Repatriation in consultation with Native religious leaders];

--Archaeological Resources Protection Act, 16 USCA 470cc [requires notification to Tribes of possible harm to religious sites located on federal or Indian lands];

--Rights of Indian School Children, 25 USCA 2017 [requires Secretary of the Interior to promulgate rules to inter alia protect religious freedom rights of Indian students attending BIA boarding schools];

--Access to Sacred Sites Located on various federal lands: Federal Cave Resources Protection Act, 16 USCA 4305 [notice to Tribes of possible harm to sacred sites]; National Forest Scenic-Research Areas, 16 USCA 543f [access by Indians to federal lands for religious purposes insured]; Chaco Canyon National Historical Park, 16 USCA 410ii-4 [Traditional Native religious uses allowed]; El Malpais National Monument and Conservation Act, 16 USCA 564uu-47 [Indian access to monument for religious purpose protected, including temporary closure to protect privacy for worship allowed]; Pipestone National Monument, 16 USCA 445c [Monument established for Indian religious use]; Zuni-Cibola National Historical Park, 16 USCA 410pp-6 [Park may be closed off for tribal religious worship]; Havasupi Indian Reservation, 16 USCA 228i(c) [access to Indian sacred sites may not be prohibited];

--Conveyance of lands containing sacred sites to Indian tribes: Blue Lake Transfer, Pub.L. 91-550 [sacred lake transferred to the Pueblo of Taos]; Pueblo of Zia, 92 Stat. 1679 [certain lands placed in trust protecting 6 tribal religious sites and shrines]; Pueblo of Santa Ana, Pub.L. 95-498, 92 Stat. 1672 [lands placed in trust and protecting 14 tribal religious sites]; Zuni Tribe, 98 Stat. 1533 [conveyance of lands for religious purposes]; Yakima Tribe, Exec. Order No. 11,670, 37 F.R. 10,431 (May 23, 1972) [sacred site transferred to Tribe by federal government].

A large body of federal administrative regulations carries out the above federal Indian religious policies, including DEA exemptions for the religious use of peyote under 21 CFR 1307.31; access to certain Native Hawaiian religious sites, 32 CFR 763.5; religious use of Eagle feathers, 50 CFR 12.36, 22.11; and consideration of environmental impacts on sacred sites under NEPA, 47 CFR 1.1307.

The above laws and regulations are piecemeal efforts to remove barriers to the free exercise of traditional religions, leaving enormous holes in needed protective fabric, that were done before the Smith and Lyng decisions. However, this patchwork reveals Congress' long history of legislating in the area of American Indian religious freedom; and this legislative record is appropriate in light of the treaty, political and trust relationship, as well as the unique nature of America's indigenous tribal religions.

CONCLUSION

In response to Smith and Lyng, the Senate Select Committee on Indian Affairs is developing proposed amendments to the American Indian Religious Freedom Act. This legislative effort is supported by Indian country as a major legislative priority for 1992, with support from concerned human rights, church and environmental organizations who have joined Natives in an unprecedented alliance to secure passage of adequate religious freedom legislation for Native Americans.

Proposed amendments were mailed to tribal leaders in August of 1991; and a field hearing in Portland, Oregon was conducted on March 7 by the Senate Select Committee on Indian Affairs. Testimony from Native witnesses on barriers to the Free Exercise of traditional religions was received. Further hearings will be scheduled later this year. In addition, Native American and environmental groups have also recently requested that the House Interior and Insular Affairs Committee hold oversight hearings on AIRFA to begin the process in the House of considering appropriate measures to protect religious freedom of America's native peoples in the wake of Smith and Lyng.

We urge the supporters and sponsors of H.R. 2797 to understand and support the need for such additional legislation, so that both compatible legislative efforts -- H.R. 2797 and AIRFA amendments -- can go forward as expeditiously as possible.

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May 6, 1992

Ms. Kathryn Hazeem, Counsel  
Subcommittee on Civil and  
Constitutional Rights  
House Judiciary Committee  
B-351-C Rayburn House Office Building  
Washington, D.C. 20515

Dear Ms. Hazeem:

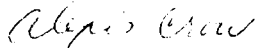
The Rutherford Institute, an international civil liberties organization that defends the rights of religious persons, is opposed to H.R. 2797 in its current form. Although the Institute is unable to provide a speaker at the public hearings on H.R. 2797, we hereby request that you include the enclosed article in the record. It clearly sets forth the position of the Institute and support for that position.

I have enclosed various other materials that will acquaint you with The Rutherford Institute.

Thank you for your consideration of this request.

Very truly yours,

THE RUTHERFORD INSTITUTE



Alexis I. Crow, Esq.  
Legal/Educational Coordinator

enclosures

cc: Douglas Johnson-National Right to Life Committee, Inc.

## PLYMOUTH ROCK FOUNDATION LEADERSHIP MEMO

RELIGIOUS FREEDOM RESTORATION ACT:  
Wolf in Sheep's Clothing?By John W. Whitehead  
and

James J. Knicely \*

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**T**he United States Supreme Court stunned the organized religious community when, without being asked to do so, it overturned three decades of established free exercise jurisprudence. The case, *Employment Division, Oregon Department of Human Resources v. Smith*,<sup>1</sup> amounts to, in the words of dissenting Justice Harry Blackmun, a "wholesale overturning of settled law concerning the Religion Clauses of our Constitution."<sup>2</sup> Professor Michael McConnell, Professor of Law at the University of Chicago, has written that "[t]he *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades."<sup>3</sup>

In *Smith*, the Supreme Court upheld Oregon's denial of unemployment compensation benefits for two Native American Church members who had been fired for their sacramental use of peyote.

Instead of deciding the issues of the case as raised and argued during the seven-year journey through various administrative and state and federal judicial proceedings, five members of the Court joined a sweeping opinion written by Justice Antonin Scalia and arbitrarily and dramatically emasculated the legal standards that had previously applied to Free Exercise claims. Compared to the First Amendment's, doctrinally vigorous and judicially favored Free Speech, Free Press and Establishment Clauses, the already chronically weak Free Exercise Clause was further debilitated by Justice Scalia's opinion.<sup>4</sup>

The problem with the *Smith* decision is not so much what the Court ruled as how it reached its result. The Court's deliberate slighting of one of the two express "conscience" clauses, in the Constitution is truly alarming, not only for the continued vitality of individual rights under the Bill of Rights, but also as an expression of the Court's apparent unconcern for the reasons the framers adopted the Free Exercise Clause. As constitutional attorney William Bentley Ball observed, "[t]he court's opinion is strikingly cold in reference to religion. The tone is entirely one of limitation and curbing, as though the free exercise of religion is a danger to be closely confined."<sup>5</sup>

**The Majoritarian Court**

Majoritarian philosophy explains, in large part, the result reached in *Smith*. Majoritarianism is a philosophy or practice requiring that decisions of an organized group be made by a numerical majority of its members.<sup>6</sup> A majoritarian judge resolves the

basic tension of constitutionalism between individual rights and democracy in favor of relatively unmitigated democratic rule. In other words, in a conflict between individual rights and legislative enactments (which also includes governmental regulations, actions, etc.), the majoritarian will almost always decide in favor of the legislative or governmental action.<sup>7</sup> This does not mean that the majoritarian judge is necessarily a friend or a foe of religion. Regardless of their decisions, majoritarian judges are probably not generally guided by their theology. Instead, such a judge is guided by his deference to the legislature (or governmental action), for better or for worse. The majoritarian bias of the present Supreme Court is reflected in a number of decisions prior to *Smith*.<sup>8</sup>

It may be argued that upholding state and federal laws is merely reinstating federalism and American constitutionalism. However, the United States Constitution has been altered by the Supreme Court through its broad interpretation of the Fourteenth Amendment, incorporating the protections contained in the Bill of Rights and enforcing them against the states and subordinate governmental agencies.<sup>9</sup> Allowing states and the federal government to enact legislation that restricts religious freedom under the guise of federalism and neutrality is not consistent with any real understanding of modern American political structures, let alone the original intent of the Framers of the First Amendment.<sup>10</sup>

**The Court's Free Exercise Shift**

Traditionally, whenever it has been claimed that a state law of general applicability interferes with religious practice, the Supreme Court has subjected the restriction to careful scrutiny. In recent years, when a law or government action affected rights of conscience, the Court applied the "compelling state interest" test.<sup>11</sup> In order to override a religious liberty claim, the state had to prove that its legislation advanced a "compelling state interest."<sup>12</sup> Moreover, even if the state proved its compelling interest, the state also was required to demonstrate that its means of regulation constituted the "least restrictive means" of accomplishing its alleged interest.<sup>13</sup> Likewise, if the state's objective could be served as well by granting an exemption to individuals whose religious beliefs were burdened by such state action, such an exemption was required to be given.<sup>14</sup>

The reasoning in *Smith*, in contrast, seriously jeopardizes the pre-*Smith* standards protecting religious liberty. The Supreme Court concluded in *Smith* that the traditional "compelling state interest" test need not be employed in the case of so-called "generally applicable" laws regulating socially harmful conduct.<sup>15</sup> Such "religiously neutral" laws, the Court said, may bypass the test and need only be rationally related to a legitimate state interest.<sup>16</sup> Justice Scalia concluded: "We have never held

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(Continued on page 2)

that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>21</sup> The truth of the matter is that the Court had no held.<sup>22</sup> For example, in *Wisconsin v. Yoder*, the Supreme Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."<sup>24</sup> Furthermore, the compelling interest test has been applied numerous times since *Yoder*.<sup>25</sup>

In *Smith*, the Supreme Court drew narrow exceptions to its new "rational basis" test in what it termed "hybrid situation" involving "communicative activity or parental rights."<sup>26</sup> Although these exceptions may limit the effect of the *Smith* decision, the federal courts generally require litigants to meet high evidentiary burdens to qualify for exceptions. And since the *Smith* decision, "[c]oincompetent counsel for state and local governments are arguing with equal vigor that no cases fit into any of the exceptions. It is unlikely that the Court will gradually eliminate the exceptions as inconsistent with the logic of *Smith*. It is not encouraging that the first lower courts decisions applying *Smith* have given short shrift to its limitations and exceptions."<sup>27</sup>

What this may mean is that religious freedom, once zealously guarded, has now been and will continue to be limited. Congressman Stephen J. Solarz, for example, has warned of the possible harmful effects of the *Smith* decision for American religious life:

The implications of this ruling are staggering and extend far beyond the concerns of Native American religions. Minors may no longer be permitted to participate in religious rituals involving wine. Jews and Muslims whose religions mandate ritual slaughter could be unable to obtain religiously sanctioned foods under broadly-written animal welfare legislation. Those religions that require special articles of clothing or strict standards of modesty could be penalized by workplace and schoolhouse dress codes. Even the practice of ritual circumcision could be outlawed if certain elements viewing the procedure as unnecessary prevail on state legislation to ban it.<sup>28</sup>

The *Smith* decision held that there is no pure religious liberty defense to generally applicable laws. With this in mind, one can predict certain consequences arising from the *Smith* rationale: churches or private Christian schools with doctrinal objections may be required to hire gay persons under discrimination laws prohibiting decisions based on "sexual preference";<sup>29</sup> public school students might be required to attend sex education classes with no provisions for excusal;<sup>30</sup> religious sermons on political issues could prompt revocation of church tax exemptions;<sup>31</sup> and doctors and nurses in public hospitals might permissibly be fired if they refuse to perform abortions.<sup>32</sup>

To posit these examples is not to "cry wolf." Lawsuits and claims relating to each of these issues have surfaced in the past and the Free Exercise Clause has afforded a measure of protection. Rights of conscience for religious individuals and religious organizations, previously thought to be protected under the Free Exercise Clause will now, in various circumstances, be forced to yield to majoritarian rule under the reasonably anticipated development and application of *Smith* free exercise revisionism.

