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## Holier Than Thou: Attacking the Constitutionality of State Religious Freedom Legislation

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# HOLIER THAN THOU: ATTACKING THE CONSTITUTIONALITY OF STATE RELIGIOUS FREEDOM LEGISLATION

## I. INTRODUCTION

Over the past few years, a small number of states have either passed, or attempted to pass, legislation that would allow individuals to exempt themselves from generally applicable laws that conflict with the dictates of their religion.<sup>1</sup> The California legislature, for example, in its 1997-98 term, passed a bill known as the “Religious Freedom Protection Act.”<sup>2</sup> Were it not for Governor Wilson’s veto,<sup>3</sup> this bill would have provided a defense to any law that substantially interfered with an individual’s right to the free exercise of religion.<sup>4</sup> Furthermore, this defense could only have been overcome if the government could demonstrate that the challenged law satisfied what is known as the “strict scrutiny,” or “compelling interest,” test.<sup>5</sup> Once referred to by the United States Supreme Court as “the most demanding test known to constitutional law,”<sup>6</sup> the strict scrutiny test requires a showing that a challenged law is justified by a “compelling interest,” and that the law achieves this interest through the least restrictive means available.<sup>7</sup> The harshness of this test has earned it

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1. *See, e.g.*, Religious Freedom Protection Act of 1998, FLA. STAT. ANN. §§ 761.01–.05 (West 1998); Proposed Alabama Religious Freedom Amendment, 1998 Ala. Acts 98-409; Religious Freedom Protection Act, A.B. 1617, 1997-98 Legis., Reg. Sess. (Cal. 1997).

2. A.B. 1617, 1997-98 Legis., Reg. Sess. (Cal. 1997).

3. *See* A.B. 1617, 1997-98 Legis., Reg. Sess. (Cal. 1997) Veto Message (visited Jan. 21, 1998) <[http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_1617&sess=PREV&house=B](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_1617&sess=PREV&house=B)>.

4. *See* A.B. 1617 § 6400(b)(2) (Cal. 1997).

5. *See id.* § 6400(b)(1) (referring to the test as the “compelling interest” test).

6. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

7. *See Bernal v. Fainter*, 467 U.S. 216, 227 (1984).

the reputation of being “‘strict’ in theory . . . [yet] fatal in fact.”<sup>8</sup> Despite this reputation, however, the California legislature would have it apply in the context of *any* challenge to *any* law that allegedly placed a burden on an individual’s religious liberty.<sup>9</sup>

Legislation similar to California’s Religious Freedom Protection Act has been successfully passed in a number of states, and still other states continue to debate whether they should follow suit.<sup>10</sup> Like the California bill, this legislation applies, or would apply, the strict scrutiny test to any law that is shown to place a burden on the free exercise of an individual’s religion.<sup>11</sup> The striking similarity of form between the states’ respective statutes is attributable to the fact that each was patterned after Congress’s ill-fated Religious Freedom Restoration Act (RFRA).<sup>12</sup> RFRA was the first statute to require use of the strict scrutiny test in the context of free exercise challenges to generally applicable laws. Passed by Congress in 1993, the Act was a direct response to the United States Supreme Court’s decision in *Employment Division, Department of Human Resources v. Smith*,<sup>13</sup> where the Court specifically declined to use the test in that context.<sup>14</sup> Four years after RFRA’s passage, the Court struck down the Act as an unconstitutional violation of the principles of federalism and

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

9. See A.B. 1617 § 6400(b).

10. Compare Religious Freedom Protection Act, A.B. 1617, 1997-98 Legis., Reg. Sess. (Cal. 1997), with Religious Freedom Protection Act of 1998, FLA. STAT. ANN. §§ 761.01–.05 (West 1998), and Proposed Alabama Religious Freedom Amendment, 1998 Ala. Acts 98-409.

11. See, e.g., Religious Freedom Protection Act of 1998, FLA. STAT. ANN. § 761.03 (1998); Proposed Alabama Religious Freedom Amendment, 1998 Ala. Acts 98-409, § V(a).

12. 42 U.S.C. § 2000bb (1994) (invalidated in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

13. 494 U.S. 872 (1990). For the proposition that RFRA was passed in response to *Smith*, see 42 U.S.C. § 2000bb(a)(4) (citing *Smith* as “virtually eliminat[ing] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”). See also *Free Exercise of Religion: Hearing on A.B. 1617 Before the Assembly Comm. on the Judiciary*, 1997-98 Legis., Reg. Sess. 6 (Cal. 1998) [hereinafter *Hearing on A.B. 1617*] (stating that RFRA was passed in “direct response” to *Smith*).

14. *Smith*, 494 U.S. at 878-82.

separation of powers.<sup>15</sup> As a result, those state leaders who felt that Congress was correct in passing RFRA were forced to create religious freedom legislation of their own.