This fact is illustrated compellingly in the

recent federal court decision in *Yang v. Sturmer*.<sup>33</sup> In *Yang*, the state's medical examiner conducted an autopsy on the Yangs' son, in violation of their religious belief as part of the Laotian Hmong religion that autopsies are a mutilation of the body and that, as a result the autopsy, the spirit of their son would not be free and would return and take another person in his family. In rescinding his earlier favorable decision supporting the First Amendment claim of the Yangs, the federal district judge recorded his sympathy for the Yangs and other Hmong whose "silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief."<sup>34</sup> The judge then stated that he believed he was on "solid ground" in his earlier ruling for the Yangs and expressed his agreement with Justice Blackmun's forceful characterization of *Smith* as a distortion of longstanding precedent.<sup>35</sup> Despite his "profound regret," the judge withdrew his earlier opinion and, as he believed he was required to do by *Smith*, rejected the free exercise claims of the Yangs.<sup>36</sup>

#### Historical Roots of the Smith Decision

Notwithstanding the vigorous protests against the *Smith* decision in the civil liberties and religious communities, economic libertarians and conservatives have applauded it. For example, syndicated columnist George Will praised the opinion for what he viewed as its faithfulness to the intent of the framers of the Constitution. In a column in the *Washington Post*, Will argued:

To understand the philosophic pedigree of Scalia's sensible position is to understand the cool realism and secularism of the philosophy that informed the Founders.

A central purpose of America's political arrangements is the subordination of religion to the political order, meaning the primacy of democracy. The founders, like Locke before them, wished to tame and domesticate religious passions of the sort that convulsed Europe. They aimed to do so not by establishing religion but by establishing a commercial republic—capitalism. They aimed to submerge people's turbulent energies in self-interested pursuit of material comforts.<sup>37</sup>

Unfortunately, Will's argument is not only historically inaccurate, it also lends itself to an authoritarianism that is dangerous in its implications. The fact is that religion was a freedom elevated to the highest order by the framers. As James Madison, purportedly the author of the First Amendment, wrote: "There is not a shadow of right in the general [federal] government to intermeddle with religion."<sup>38</sup>

The First Amendment itself came into being in large part at the urging of the colonial clergy who sought a specific protection for religious freedom.<sup>39</sup> In fact, the Bill of Rights was adopted in an environment where religion was in fact established in many, if not most, of the thirteen colonies.<sup>40</sup> The republic could not have been born with a national establishment of religion, nor could it have emerged without the protections expressly afforded religious practice by the Bill of Rights. The very fact that the colonies had established diverse religious traditions made it impossible even to contemplate the establishment of a national religion.

The Religion Clauses were adopted, not because the framers intended to proclaim "capitalism" as the republic's creed or to promote "secularism" as the republic's creed or to promote "secular-

(Continued on page 3)

ism," but because continuation of the diverse establishments of religion in the colonies required the adoption of the Bill of Rights and the protections it afforded. Moreover, contrary to Will's assertion that the framers intended to disadvantage individual religious practice in order to avoid, in Scalia's words, "a system in which each conscience is a law unto itself,"<sup>41</sup> the framers sought to establish, by the very adoption of the Free Exercise Clause, rights of conscience where minority religious views would be protected from majoritarian excesses.

It must be remembered that the Free Exercise Clause of the First Amendment arose in the context of religious persecution. Contemporaneously with its adoption, James Madison was personally concerned about majoritarian Anglican persecution of minority Baptists in the Virginia Piedmont near Montpelier, Madison's home in Orange County:

A religious revival was sweeping the Virginia Piedmont. Unlettered, self-appointed preachers of the Separate Baptist sect preached without license in private houses and open fields. Anglicans were encouraged to reborn again and to bear witness by hollering, singing and swoon... Some counties tried to suppress loud preachers by charging them with disturbing the peace. But even in jail they preached -- through barred windows. [Madison] argued against that "Hell-conceived principle of persecution [that] rages against some."<sup>42</sup>

The entire historical record -- including the records of the debate as the First Congress adopted the Bill of Rights and the records of the state legislatures ratifying the Constitution -- clearly and unequivocally demonstrates that the Free Exercise and Establishment Clauses of the First Amendment were aimed at two goals: the nonestablishment of a national religion and the accommodation of rights of religious practice and conscience to promote religious tolerance.<sup>43</sup> The freedom guaranteed under the Free Exercise Clause, like the Free Speech, Free Press, and the Establishment Clauses, was a "preferred freedom."<sup>44</sup> The so-called Reagan Court has, however, ignored this history and revised constitutional doctrine to fit its preoccupation with "majoritarianism." This theme is no doubt embedded in the American governmental tradition, but not without concurrent deference to the important constitutional tradition of individual rights clearly evident in the express constraints imposed by the Bill of Rights as well as in provisions establishing limited government and checks and balances expressed elsewhere in the Constitution.

#### Opposition to the Smith and Its Proposed Majoritarian Remedy

Much of the organized religious community, conservative and liberal, have protested the *Smith* decision. Its unpopularity in this community would be exceeded only by the Supreme Court's *Dred Scott*,<sup>45</sup> and *Roe v. Wade*,<sup>46</sup> decisions. After the *Smith* decision was announced, the National Council of Churches, the American Civil Liberties Union, the People for the American Way, the American Jewish Congress and the American Humanist, among others, joined with such ideologically disparate organizations like The Rutherford Institute, the National Association of Evangelicals and Concerned Women for America as part of a coalition to seek a rehearing by the Supreme Court of the *Smith* case.<sup>47</sup> When that failed, some of these groups sought a legislative remedy for the decision.

As a consequence of this organized effort,

Congressman Stephen J. Solarz of New York introduced the Religious Freedom Restoration Act,<sup>48</sup> ("RFRA") in the United States House of Representatives on July 26, 1990.<sup>49</sup> The proposal is an attempt to legislate restoration of the pre-*Smith* judicial standard in Free Exercise cases.

The RFRA is not an attempt to amend the Constitution. It would, instead, establish a statutory claim to free exercise of religion. The RFRA would prohibit government from "restricting" a person's free exercise of religion unless the restriction:

- (1) was in the form of a law of general applicability and did not intentionally discriminate against religion; and
- (2) was essential to further a compelling government interest and was the least restrictive means of furthering that compelling governmental interest.<sup>50</sup>

The RFRA would permit any aggrieved party to obtain appropriate relief against government restrictions in a civil lawsuit. The Act also claims that it would not "limit or create any rights under the Establishment Clause."<sup>51</sup>

It is not without irony that "the proposed 'solution' to the problem [Scalia] has created is the very result he welcomed,"<sup>52</sup> namely, enlisting the power of the majoritarian political process to implement protections for a minority social problem. It remains to be seen whether the Court's experiment in subjecting "minorities" to the beneficence of the "majority" in the highly charged political process will do irreparable damage to the freedoms afforded by the Bill of Rights.<sup>53</sup>

#### Reservations About the RFRA

While most of the organized civil liberties community and much of organized religion has enthusiastically endorsed the RFRA, questions have nevertheless been raised about the resort to "majoritarian" remedies to create "minority" rights. Others have questioned whether the RFRA as introduced has been sufficiently crafted to avoid generating a whole new genre of claims that could skew religious liberty as we know it or produce other undesired consequences for our culture. One thing is clear. The adoption of the RFRA is *de facto* little different from an amendment of the Free Exercise Clause. As such, the temptation to knee-jerk acceptance should give way to thoughtful consideration and analysis, both as to whether it should be adopted at all as a matter of constitutional process, as well as to its content and reach.

#### The Problem of "Majoritarian" Solutions to Constitutional Issues.

The greatest danger of the Supreme Court's "majoritarian" approach, which makes definition of the guarantees of the Bill of Rights a routine part of the majoritarian political process, is the eventual dilution and devaluation of the freedoms granted in the Bill of Rights. This "process," if unchecked, runs counter to the notion of limited government reflected in the Bill of Rights. Not only does it leave definition of individual rights to the political process, it virtually eliminates any substantial check on "majoritarian" excesses because its standard of review subjects legislative action only to a standard of "reasonableness." Under this regime, virtually *any* religiously neutral legislation will pass scrutiny. Moreover, the standard of review which might apply for review of so-called "remedial" legislation like the RFRA may likewise dilute the protections otherwise afforded by the Bill of Rights.

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Presumably, the Court would not sanction wholesale amendment of the Bill of Rights through the legislative process. However, the "majoritarian" approach will inexorably move the legislature to define the Bill of Rights in extremes heretofore limited by the slower pace of judicial review and procedure, the more conservative rules of judicial interpretation like *stare decisis* (that is, adhering to past decisions) and, from time to time, the reluctance of courts to intrude upon what are clearly social policy questions (as opposed to matters of constitutional right).

Indeed, many of the civil rights organizations that support the RFRA disagreed when other ideological forces sought to amend the Bill of Rights, directly by statute, to prohibit, for example, flag burning. Likewise, there were numerous objections raised when pro-life forces sought several years ago legislatively to declare that "life" begins at conception and to limit the jurisdiction of the Supreme Court in abortion cases. Broader acceptance of the "majoritarian" trend in defining individual rights would no doubt enhance recent efforts to adopt the "Freedom of Choice Act," proposed federal legislation that would make abortion a matter of statutory right.<sup>41</sup>

The "majoritarian" philosophy of subjecting what has been a matter of Constitutional right to the legislative process will produce three potentially harmful outcomes: (1) less individual freedoms, (2) politicization of the Bill of Rights, and (3) instability in the law, including more frequent strife and confrontation between the judicial and legislative branches.

Some have strongly cautioned against using the majoritarian process to remedy the *Smith* problem. "Legislative fixes" like the RFRA "require interpretation and application through the same judicial system, and they can be modified or eliminated at any time by the legislature that enacted them."<sup>42</sup> The argument here is twofold: (1) it is dangerous to leave constitutional rights up to the political process; and (2) constitutional adjudication contains its own corrective mechanisms and the judicial process should be allowed to "correct" the excesses in *Smith*.<sup>43</sup>

**The Problem of Legislative Draftsmanship: The RFRA As A Sword Against Abortion Restriction and Religious Liberty.**

Even if one were to accept that there is a valid role for Congress in enhancing constitutional protections,<sup>44</sup> other than through the amendment process itself, the question remains as to whether the RFRA as presently proposed is sufficiently precise to correct the problems at hand without creating new, and possibly worse, problems. For example, the National Right to Life Committee objects to the current draft of the RFRA. This organization astutely notes that abortion rights groups have long argued that state and federal restrictions on abortion violate the free exercise rights of women seeking abortions.<sup>45</sup> While the Supreme Court has not reached the merits of this Free Exercise claim, the National Right to Life Committee believes that pro-abortion groups could use the RFRA to "prevail against a law restricting abortion."<sup>46</sup> The National Right to Life Committee will understandably oppose the RFRA unless Congress enacts it with "abortion-neutral" language.<sup>47</sup>

Just as the RFRA might be used as a "sword" in the hands of pro-abortion forces, the potential exists for it being used likewise by persons and

groups whose aim is to "sanitize" American culture from public recognition of this country's religious traditions. It should also be viewed as an instrument to deprive religious persons of access to certain public forums. Therefore, if the RFRA is to be enacted, it must contain safeguards that will prevent interpretations that could generate new, statutory free exercise rights that exceed existing constitutional rights or otherwise alter the pre-*Smith* constitutional landscape.

As mentioned earlier, the RFRA generally prohibits government from "restricting any person's free exercise of religion." It would, however, permit government to "restrict" the free exercise of religion under the following conditions:

- (1) the restriction is a general law that does not intentionally discriminate against religion, and
- (2) application of the restriction is essential to further a compelling governmental interest and is the least restrictive means of furthering that interest.<sup>48</sup>

Regrettably, the RFRA does not define "free exercise of religion." While its meaning could coincide with the meaning given in modern Supreme Court jurisprudence,<sup>49</sup> it might also be given an entirely more expansive definition. Without clear statutory definition, the courts will be left to interpret an undoubtedly highly ambiguous legislative history. Moreover, although the Free Exercise clause outlaws only "prohibitions" on free exercise, the RFRA outlaws "restrictions" on free exercise. In this new environment, there could arise whole new species of free exercise claims. If not properly delineated, a flood of individual claims might even confirm the fears expressed by Justice Scalia in *Smith* that "any society adopting such a system would be court-judging anarchy."<sup>50</sup>

Some have argued that "the better solution" is not new language in the RFRA, but "to explain in the committee report that the 'compelling' interest test is a reference to the test applied in *Wisconsin v. Yoder* (1972), *Thomas v. Review Board* (1981) and *Sherbert v. Verner* (1963)."<sup>51</sup> Advocates of this approach are apparently unconcerned about the ability of opponents of the RFRA to analogize legislative history with contrary, ambiguous or confusing statements. And they appear to be far more sanguine about the ability of Congress even to formulate "workable" legislative history, let alone of the federal courts to make proper sense of legislative history at its best. For example, although the outcome was positive, the mixed legislative history of the Equal Access Act and its contorted interpretation through the Federal court system,<sup>52</sup> only enhances the point that it is perilous to risk achieving the goals of legislation on the hope of obtaining proper development and interpretation of legislative history.

More importantly, the RFRA might significantly alter the meaning of the Free Exercise Clause as it has historically been understood and interpreted. Therefore, it is important that free exercise, under any legislation, be carefully defined. In the absence of Congressional definition, creative advocates and federal judges will define what free exercise of religion means, leaving the RFRA to wander from the ends its supporters and framers intend. The history of federal litigation under the Equal Access Act,<sup>53</sup> and a cursory reading of the Court's recent interpretation of the Equal Access Act,<sup>54</sup> demonstrate the perils and difficulties of solving matters of constitutional right through legislative

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action.

Even an acceptable definition of "free exercise" in the RFRA may not alleviate all of the problems with its formulation. There are, of course, two Religion Clauses in the First Amendment.<sup>24</sup> Though frequently viewed as opposite sides of the religious liberty coin, the Free Exercise and the Establishment Clauses do in fact share substantive protections for rights of religious conscience.

Under the Court's Establishment Clause jurisprudence, citizens complaining about government practices that arguably establish religion most frequently succeed with the second prong of the tripartite *Lemon*<sup>25</sup> test, namely, does the practice advance or inhibit religion?<sup>26</sup> In other words, does the government practice impermissibly infringe rights of conscience for nonadherents? In substance, this is little different from the free exercise argument that a particular government practice coerces or penalizes the exercise of religious beliefs in violation of the Free Exercise Clause.

In fact, in many cases involving challenged governmental practices, claimants advance both Establishment and Free Exercise Clause claims that the government practice in question violates their rights of conscience.<sup>27</sup> The significance of this frequent conjunction of Free Exercise and Establishment Clause claims is that under the RFRA, "free exercise" claims, unless properly delineated, could be used by those hostile to religion to challenge government practices that have heretofore been challenged (and largely upheld) under the Establishment Clause. For example, under a broad reading of the RFRA:

- an atheist could assert that the legend "In God We Trust" which is stamped and printed on the currency that everyone is required to use in this country "restricts" his or her free exercise of religion;
- a legislator could argue that the imposition of prayer at the beginning of each legislative session "restricts" his free exercise of religion;
- Madeline Murray O'Hair could argue that the government's issuance of permits for religious gatherings on public property "restricts" rights of conscience protected by the RFRA;
- a Jewish person or an atheist could complain that the singing of religious holiday music or instruction concerning the religious tradition of religious holidays in the public schools violates his or her free exercise of religion;
- Baptists advocating separation of church and state could complain that the erection by Catholics of a nativity display on publicly owned property infringes their rights of conscience;
- Gay activists could argue that criminal sodomy statutes or civil statutes allowing marriage only to heterosexual couples violate their right to free exercise of their religion; and
- Morinons or Muslims might once again challenge on free exercise grounds statutes prohibiting polygamy and bigamy.

Under the RFRA as now worded, there is nothing to prevent these claims from being raised. Moreover, these governmental actions might not withstand challenge under the relatively high scrutiny of the RFRA. Several actions described above would arguably be prohibited under the RFRA's proscription against restrictions on free exercise and might not qualify under the statutory exception because they arguably intentionally discriminate among religions. If they did qualify under the statu-

tory exception, they very likely would not survive the compelling state interest/least restrictive means standard.

Nor are "creative" free exercise claims under the RFRA limited to those who hate religion. Proponents of religion may also be expected to take advantage of an ill-defined free exercise statute. Consider that:

- free exercise claims could be made to require exemption from certain teaching materials in the public schools;
- the Salvation Army and other religious organizations might successfully challenge the application of wage/hour and other employment laws relating to their workers or beneficiaries; and
- free exercise objections could be raised against any number of general laws, most of which could not be justified by a compelling state interest.

The problem, therefore, is that the RFRA might generate entirely new and unforeseen species of free exercise claims that very likely would go far beyond constitutional free exercise standards as we know them and perhaps may even adversely influence Establishment Clause jurisprudence. The dangers arise in two areas:

- (1) challenges to government practices that under current constitutional standards do not violate the Establishment Clause, but could now be held to violate free exercise under an unchecked interpretation of the RFRA, and (2) challenges to government action involving competing free exercise claims or free exercise claims competing with free speech or other constitutional rights.

To avoid these pitfalls, the language of the RFRA should be amended to make clear that government practices affecting rights of religious conscience and found to be valid under the Establishment Clause are not prohibited under the RFRA. This could be done by expressly providing an Establishment Clause defense to a claim under the RFRA. In other words, if a bona fide Establishment Clause defense were raised, the RFRA claim would not succeed if the challenged practice was valid under the Establishment Clause.

The RFRA should also be amended clearly to indicate that the RFRA does not apply to any dispute involving compelling claims by more than one person of the free exercise of religion.<sup>28</sup> The latter amendment holds important implications for compelling free exercise claims in the public forum. For example, a person could object to the government permitting a private group to display a religious symbol on public property.<sup>29</sup> Although the private group would arguably have their own free exercise right to be on the public property, the RFRA would, ironically, provide no protection for the latter group since it is geared toward preventing "restrictions" on free exercise, though admittedly the Free Speech or Free Exercise Clauses might provide some measure of protection for this group. The point is that there are countless permutations involving compelling claims of free exercise and the RFRA will only spawn new legal conflicts unless properly limited. The RFRA should abstain in the event of such compelling claims and let the provisions of the First Amendment control.

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### Questions and Approaches: The Alternatives

In the end, the question must be raised, should we even embark on this journey or should we let the process of constitutional adjudication proceed without the RFRA? And even assuming remedial amendments can be tailored to limit the RFRA, the potential for unanticipated fallout is so great that free exercise proponents and Congress must deliberately and carefully scrutinize the RFRA.

Another alternative is worth considering. Instead of effecting a sweeping reversal of Justice Scalia's dicta, limit the RFRA to overrule *Smith*,<sup>14</sup> and look to future jurisprudence to overrule Scalia's broader dicta. If the RFRA were to reach only restrictions affecting any person's free exercise of religion "in the receipt of governmental benefits," and if the RFRA included the abortion neutral clause, the impact of the RFRA would be narrowed to overruling *Smith* and other similar unemployment compensation, social security and governmental benefit cases. This would avoid raising the uncertainty of the broader First Amendment questions that now plague it.