This Comment will analyze the implications of permitting individual states to pass religious freedom legislation similar to RFRA. Part II will focus on some of the practical considerations that counsel against passage of such laws, and Part III will recount the historical development of such legislation on both the federal and state level. Part III will also give a synopsis of some of the major arguments that have been put forth by the legislation's proponents. Finally, Part IV will address a specific constitutional challenge to religious freedom legislation under the First Amendment's Establishment Clause.

The ultimate purpose of this Comment is to demonstrate that the Supreme Court has both the ability and the desire to strike down religious freedom legislation. This desire is evidenced not only by dicta in the controversial *Smith* decision but also by undercurrents in the more recent case of *City of Boerne v. Flores*, where the Court struck down RFRA.<sup>16</sup> While it may be possible to interpret *Boerne* as giving the states free reign to pass religious freedom legislation of its own (since the basis of the *Boerne* holding applied only to the Federal Congress),<sup>17</sup> this Comment will show that such a result was not, in fact, the Court's intention.

## II. PRUDENTIAL CONCERNS

In modern America, diversity—whether it is racial, ideological, or religious—is encouraged. According to Justice Scalia's opinion in *Smith*, “we are a cosmopolitan nation made up of people of almost every conceivable religious preference, . . . and . . . we value and protect that religious divergence.”<sup>18</sup>

In a society as admittedly heterogeneous as our own, passage of religious freedom legislation such as RFRA or California's Religious Freedom Protection Act raises an important concern—namely, what would be the scope of its effect? In other words, how many people

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15. See *Boerne*, 521 U.S. 507 (1997).

16. See *id.*

17. See *infra* Part III.D.

18. *Smith*, 494 U.S. at 888 (quoting *Braunfield v. Brown*, 366 U.S. 599, 606 (1961) (plurality opinion)).

would claim exemption from how many laws? On a more alarming note, how many new and heretofore unheard of "religions" would crawl out of the woodwork to jump on the bandwagon of legal immunity? The answers cannot be known, but the simple fact that religious freedom legislation like RFRA is on the books causes the imagination to spin with thoughts of the potential limitless expanses to which it could be taken.

For example, imagine a member of a religious cult that believes in human sacrifice. (Sure, it sounds absurd, but the founder of Jonestown did not think it was too far outside the realm of possibilities.) Would that member be able to claim exemption from murder laws? The proponents of religious freedom legislation would maintain, "Of course not—the regulation of murderers is certainly a compelling interest that would outweigh any assertion of this so-called 'religious freedom.'" But that still would not answer the question, which is, Would the member be able to even make the claim? If the answer to this question is "yes," then it seems that religious freedom legislation would certainly have unlimited applicability.

If that is the case, then what might become of some of our "less compelling" laws? Anyone with a conscientious eye towards the maintenance of societal order would be justifiably concerned about the extent to which people could successfully claim legal exemptions under religious freedom laws. After all, if they were not foreseen to have a definable impact on the ability of individuals to practice their religions without state interference, then why pass them? The speed alone with which Congress passed RFRA after the Supreme Court's decision in *Smith* belies any assertion that the law was not intended to have far-reaching effects.<sup>19</sup>

The Supreme Court itself has expressed concern with the potential scope of religious freedom laws.<sup>20</sup> Also, it has pointed to other prudential concerns that counsel against their passage, including the inappropriateness of giving the judiciary the task of determining what is important to a given religion.<sup>21</sup> Each of these issues represents a valid basis for rethinking this modern legislative approach

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19. *Smith* was decided in April of 1990. RFRA was passed only three years later in November of 1993.

20. See, e.g., *Smith*, 494 U.S. at 888-89.

21. See *id.* at 886-87.

to religious freedom jurisprudence. This Comment discusses the Court's analysis of these factors more fully in Part III.<sup>22</sup>

### III. HISTORY OF THE RELIGIOUS FREEDOM ACTS

#### A. *The Concerns That Led to RFRA's Passage*

Before Congress passed its Religious Freedom Restoration Act, there had been an outpouring of concern from scholars and religious groups about the ability of government to infringe upon the religious liberty of its constituents under the guise of representing the interests of the majority.<sup>23</sup> According to some, the recent Supreme Court decision in *Smith* marked the end of religious freedom.<sup>24</sup> "Religious minorities would be destroyed . . . [and] the devout would be forced to choose between fidelity to their beliefs and bowing to Caesar. The images were grim indeed."<sup>25</sup>

The spark that set these concerns ablaze was a series of decisions by the United States Supreme Court. The first of these was *Employment Division v. Smith*,<sup>26</sup> where the Court held that the strict scrutiny test was inappropriate in the context of religious freedom

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22. In addition to the Supreme Court, some legal scholars have stated their own concerns regarding the possible effects of religious freedom laws. See, e.g., David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119, 143 (1995) (stating that "[m]y practical concern is that those most in need of RFRA, the adherents of the socially peripheral, marginalized, and disfavored religions and sects, will be ground under in the secular workplace by their majoritarian religious co-workers").