Another approach to remedying the *Smith* problem that could, perhaps, be both the most meaningful and successful at present is state constitutional litigation or amendment. There is arguably a base of support in this country for the concept, if not the implementation, of religious liberty. Some state courts have already indicated a willingness to

circumvent *Smith* through their own state constitutions.<sup>15</sup> State constitutional amendments, where necessary, might be easier to obtain than a reinvestment by the Supreme Court and more satisfactory than federal legislation.

### The Present Necessity

The Supreme Court has chosen to tamper with the delicate Constitutional balance of the First Amendment. The present necessity is to attempt to restore that balance without creating mutations that could further erode the right to religious liberty.

It is important to avoid hasty "fixes" to complex constitutional problems. If legislation is a solution, it is imperative that it be "properly worded" and "narrowly tailored."<sup>16</sup> This means that prudent deliberation must be the order of the day and the myriad of alternatives must be carefully considered. Otherwise, the delicate balance effected by the First Amendment may never be restored and the erosion of religious freedom will most likely continue.

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### ENDNOTES

1. 110 S. Ct. 1606 (1990).

2. *Smith*, 110 S. Ct. at 1610 (Blackmun, J., dissenting).

3. McCune, *Free Exercise Revisionism and the Smith Decision*, 67 U. Chi. L. Rev. 1109, 1111 (1991).

4. See *Smith v. Employment Division, Department of Human Resources*, 709 P.2d 246 (Or. App. 1986); *Smith v. Employment Division, Department of Human Resources*, 721 P.2d 445 (Or. 1986); *Employment Division, Department of Human Resources of the State of Oregon v. Smith*, 480 U.S. 918 (1987); *Employment Division, Department of Human Resources of the State of Oregon*, 485 U.S. 650 (1988); *Smith v. Employment Division*, 783 P.2d 148 (Or. 1988); *Employment Division, Department of Human Resources of Oregon v. Smith*, 109 S. Ct. 1628 (1989); *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1606 (1990); *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 2606 (1990).

5. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

6. The decision prompted William B. Ball to comment that the Court had moved religious liberty "to the back of the constitutional bus - maybe off the bus." *Statement by Rep. Restoration Act, Press Release of Congressman Stephen J. Solari*, July 26, 1990.

7. Indeed, had the Supreme Court applied its established compelling interest/balancing test, it is very likely that this case would have had little significance with respect to the fundamental constitutional right to practice one's religion freely. See *Smith*, 110 S. Ct. at 1600 (O'Connor, J., concurring in judgment), 110 S. Ct. at 1622-23 (Blackmun, J., dissenting). Justice O'Connor seems to imply that, had the Supreme Court applied its established compelling interest/balancing test and ruled against *Smith*, the case still would have had no significance for free exercise rights. See *Smith*, 110 S. Ct. at 1600 (O'Connor, J., concurring in judgment). As Justice O'Connor notes, "[e]ven if, as an empirical matter, a government's official law might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim." *Id.* at 1611.

8. The other conscience clause found in Article VI of the United States Constitution which mandates that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

9. As quoted in *Lyner, Is Religious Liberty a "Luxury" We Can No Longer Afford*, 85 Liberty No. 6, (1990), p. 2, 7.

10. *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster, Inc.: Springfield, 1985), p. 718.

11. See John Whitehead, *The "Conscientious" Court and Authoritarianism*, *Action* (August 1990), p.3.

12. See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990) (imposition of sales and use taxes on retailers, including religious organizations selling Bibles upheld); *Board of Education v. Mer-*

gens, 110 S. Ct. 2766 (1990) (federal Equal Access Act providing access to public school premises to students on equal basis held constitutional); and *Cruzan v. Missouri Department of Health*, No. 88-1603 (Supreme Court, decided June 26, 1990) (state statute requiring clear and convincing evidence prior to termination of comatose patients upheld); see also cases cited in note 63, *infra*.

13. The United States Constitution erects a federal system of civil government. Federalism is, of course, the concept that civil government is composed of a conglomerate of civil governing bodies each with its own sphere of authority. Furthermore, the Constitution established a limited federal government that possessed only the powers enumerated. The consequence of federalism is that government power is decentralized and through various levels of government. These principles were stressed throughout the *Federalist Papers*, a group of essays written by James Madison, Alexander Hamilton, and John Jay (1746-1820). See Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1976).

Following the American Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution in order to resolve the effects of the war which established greater federal power and influence. The Supreme Court interpretation of the Fourteenth Amendment, in particular, has played a primary role in further transforming the basic nature of American government. The Bill of Rights, originally written to check the powers of the federal government, were extended to the states in *Gilow v. New York*, 268 U.S. 652 (1926). Since *Gilow*, the entire Bill of Rights is now a matter of federal government enforcement against the individual states. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

By holding that the word *liberty* in the Due Process Clause of the Fourteenth Amendment refers to the freedoms contained in the Bill of Rights, the Supreme Court has transformed the original understanding of the Bill of Rights so that instead of its sole restraint on federal government interference, it is now a source of intervention by the federal government into the affairs of the state governments. See Robert G. McCloskey, ed., *Essays in Constitutional Law* (New York: Vintage Books, 1957). Justice William O'Douglas observed that "Due Process, to use the vernacular, is the wild card that can be put to such use as the judges choose." As quoted in William Iray Forrester, *Are We Ready for Truth in Judging?* 63 American Bar Association Journal 1212 (1977).

14. Whitehead, *op. cit.*, at 6.

15. The United States Supreme Court developed this "free exercise/compelling state interest balancing test" in *Sherbert v. Verner*, 374 U.S. 398 (1963).

16. In *Sherbert*, Justice William Brennan, who delivered the opinion of the Court, wrote that, in order to withstand a constitutional challenge, the disqualification of Mrs. Sherbert as an unemployment compensation beneficiary because she would not work on Saturday, her Sabbath, must either (i) represent no infringement by the state of her free exercise rights, or (ii) insofar as the law imposed an incidental burden on Mrs. Sherbert's free exercise of religion, the law must be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." 374 U.S. at 403, quoting *NAACP v. Button*, 371 U.S. 416, 438 (1963).

17. *Sherbert*, 374 U.S. at 407.

18. *Id.*, at 407-08.

19. *Smith*, 110 S. Ct. at 1699, 1603-06.

20. *Id.* at 1603.

21. *Id.* at 1600.

22. In fact, fourteen months before he penned the *Smith* opinion, Justice Scalia wrote, in his dissent in an Establishment Clause case, that the Court had "held that the Free Exercise Clause of the First Amendment required religious beliefs to be accommodated by granting religious-specific exemptions from other wise applicable laws." *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 912 (1989) (Scalia, J., dissenting) (emphasis in original) (challenge to Texas statute providing sales tax exemption for religious periodicals failed). Also, two of the five Justices in the *Smith* majority joined with Justice Scalia in that dissent, i.e., Chief Justice Rehnquist and Justice Kennedy.

23. 406 U.S. 206 (1972) (landmark Amish protest of compulsory public education beyond the eighth grade).

24. *Id.* at 215.

25. See McConnell, *Free Exercise Revisionism and the Smith Decision*, 67 U. Chi. L. Rev. 1109, 1120 (1990).

26. *Smith*, 110 S. Ct. 1696, 1602 (1990). Justice Scalia argues that the United States Supreme Court has applied the *Sherbert* "compelling state interest" standard only in cases involving the denial of unemployment compensation benefits. It is true that most of the other Supreme Court cases in which government action has been strictly scrutinized have involved "communicative activity" or "parental rights." What Justice Scalia ignored, however, are statements in the earlier jurisprudence of the Court which did not speak of "hybrid situations", but rather of the parity of free exercise with free speech and free press. Thus, in the seminal Free Exercise case, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court equated free exercise with these other rights as all being preferred freedoms. See also *Murdock v. Pennsylvania*, 310 U.S. 105 (1943). There is, moreover, an extensive jurisprudence in the lower federal courts and in state supreme courts extending the *Sherbert* rationale well beyond unemployment compensation cases.

27. Gaffney, Laycock and McConnell, *An Answer to Smith: The Religious Freedom Restoration Act*, From the Center 17 (Winter 1990).

28. Solari, *The Court's Erosion of Religious Freedom*, *Newsday*, August 21, 1990.

29. Compare *McClure v. Salvation Army*, 460 F.2d 653 (6th Cir. 1972); *Walker v. First Orthodox Presbyterian Church*, 22 Fair Empl. Prac. Cas. (DNA) 762 (Cal. Super. Ct. 1980) (Free Exercise Clause bars application of a local gay rights ordinance to employment of a church organist); *Lewis ex rel. Murphy v. Buchanan*, 21 Fair Empl. Prac. Cas. (DNA) 696 (11. Minn. 1979) (anime holding as applied to a parochial school teacher).

30. Compare *Smith v. Ricci*, 80 N.J. 514, 446 A.2d 501 (1982) (Free Exercise Clause requires students be excused from sex education classes which are contrary to their faith).

31. Compare *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972) (statutory provisions withholding tax exempt status from a religious and educational organization engaged in substantial activities intended to influence legislation does not infringe the organization's right of free exercise of religion or deprive the organization of the right of free speech).

32. Compare *Kenny v. Ambulatory Centre of Miami*, 400 S. 2d 1282 (Fla. App. 1981) (right of medical personnel to refuse to assist abortions upheld).

33. C.A. No. 88-0242 P' (D. Rhode Island, Nov. 9, 1990), 728 F. Supp. 846 (D. Rhode Island, 1990).

34. *Id.* at 2.

35. *Id.* at 6.
36. *Id.* at 6 n.
37. Will, *Conduct, Coercion, Belief*, *The Washington Post*, April 22, 1990.
38. Hunt, Gaillard, ed., Letter from James Madison to Edward Livingston (July 10, 1822) in *9 The Writings of James Madison* 132 (New York: G.P. Putnam's Sons, 1904).
39. See generally Robert Allen Rutland, *The Birth of the Bill of Rights: 1776-1791* (Chapel Hill: University of North Carolina Press, 1965).
40. See *Engel v. Vitale*, 370 U.S. 421, 427-28 (1962).
41. *Smith*, 110 S. Ct. at 1006.
42. Hall, *James Madison, Architect of the Constitution*, 172 *National Geographic* No. 3, 340, 360 (1987); cf. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409 (1990).
43. Daniel L. Dreisbach, *Real Threat and Mere Shadow*, (Westchester, Ill.: Crossway Books, 1987), pp. 83-90.
44. *Murdock v. Pennsylvania*, 310 U.S. 105, 116 (1943). See also Pfeffer, *The Supremacy of Free Exercise*, 61 *The Georgetown L. J.* 1116 (1973).
45. *Dred Scott v. Sandford*, 60 U.S. 393 (1867).
46. 410 U.S. 113 (1973).
47. See, *Smith*, 110 S. Ct. 2606 (1990) relig' denied.
48. H.R. 6377.
49. See *Statement by Rep. Stephen J. Solari Introduction of the Religious Freedom Restoration Act*, Press Release of Congressman Stephen J. Solari, July 26, 1990.
50. RFRA, H.R. 6377, Section 2(b).
51. *Id.* at Section 6.
52. Harris, *Leaping Headfirst Into the Smith Trap*, *First Things*, 37-38 (February 1991).
53. It also remains to be seen whether the *Smith* doctrine will be applied by the Court by analogy to other cherished freedoms. There are hints that *Smith* is simply part of the Court's broader move in a majoritarian or "statist" direction. Thus, the Court's public forum doctrine, formulated over the last several years, has accorded legislative bodies greater and more explicit power to "close" or "open" public property for speech activity. *Carnelios v. NAACP*, 473 U.S. 788 (1985). Some government agencies seized upon this shift attempting to create broad "speech free" zones. *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 660 (1987). In addition, the constitutional free speech rights of students in the public schools, recognized in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), were substantially eroded in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). The Court has also been receptive to broad remedial legislation designed to extend equal Free Speech rights and access to public forums created in the public schools. *Mergens v. Westside Community Schools*, 110 S. Ct. 2366 (1990). Finally, the Court has, of course, adopted a distinctly majoritarian approach to limit the effect of the rights it created in *Roe v. Wade*, 410 U.S. 113 (1973), although the end of this adjustment remains to be seen. See *Webster v. Reproductive Health Service*, 109 S. Ct. 3040 (1989).
54. H. R. 26 and S. 26, introduced in the 102nd Congress by Representative Don Edwards and Senator Alan Cranston, both of California.
55. Harris, *Leaping Headfirst into the Smith Trap*, *op. cit.* nt 39.
56. *Id.*
57. The status of remedial legislation like the RFRA is unclear. Presumably, it is authorized by the Commerce Power or under the Doctrine of Implied Powers. Moreover, Section 6 of the Fourteenth Amendment also grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." Thus, it would appear that the incorporation of the provisions of the Bill of Rights against the states would give Congress the power to "enforce" it. To date, the Supreme Court has upheld such remedial legislation so long as it does not restrict, abrogate or dilute constitutional guarantees. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Board of Education v. Mergens*, 110 U.S. 2366 (1990).
58. James Duppy, Jr., January 18, 1991, Memorandum to Douglas Johnson, Legislation Director, National Right to Life Committee, Inc., "The Religious Freedom Restoration Act of 1990, H.R. 6377."
59. *Id.* at 2.
60. The language proposed by the National Right to Life Committee is as follows: "Nothing in this Act shall be construed to grant, secure or guarantee any right to abortion, access to abortion services, or funding of abortion." Memorandum from Douglas Johnson, NRI-C Legislative Director, to Interested Parties, *Pro-life Concerns Regarding the "Religious Freedom Restoration Act*, January 18, 1991.
61. See RFRA, H.R. 6377, Section 2(b).
62. The 1988 case of *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 430 (1988), has been labeled as the philosophical precursor of the *Smith* Free Exercise revisionism. In *Lyng*, Justice Sandra Day O'Connor argued that strict scrutiny under the Free Exercise Clause was limited to outright prohibitions and indirect coercion or penalties on free exercise of religion. However, she said, "[t]his does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-51.
- Justice Brennan, on the other hand, objected to Justice O'Connor's "affirmative compulsion" test and, instead, argued that the Free Exercise Clause protects not only indirect coercion or penalties and outright prohibitions, but also "laws that frustrate or inhibit religious practice." *Id.* at 460. In his view, "governmental action that makes the practice of a given faith more difficult necessarily penalizes that practice and thereby tends to prevent adherence to religious belief." *Id.*
63. *Smith*, 110 S. Ct. at 1006.
64. Gaffney, Lyncuck & McConnell, *An Open Letter to the Religious Community*, *First Things* 44, 46 (March 1991).
65. See the numerous arguments disposed of in Justice O'Connor's majority opinion in *Board of Education v. Mergens*, 110 S. Ct. 2366 (1990), and Duncan, *Religious Civil Rights in Public High Schools: The Supreme Court Speaks On Equal Access*, 24 *Ind. L. Rev.* 111, 116, n. 36, 117, n. 40, 118-120.

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66. See John W. Whitehead, *The Rights of Religious Persons in Public Education* (Westchester, Ill.: Crossway Books, 1991), pp. 116-126 and p. 110, n.6.

67. *Id.*

68. See note 6.

69. *Lemon v. Kurtzman*, 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971).

70. The second prong of the *Lemon* test states that a law or governmental action that has the primary effect of advancing or inhibiting religion is a violation of the Establishment Clause. *Id.* at 612-13.

71. See e.g., *Larson v. Valente*, 456 U.S. 228 (1982) (state ordinance restricting solicitation by churches presented both Free Exercise and Establishment Clause questions); *Widmar v. Vincent*, 464 U.S. 263 (1981) (students alleged that University policy prohibiting religious meetings on campus violated both Free Exercise and Establishment Clause claims); *Foley v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir.), *cert. denied* 449 U.S. 987 (1980) (persons challenging school district's program of Christmas carols and exposition of religious significance of the Christmas holiday allege both Free Exercise and Establishment Clause questions); *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1986) (plaintiffs challenging cross in Bernalillo County, New Mexico, seal alleged both Free Exercise and Establishment Clause complaints); and *Sheridan Road Baptist Church v. State of Michigan*, 348 N.W. 2d 263 (Mich. App. 1984) (Christian schools challenging state regulations alleged both Free Exercise and Establishment Clause claims).

72. The Rutherford Institute, among others, has submitted redrafts of the RFRA with such an amendment.

73. For example, in the case *ACLU v. City of St. Charles*, 781 F.2d 265 (7th Cir. 1986), involving a challenge to a City's display of a lighted Latin cross on a fire departmenterial during the Christmas season, the plaintiffs justified standing to sue on grounds that "they have been led to alter their behavior -- to detour, at some inconvenience to themselves, around the streets they ordinarily use" in order to "avoid the cross when it is lit." *Id.* at 268-269. It is precisely this type of "injury" or "violation of rights of conscience" accepted as justification for standing to sue on Establishment Clause grounds that could in the future be used to justify a claim that government action has "restricted" rights of conscience under an ill-defined, statutory free exercise claim.

74. Reputedly, 23 states already exempt the sacramental use of peyote for indigenous religious rites. See *Smith*, 110 S. Ct. at 1618, n. 5 (Blackmun, J. dissenting). A limited RFRA that would, in effect, permit the sacramental use of peyote would thus have a minor societal impact. It would also send a message to the Court that its proposed tinkering with the *Sherbert* constitutional standard was not approved of by the legislative branch and put the Court on notice that further development of the *Smith* doctrine might generate a legislative response. Finally, a limited RFRA would be more in line with the narrow nature of the Equal Access Act, a precedent frequently cited in justification of the RFRA. The Equal Access Act was addressed to a free speech problem only in the limited context of public secondary schools. The RFRA, on the other hand, addresses the *universe* of free exercise. The potential for unanticipated mischief is thus far greater with the broad brush version of the RFRA.

75. See e.g., *State of Minnesota v. Heisberger*, No. 17133(Minn. Nov. 0), *cert. granted, vacated and remanded* 110 S. Ct. 1918 (1990), 443 N.W. 2d 282 (Minn. 1989) (requirement of triangular emblems on Amish horse drawn vehicles found to violate Amish religious

beliefs under state constitutional freedom of conscience guarantee). See also *Society of Jesus of New England v. Boston Landmarks Commission*, No. B 6416 (Mass. Dec. 31, 1990) (state designation of church interior an landmark held to be violation of state constitution).

76. Gaffney, Laycock & McConnell, *An Open Letter to the Religious Community*, First Things 40 (March 1991).

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH

JANE LIBERTY, <u>et al.</u> ,	X
	:
Plaintiffs,	:
	:
- versus -	:
	:
NORMAN BANGERTER, <u>et al.</u>	:
	:
Defendants.	:
	X

CIVIL ACTION NO.

*ACLU challenge  
to Utah abortion law*

**AFFIRMATION OF JANE LIBERTY**

JANE LIBERTY affirms the following is true under penalty of perjury:

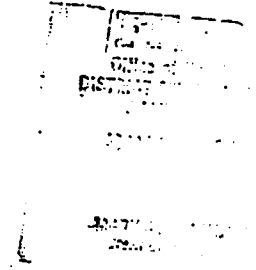
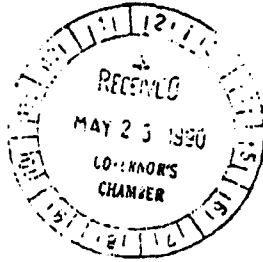
1. I reside in Northern Utah, and I am in my early 30's. I am a divorced mother raising and supporting my two young children. I got a divorce because my spouse was abusive. The abuse began during my first pregnancy. I am trying to complete my education in order to provide a better life for myself and my children. My doctor has confirmed that I am less than two weeks pregnant. I am making this affirmation because I need an abortion which will be prohibited by the new law.

2. I was very sick during my first two pregnancies: in both, I suffered from nausea, and in the first, I had severe toxemia, and HELLP syndrome (hypertension elevated liver low platelet). This was very disabling and health-threatening. My doctor has told me that there is a 50% risk of the recurrence of toxemia if I carry this pregnancy to term. Perhaps at some point, if I remarry and have help and support in caring for my two existing children, I could risk being that sick again. Now,

the smoking on the fetus. I would also worry that the fetus could be damaged by the antibiotic that I have been taking for two weeks. The greatest stress, though, would be trying to care for another baby at this point.

6. I have been a student for several years. I have pursued this course in order to provide security for myself and my children. I want to be a good role model for my children and achieve independence.

→ 7. I am a practicing Christian, and have talked to my minister about how to handle this unintended pregnancy. He helped me come to the conclusion that terminating this pregnancy was the choice consistent with my faith. It would be wrong for me to have another baby at this point: wrong for my children, wrong for me, and wrong for the baby to which I would give birth. With an infant, I would have to give up my goal of independence for myself and my children. I would simply not be able to get my degree, thereby diminishing my employment opportunities and increasing the risk that I might have to receive public assistance. I could not, morally, continue in school and have too little time to devote to a newborn. Time and money spent on a newborn would be taken away from my two existing children. To give inadequate care to a newborn, and to take away from my existing children the emotional and financial support they desperately need from me, is an unacceptable course inconsistent with my religious faith. Moreover, in November I would be



IN THE UNITED STATES DISTRICT COURT OF GUAM FOR THE TERRITORY OF GUAM

MARIA DOE, on behalf of herself )
and all others similarly )
situated, et. al, )
Plaintiffs, )
vs. )
JOSEPH F. ADA, et. al., )
Defendants. )

CIVIL ACTION NO. 90-00013

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

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ARRIOLA, COWAN & BORDALLO
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The Rev. Milton H. Cole, Edmund
A. Griley, M.D., William S.
Freeman, M.D. and John Dunlop, M.D.

LYNN M. PALTROW
SIMON HELLER
RACHAEL PINE
KATHRYN KOLBERT
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ELLEN GOETZ
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
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Counsel for Plaintiffs
Guam Nurses Association
and Laurie Konwith



thus violate the Establishment Clause. Thus, while some Roman Catholics are free to follow the dictates of their religion under the Act, a Jewish woman faced with an unwanted pregnancy, for whom an abortion may be permitted or even required under the tenets of her religion, will be prohibited from practicing her faith under this law. See, e.g., Decl. of L. Konwith.

This religiously discriminatory effect of the Act is exacerbated by Section 3, which prohibits any person from "solicit[ing] any woman to submit to any operation, or to the use of any means whatever, to cause an abortion." For Jewish and mainline Protestant groups, in order for a woman to make a religiously conscious decision regarding whether to have an abortion, she must be counseled on all options available to her. Decls. of M. Cole, Jr.; L. Konwith; D. Corbin. But, under the solicitation provisions of the Act, a minister or rabbi would be unable to counsel freely women who sought pastoral care, because any counseling regarding abortion might be punishable as "solicitation" under the Act. On the other hand, a Roman Catholic priest who follows official Church doctrine would face no restrictions on his religious counseling.

V. THE ACT VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND THE ORGANIC ACT.

As already described, Jewish and several Protestant faiths, each with a substantial number of adherents on Guam, hold religious beliefs concerning the fetus and abortion different from the religious view embodied in the Act. These faiths hold

that under certain circumstances -- to be determined in the first instance by the pregnant woman herself -- a woman is morally permitted or, in some cases, even required to obtain an abortion. See Decis. of L. Konwith; M. Cole; D. Corbin. By failing to make any accommodation for these beliefs, the Act denies members of these faiths their First Amendment right to the free exercise of religion.

Free exercise problems can arise whenever government regulation compels conduct which is forbidden by one's religious belief. See Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). Courts have already recognized that a woman's free exercise rights are violated when she is forced to undergo an abortion contrary to her religious belief. Arnold v. Board of Education, 880 F.2d 305, 314-15 (11th Cir. 1989). Thus, it follows that a woman's free exercise rights are also violated when, against her religious principles, she is forced to carry a pregnancy to term. The solicitation provision of the Act also violates the Free Exercise Clause by impairing the ability of women to seek, and the ability of rabbis and ministers to provide, religious counseling with regard to abortion. See Decis. of M. Cole; D. Corbin. Although the Supreme Court has recently given a more narrow reading to the Free Exercise Clause, even under that analysis the Act is unconstitutional. In Employment Division, Dep't of Human Resources of Oregon v. Smith, 58 U.S.L.W. 4433 (U.S. Apr. 17, 1990), the Court held that the "First Amendment bars applica-

of a neutral, generally applicable law to religiously motivated action" only when the Free Exercise Clause is involved "in conjunction with other constitutional protections." *Id.* at 44. This case "present[s] such a hybrid situation." *Id.* As already argued, the Act violates, *inter alia*, the right to privacy and the First Amendment's protection of freedom of speech. Thus, this case is analogous to Murdock v. Pennsylvania, 319 U.S. 10 (1943), or Follett v. McCormick, 321 U.S. 573 (1944), each of which invalidated a tax on solicitation as applied to the dissemination of religious ideas, or Yoder, 406 U.S. at 219-20 which invalidated compulsory school attendance laws as applied to Amish parents who refused, on religious grounds, to send their children to school. By violating other constitutional protections, the Act's provisions, as applied to religiously motivated conduct, also violate the Free Exercise Clause.

VI. THE PROHIBITIONS AGAINST SOLICITATION OF ABORTION UNCONSTITUTIONALLY INFRINGE ON SPEECH

Sections 31.22 and 31.23 of the Act, which respectively prohibit solicitation by a woman of an abortion<sup>21/</sup> and of a woman for an abortion,<sup>22/</sup> are unconstitutional, as they make crimina

<sup>21/</sup> Section 31.22 provides that "[e]very woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

<sup>22/</sup> Section 31.23 specifies that "[e]very person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

FILED  
U.S. DISTRICT COURT

JUN 18 7 49 PM '91

LOREITA G. ...  
CIVIL ACTION NO.

SOJOURNER T., JANE, and IDA B., on :  
behalf of themselves and all others :  
similarly situated; JAMES DEGUEURCE, :  
M.D., CALVIN JACKSON, M.D.; PAMELA :  
BRANNING M.D., on behalf of :  
themselves and all others similarly :  
situated and their patients; HOPE :  
MEDICAL GROUP FOR WOMEN; DELTA :  
WOMEN'S CLINIC WEST; CAUSEWAY :  
MEDICAL SUITE; EMILIA BELLONE, :  
M.S.W., on behalf of herself and her :  
clients; REVEREND KATHLEEN KORB; :  
RABBI MICHAEL MATUSON, on behalf of :  
themselves and their congregants, :

Plaintiffs, :

- versus -

BUDDY ROEMER, as Governor of the :  
State of Louisiana; WILLIAM J. :  
GUSTE, JR., as Attorney General of :  
Louisiana and as representative :  
of all others similarly situated; :  
HON. HARRY CONNICK, as District :  
Attorney of the Parish of Orleans, :

Defendants. :  
X

91-2247

COMPLAINT

SECT. # MAG. 2

COMPLAINT

Plaintiffs, by their undersigned attorneys, bring this  
Complaint against the defendants, their employees, agents and  
successors and in support thereof aver the following:

FILE 8120.07  
~~PROCESS~~ full  
~~X CHARGE~~  
~~ORDER~~ etc  
~~ORDER~~  
~~HEARING~~  
DOCUMENT No. 1

under the law guaranteed by the Fourteenth Amendment to the United States Constitution because it imposes burdens upon women's reproductive choices and bodily integrity that are not imposed upon the reproductive choices of men.

X. Fifth Cause of Action

107. Plaintiffs hereby incorporate by reference Paragraphs 1 through 106 above.

108. The Act violates the prohibition on involuntary servitude of the Thirteenth Amendment to the United States Constitution by forcing unwanted pregnancy on all women seeking abortions in Louisiana, thereby robbing women of their bodily integrity and dignity and causing risks to their lives and health.

XI. Sixth Cause of Action

109. Plaintiffs hereby incorporate by reference Paragraphs 1 through 108 above.

110. The Act violates free exercise of religion as guaranteed by the First Amendment to the United States Constitution in that it seriously inhibits the religious liberty of plaintiffs Rabbi Matuson, Reverend Korb, and their congregants.

RECEIVED

MAR 6 1991

DYKEMA GOSSETT

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

PLANNED PARENTHOOD OF MID-  
MICHIGAN INC., REPRODUCTIVE  
HEALTH CARE CENTER OF SOUTH  
CENTRAL MICHIGAN, INC. -- AN  
AFFILIATE OF PLANNED  
PARENTHOOD FEDERATION OF  
AMERICA, INC., ETHELENE C.  
JONES, M.D., and RICHARD  
VENUS,

Case No. D91-0571-AZ

Hon. Philip D. Schaefer

MOTION TO INTERVENE AS  
PARTY-PLAINTIFFS

Plaintiffs,

v

ATTORNEY-GENERAL OF MICHIGAN,

Defendant.

RCAR on page 2

AMERICAN CIVIL LIBERTIES UNION  
FUND OF MICHIGAN

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E. Michigan's Republicans for Choice is both a non-profit corporation and a Political Action Committee committed to all women being able to freely choose an abortion in consultation with their physicians. It is comprised of persons affiliated with the Republican Party. The organization has been involved in all of the circumstances leading up to the enactment of 1990 PA 211, and has consistently opposed the erection of barriers to the ability of teenagers to receive essential medical services, including an abortion for unplanned or health-endangering pregnancies. The organization is headquartered in Grand Rapids, and its President is Judith Frey.

F. The Religious Coalition for Abortion Rights, is a national non-profit, non-partisan organization of Protestant, Jewish and other faith groups committed to the preservation of religious liberty with regard to reproductive freedom. The Religious Coalition for Abortion Rights believes that the right to reproductive freedom is based on religious liberty. The organization believes that parental consent laws which purport to promote familial communications, by mandating such communications, may actually harm the teens and families they hope to protect. The Michigan branch of the organization was active in the events leading up to the enactment of 1990 PA 211.

8. Intervening Plaintiffs have a right to intervene pursuant to MCR 2.209(A)(3) in order to test the constitutionality of 1990 PA 211, MCL 722.901 et seq; MSA 25.248(101) et seq, the subject of this action in order to protect their various interests outlined above.

9. Intervening Plaintiffs Michigan's Republicans for Choice, NOW-Michigan Affiliate, and MRCAR actively opposed the initiative that led to 1990 PA 211, indicating their continuous and timely involvement in the issues surrounding the adoption and constitutionality of 1990 PA 211.

10. Intervening Plaintiffs have a right to intervene pursuant to MCR 2.209(A)(3). The interests of Intervening Plaintiffs cannot

October 18, 1991

Hon. Alan B. Mollohan  
229 Cannon HOB  
U.S. House of Representatives  
Washington, D.C. 20515-4801

**Re: H.R. 2797 -- Religious Freedom Restoration Act**

Dear Mr. Mollohan:

You have requested analysis of whether H.R. 2797 could be used by pro-abortion litigants to create exemptions to, or even invalidate, anti-abortion legislation, and whether H.R. 2797 ("RFRA") should be amended to exclude this possibility. Our answer to both questions is "yes".

### I. INTRODUCTION

To begin, we state our understanding of that question:

In light of persistent claims by abortion rights plaintiffs that restrictions upon abortion violate the Free Exercise clause of the First Amendment, and in light of RFRA's intent to make it easier for plaintiffs to prevail in Free Exercise challenges to facially neutral statutes, ought pro-life organizations and advocates lobby for an amendment that would prohibit RFRA from being construed to grant any right to abortion services or the funding thereof?

In other words, is the threat that RFRA could be used successfully to challenge the enforcement of pro-life legislation sufficient to warrant a specific exclusion of such challenges on the face of the statute? Or, to put a slightly different (but significant) spin on the question, is that threat sufficient to mandate such an exclusion?.

Analysis of RFRA, pending abortion cases, and the statements of pro-abortion advocates shows that if enacted, RFRA will clearly be used to bolster claims that abortion laws violate the free exercise of religion. Moreover, such claims will not be limited to minority religious sects, or to so-called "hard" cases. Finally, they will not be relegated to the position of fall-back arguments;



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Hon. Christopher H. Smith  
*Member of Congress*

Right Rev. Mggr. John Woolen,  
*Archdeacon of New York*



Hon. Alan B. Mollohan  
 October 18, 1991  
 Page 2

rather, they will be front and center, especially as Roe v. Wade is weakened and eventually overruled.

Furthermore, it is likely that at least some courts, in some circumstances, will enjoin the enforcement of anti-abortion legislation as a result of claims made under RFRA. We agree that it is somewhat less likely that the Supreme Court will uphold such a use of RFRA, and should it do so, we agree that the circumstances are likely to be narrow ones. However, we cannot assume that the Supreme Court will review every such case, or, most importantly, that every such case would even be appealed to the High Court by the losing parties, i.e., the states. Instances of "rolling over and playing dead" by state officials charged with enforcing anti-abortion laws may be expected to increase after the demise of Roe.

No one can prove whether or not the courts will interpret RFRA to support abortion rights claims. This, however, should not be the standard used to determine whether amendment of RFRA is necessary. Any significant possibility that RFRA could be so interpreted is sufficient grounds to press for an amendment. Indeed, given the virtual promise by pro-abortion activists that RFRA will be used in this manner, and the aggressive pleading of free exercise claims in pending abortion cases, it would be imprudent for pro-life advocates not to press for such an amendment.

Therefore, Congress should only enact RFRA if it has been amended to exclude the possibility of it being used to secure any right to abortion, or to the funding thereof. More detailed reasons for this conclusion are provided below.

## II. WILL RFRA SUPPORT A FREE EXERCISE RIGHT TO ABORTION?

The only federal court decision to recognize a Free Exercise right to abortion, McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y.), reversed sub nom. Harris v. McRae, 448 U.S. 297 (1980) reached an ultimately inconclusive result. In McRae, the district court accepted the plaintiffs' claim that in certain circumstances, women have a religious duty not to bear a child that has been conceived, and thus held that the Hyde Amendment violated the Free Exercise clause. 491 F. Supp. at 742. The Supreme Court reversed, finding that the plaintiffs lacked standing because none had "alleged, much less proved, that she sought an abortion under compulsion of religious belief." 448 U.S. at 320. The Court, therefore, did not reach the issue of whether abortion could ever be considered part of the "free exercise of religion." And no other federal court has done so.

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The threshold question in analysis of RFRA is whether the statute would support a substantive Free Exercise claim relating to abortion that does not currently exist. The analysis of Bopp and Coleson<sup>1</sup> concludes that RFRA would expand substantive Free Exercise claims by allowing plaintiffs to argue that any activity motivated by religious belief, as opposed to compelled by religious belief, can obtain the protection of the Free Exercise clause.<sup>2</sup> Thus, a woman claiming a Free Exercise right to abortion would not have to establish that abortion in her circumstances is compelled as a matter of religious belief, but merely that the choice of abortion is motivated by religious belief. Bopp and Coleson document the positions of a wide range of religious sects which could support an individual woman's claim that abortion in her case is motivated by conscientious reflection upon her religious beliefs in light of her situation.<sup>3</sup>

Abortion rights plaintiffs must currently meet the Harris standard of "compulsion" in order to have standing to make a Free Exercise claim. Are Bopp and Coleson correct in asserting that, under RFRA, plaintiffs would only have to meet the standard of "motivation"?

Previous texts of RFRA suggested that this would be the case. For example, the draft analyzed by Bopp and Coleson included a finding that "governments should not burden conduct motivated by religious belief without compelling justification."<sup>4</sup> However, H.R. 2797 changes this finding: "governments should not burden religious exercise without compelling justification." Sec. 2(a)(3). The substantive provisions of RFRA state in part: "Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability. . . ." Sec. 3(a).

This language prompts a critical question: Does "exercise of religion" under RFRA mean anything different from "exercise of religion" under the Free Exercise clause? The text of RFRA does not address this question. One cannot know the legislative history in advance of hearings and floor debate. However, published commentary from key supporters of RFRA indicates that the contemplated standard for pleading "exercise of religion" is

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<sup>1</sup>. "Why the Religious Freedom Restoration Act Needs An Abortion-Neutral Amendment," March 27, 1991, at 8-15.

<sup>2</sup>. Bopp and Coleson, March 27, 1991, at 13-15.

<sup>3</sup>. Id. at 16-21.

<sup>4</sup>. Id. at 14.

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not the "compulsion" standard set forth in Harris v. McRae, but rather, something closer to the "religiously-motivated" standard indicated in the earlier drafts of RFRA.<sup>5</sup> The breadth of activity that would be considered "religious exercise" under RFRA, therefore, is uncertain.

One thing about RFRA, however, is certain. It is a remedial statute, drafted to promote an expansive protection of the exercise of religion. Thus, when some RFRA proponents argue that the Supreme Court will not permit the statute to be invoked to protect abortion rights, caution is in order. The experience of the Racketeering Influenced and Corrupt Organizations Act (RICO) is instructive. Many authorities, including some federal appellate courts, asserted that RICO should not be broadly applied to, for example, legitimate businesses. The Supreme Court, however, has expressly rejected such attempts to limit private rights of action under RICO. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); H.J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989). As stated in Sedima, "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." 473 U.S. at 499.

Because of the potential for a similar broad reading of RFRA, and because of the clear intent of some advocates of RFRA to make abortion rights claims under RFRA once it is enacted, RFRA should be amended to exclude such claims. The pro-life cause should not be asked to give the benefit of the doubt on this point, or to rest assured that RFRA will ultimately be construed not to protect abortion rights. It may be politically inconvenient for pro-lifers to insist on an abortion neutralization amendment to RFRA, but it is hardly impertinent that they do so.

### III. THE COMPELLING STATE INTEREST STANDARD

RFRA is most pointedly directed at changing the burden of proof which a governmental party must meet in order to defeat a claim that government law or action infringes the exercise of religion. In Employment Division v. Smith, the Supreme Court held that governments must merely show a rational relationship between the law in question and a legitimate government interest. Under RFRA, governments would be held a higher standard: that the interest being protected by the challenged law or action is "compelling," and that the law or action is narrowly tailored to meet that interest.

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<sup>5</sup>. See discussion in Bopp and Coleson at p. 14-16.

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Thus, if a RFRA plaintiff claimed that a decision to abort a pregnancy is a "religious exercise," a state defending a challenged restriction on abortion would have to prove that the restriction is supported by a compelling interest, and that it is narrowly tailored to serve that interest.

Under current law, the state's interest in the unborn child is not deemed compelling until the point of fetal viability. Many predict that the current Supreme Court will find the interest to be compelling throughout pregnancy, thus overturning a significant holding of Roe v. Wade, 410 U.S. 113 (1973). Proponents of RFRA argue that an abortion-neutralization amendment is therefore not required because states would be able to meet the compelling state interest standard in a post-Roe v. Wade environment.

While pro-lifers hope for a sweeping ruling that will render the state interest in the unborn compelling in all cases of pregnancy, it cannot be predicted when, if ever, such a ruling would issue. Intermediate steps may be taken by the Court, essentially holding that the state interest is compelling only if certain circumstances are met, e.g., the pregnancy is of a healthy child, not conceived in rape or incest, and there is no threat to the life or health of the mother. Absent an established ruling on the question, therefore, the status of the state interest in the unborn will be open to continual litigation in cases brought under RFRA.

Our conclusion, therefore, is similar to that in the previous section: ambiguity regarding the status of abortion claims under RFRA should be addressed on the face of the statute by precluding such claims.

#### IV. THE MULTIPLICATION OF LITIGATION FACTOR

No opinion reversing Roe v. Wade, no matter how strongly phrased, will terminate litigation of abortion rights claims. Even though Roe is still considered "the law of the land" by every federal court which has reviewed a post-Webster abortion statute, plaintiffs in these cases aggressively seek to rest the abortion right on other grounds, including equal protection, free exercise, and establishment of religion. They are anticipating, in other words, the day when the doctrines of Roe will no longer support their claims, and they are looking for other doctrines that will do so. The pleadings on file in cases such as Sojourner T. v. Roemer (Louisiana), Jane L. v. Bangerter (Utah), and Guam Society of Ob./Gyn. v. Ada illustrate the likely future of abortion rights litigation.

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No one should be cavalier about the difficulty that such claims will present to the interests of the unborn. It may seem unlikely that the Supreme Court will discard one constitutional doctrine supporting abortion rights, only to pick up another one, such as equal protection or free exercise. It is far more likely, however, that all federal courts, including the Supreme Court, would look differently at a statutory claim, such as one under RFRA. Groups such as the Religious Coalition for Abortion Rights have already stated their clear opinion that the right to abortion would be protected under RFRA. However, even more neutral participants in the coalition supporting RFRA have stated that they want to preserve the possibility that such claims could be brought, without stating what the outcome should be. This is tantamount to an admission that RFRA could be employed in virtually wide-open fashion to litigate abortion rights claims.

Regardless of the outcome of such litigation, the burden of potential lawsuits under RFRA will effectively deter the enactment and/or enforcement of laws protecting the unborn. And there is great danger that such litigation will hew a new path in the law that may be successfully followed by a significant number of abortion rights litigants.

Finally, RFRA claims may be litigated in state courts, several of which have proven even more friendly to pro-abortion claims than the Supreme Court. See Linton, Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis, 67 U. Det. L. Rev. 157, 236-253 (1990). The interpretation of RFRA by state courts would not be ultimately binding, i.e., the losing party could appeal to the U.S. Supreme Court, but they would be binding in a particular case, and a particular state, until reversed by the Supreme Court.

#### CONCLUSION

Pro-life concern over the use of RFRA to argue for abortion rights is controversial because it is seen to impede prospects for quick passage of RFRA. Pro-lifers, however, did not create this issue, nor the impasse that has resulted. Greater responsibility must lie with those who have aggressively pursued "abortion as free exercise" claims under the First Amendment, and who have promised to wield RFRA as a means of strengthening such claims in the future. Assuming that RFRA is a necessary means to repair damage to free exercise rights sustained by the Smith decision -- an issue on which Americans United for Life does not take a position -- we regret that the issue of abortion may slow its enactment. However, it would be irresponsible on the part of all parties not to address the problem of abortion in the course of debating RFRA.

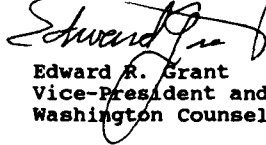
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We agree with the United States Catholic Conference, the National Right to Life Committee, and others that abortion rights claims should be excluded under RFRA. The ambiguity and uncertainty over the status of abortion claims under RFRA will not be resolved by half-measures such as a rehearsed colloquy in floor debate, or committee report language. The clarification should be made in the text of the statute.

A final concern is whether, by raising the issue so directly, pro-lifers risk adverse results in litigation should their effort to amend RFRA fail. This concern is real, and should be considered carefully by those who will shepherd the amendment through the legislative process. We suggest that arguments on how RFRA might be interpreted to support abortion rights be carefully phrased so as not to acknowledge the legitimacy of such arguments. In other words, pro-lifers who support amendment of RFRA should not embrace interpretations of RFRA that will come back later to haunt them. We believe that the more conservative interpretations offered by those pro-lifers who discount the need for amending RFRA should prevail in future litigation; we are just not as confident that they will prevail. The issue and its attendant controversy should be set aside through direct amendment of RFRA.

Please do not hesitate to contact this office if you have any further questions on this matter.

Very truly yours,



Edward R. Grant  
Vice-President and  
Washington Counsel

cc: Guy M. Condon  
Clarke D. Forsythe



June 14, 1991


Mr. Douglas Johnson  
National Right to Life Committee  
419 7th Street, N.W., Suite 500  
Washington, DC 20004-2293

Dear Doug :

This is to inform you that the Family Research Council is withdrawing from the coalition in support of the Religious Freedom Restoration Act.

While we remain committed to religious freedom, the recent controversies about the impact of the RFRA on the abortion issue have given us second thoughts about the feasibility of a statutory "fix" for the problems potentially caused by Employment Division v. Smith.

Sincerely,

  
Gary L. Bauer  
President





## PROPOSED COMMITTEE REPORT LANGUAGE

The purpose of the Religious Freedom Restoration Act is to restore the compelling governmental interest test as enunciated in Sherbert v. Verner (1963) and Wisconsin v. Yoder (1972) and to require its application in all cases where the free exercise of religion is burdened by government -- nothing more, nothing less. Although the Act would apply the familiar compelling governmental interest test to all instances in which religious exercise is burdened, it is not intended to radically rework the nature of Free Exercise litigation from what it was before the Smith decision.

As was the case before Smith, litigation under the Religious Freedom Restoration Act would be essentially individualized. The question to be decided in cases brought under the Act is whether an individual or institution has a right to be free of a particular facially neutral law, regulation or practice which, as applied, burdens religious practice, not can this law, regulation or practice have any valid application. A facially neutral law, regulation or practice challenged under RFRA will remain valid in general. However, unless government satisfies the requirements of §3(b), a law which, as applied, interferes with religious practice, cannot be enforced against a person whose religious beliefs are burdened by it.

Mere disagreement with a policy of government would not state a claim under RFRA. For example, a person who objects, for religious reasons, to the very existence of government-sponsored welfare programs, could not invoke RFRA to challenge the program's existence; a person could attempt to invoke RFRA if required to participate in such a program. Likewise, RFRA could not be invoked to challenge the bare existence of restrictive or permissive abortion laws, but it could be invoked by persons who for religious reasons wish to obtain, or not participate in, abortions where a law imposed contrary restrictions or obligations. And RFRA could not be invoked to challenge the existence of zoning laws, but could be used to challenge their application to churches.

The compelling interest test would apply across the spectrum of potential Free Exercise claims, including, to use some recently litigated examples, excusal from school tests scheduled on religious holidays, regulation of religious institutions, access to government benefit programs, entitlement to government benefits, regulation of the employment practices of religious institutions, and the landmarking of church buildings. The list, of course, is not exhaustive. Every claim of interference with religion would be scrutinized under the standards of §3(b).

Enactment of the Religious Freedom Restoration Act is intended only to prescribe a standard Congress believes can and ought to be applied by the judiciary. Enactment would not

resolve any specific case. It is to clarify this point that § 3(c) has been included in the Act. This section explicitly disclaims any claim that Congress has determined that some practice does or does not meet the compelling interest standard of § 3(b). Because the compelling governmental interest test is so fact dependent, it is appropriate that the courts, rather than the legislature, apply the test to specific claims, giving due regard to the facts and circumstances of the particular case.

It is conceivable that a practice in which government once had a compelling interest, will, due to changes in legal, social, scientific, cultural or other circumstances no longer pass muster under that test. Conversely, a practice in which government does not presently have a compelling interest may later meet that test due to changes in legal, social, scientific, cultural or other circumstances.

NOT SHEN OR APPROVED BY  
CONGRESSMAN SOLARS OR  
REPRESENTATIVE X

PROPOSED COLLOQUY  
ON  
ABORTION AND THE RELIGIOUS FREEDOM RESTORATION ACT

**Representative X:** Some in the pro-life movement are concerned that this bill would legalize abortion. Is that true?

**Congressman Solars:** No. The Religious Freedom Restoration Act is scrupulously neutral on that subject, as well as all other specific disputes. The Act will not advantage either pro-life or pro-choice positions on abortion.

**Representative X:** The National Right To Life Committee claims that by enacting this Act when Roe v. Wade has not been overruled, Congress would be endorsing the compelling interest analysis of Roe v. Wade. Am I correct that § 3(c) is intended to preclude the argument that the compelling interest analysis of Roe v. Wade or any other case is endorsed or rejected by this legislation?

**Congressman Solars:** Yes. As you point out, § 3(c) states explicitly that Congress is not determining that any particular interest is or is not compelling. I would also call the House's attention to a letter signed by three leading academic experts on church/state relations; Professors Michael McConnell and Douglas Laycock and Dean Edward Gaffney, who concluded that "it would be contrary to established principles of statutory interpretation to interpret a statute that does not even mention abortion as codifying the then-current law of abortion, especially when pro-life as well as pro-choice legislators are among the proposed statute's prominent supporters."

**Representative X:** So the Religious Freedom Restoration Act would leave abortion claims subject to the same standard applicable before the Supreme Court decided the Smith case.

**Congressman Solars:** Precisely. And that standard would also apply to claims by medical personnel and others who are forced by law to participate in an abortion or other medical procedure to which they object on religious grounds.

May 9, 1991

mds/drs

**BILL TO RESTORE RELIGIOUS GUARANTEES  
FACES FIGHT FROM ANTI-ABORTION GROUPS**  
By Howard Rosenberg

WASHINGTON, July 3 (JTA) -- A bill intended to make it tougher for states to enact laws that could infringe on religious liberties has run into opposition from anti-abortion groups.

The bill, introduced in the House of Representatives last week with broad support from Jewish groups, is intended to circumvent a U.S. Supreme Court ruling last year that said states no longer had to demonstrate a "compelling interest" before enacting laws that might bar certain religious practices.

Jewish groups fear the April 1990 ruling could permit states to outlaw such religious practices as the drinking of Sabbath wine by minors or the wearing of kippot by children in the public schools.

The Religious Freedom Restoration Act of 1991, which is expected to be introduced in the Senate later this month, would again require states to show that laws impinging on religious freedom serve a necessary state interest.

Jewish groups consider the bill the most important religious liberty legislation ever to come before Congress.

When a similar bill was introduced in Congress last July, it immediately gained the support of a wide array of groups, from the secular People for the American Way to the National Association of Evangelicals.

But now so-called pro-life groups are concerned that the "compelling state interest test" could be used to overturn state laws regulating abortion, on the grounds that they would violate a woman's religious right to have an abortion.

These opponents of the bill, which include the National Right to Life Committee, the U.S. Catholic Conference and key anti-abortion lawmakers, cite a 1979 decision by a federal district court judge in Brooklyn that struck down an anti-abortion law on religious liberty grounds.

In *Harris vs. McRae*, the Brooklyn court struck down the Hyde Amendment, which barred the use of federal funds for abortion except in cases of race, incest or endangerment to the life of the mother. But the Supreme Court later overturned the decision.

While the Catholic Conference is against any law that could invalidate legislation curbing abortion rights, it supports a legislative mechanism for guaranteeing that laws do not impose undue hardship on individual religious practices.

ENCL. A

The conference is suggesting that the House bill be amended to exempt abortion laws from having to meet the "compelling interest" test.

But the bill's sponsor, Rep. Stephen Solarz (D-N.Y.), recently argued that if such a provision were incorporated, the coalition that supports the proposed legislation would "come apart, and we wouldn't be able to pass the bill."

Neither the American Jewish Committee nor the American Jewish Congress expressed any interest in backing such a modification, even if it meant ensuring passage of the bill.

Mark Pelavin, AJCongress Washington representative, said he "can't think of anything more inconsistent with religious liberties" than to divide religious freedom guarantees in that manner.

Samuel Rabinove, legal director of the AJCommittee, said his group would oppose a distinction between anti-abortion laws and other legislation.

A woman's desire to have an abortion for religious reasons is "a matter of religious belief and conviction" equal to other free-exercise interests that an individual has, he argued.

The House bill has 41 co-sponsors besides Solarz, 35 of whom are Democrats. Key opponents include Reps. Henry Hyde (R-Ill.), for whom the Hyde Amendment is named, and Paul Henry (R-Mich.), one of the original bill's co-sponsors.

The Senate bill will be introduced by Sens. Joseph Biden (D-Del.) and Orrin Hatch (R-Utah).

JTA END