23. See Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 235 (1998) (discussing the concerns that arose as a result of the *Smith* decision).

24. See *id.*

25. *Id.* (citing Janet V. Rugg & Andrea A. Simone, Comment, *The Free Exercise Clause: Employment Division v. Smith's Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL COMMENT 117, 141 (1990); Gregory D. Wellons, Note, *Employment Division, Department of Human Resources v. Smith: The Melting of Sherbert Means a Chilling Effect on Religion*, 26 U.S.F. L. REV. 149, 173 (1991); Rashelle Perry, Note, *Employment Division, Department of Human Resources v. Smith: A Hallucinogenic Treatment of the Free Exercise Clause*, 17 J. CONTEMP. L. 359, 376 (1991)); see also Gregory, *supra* note 22 (discussing the negative impact of the *Smith* decision on religious harassment in the workplace).

26. 494 U.S. 872 (1990).

claims. The next decision was *City of Boerne v. Flores*,<sup>27</sup> where the Court struck down Congress's legislative attempt to reestablish the test in that context. The reasoning behind these decisions will be the focus of the remainder of this Part.

### B. Smith

The origins of religious freedom legislation can be traced to the Supreme Court's controversial decision in *Employment Division v. Smith*.<sup>28</sup> That case involved a denial of unemployment benefits to two members of the Native American Church because of their sacramental use of peyote, a controlled substance in the state of Oregon, where the case originated.<sup>29</sup> The defendants claimed that the denial of benefits was an infringement of their right to the free exercise of religion, protected by the First Amendment of the United States Constitution.<sup>30</sup> The Supreme Court disagreed, ruling that individuals cannot claim exemptions from generally applicable laws simply because the laws conflict with their religious practices.<sup>31</sup>

Most of the Court's opinion in *Smith* was dedicated to explaining why it would be inappropriate to use the strict scrutiny test against generally applicable laws that burden an individual's right to the free exercise of religion.<sup>32</sup> The Court stated that the use of such a burden as a proxy for a religion-neutral law's invalidity would be "a constitutional anomaly,"<sup>33</sup> and "would be courting anarchy,"<sup>34</sup> particularly in a society as religiously diverse as ours.<sup>35</sup> Yet, despite the Court's apparent conviction that the use of strict scrutiny in this context represented a constitutional violation, the Court supported this proposition with no explanation or citation to the Constitution

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27. 521 U.S. 507 (1997).

28. 494 U.S. 872 (1990).

29. *See id.* at 874.

30. *See id.*

31. *See id.* at 878-82.

32. Strict scrutiny, the Court noted, would require that a challenged law be justified by a compelling state interest and that it be the least discriminatory means of achieving that interest. *See id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

33. *Id.* at 886.

34. *Id.* at 888.

35. *See id.*

whatsoever. In fact, the Court's conclusion was ultimately based more on prudential concerns than anything else. Specifically, the Court focused on the variety of laws that could be challenged<sup>36</sup> on similar free-exercise grounds and on the impracticality of charging a court with the duty of determining which practices are truly important to particular religions.<sup>37</sup> Thus, although the Court's instinct led it to the conclusion that, *for constitutional reasons*, the strict scrutiny test did not belong in the context of free exercise vindication, one who truly searches for the constitutional underpinnings of the *Smith* holding is left with only the weak foundation that the Court thought it was a bad idea. Ultimately, after stating that the use of strict scrutiny would "contradict[] both constitutional tradition and common sense,"<sup>38</sup> the Court went on to explain itself only with regard to the latter.

In attempting to distinguish its *past* use of the strict scrutiny test in the free exercise context, the Court fared only slightly better. The primary case relied on by the defendants to illustrate this past use was *Sherbert v. Verner*.<sup>39</sup> In *Sherbert*, a member of the Seventh Day Adventist Church was denied unemployment benefits after being fired from her job for refusing to work on Saturdays—a refusal required by her religion.<sup>40</sup> Despite the striking similarity of facts between *Sherbert* and *Smith*, the Court in *Sherbert* applied strict scrutiny and found in favor of the Seventh Day Adventists.<sup>41</sup> The *Smith* Court distinguished *Sherbert* by stating that the "good cause" requirement of the benefits system involved in that case enabled the decision-making body to make individualized determinations of eligibility.<sup>42</sup> Under such a system, the Court stated, "religious hardship" could not be excluded as a form of good cause without compelling justification.<sup>43</sup> *Smith*, meanwhile, involved a denial of

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36. *See id.* at 888-89 (noting that use of the compelling interest test in this context could bring religious exercise into conflict with child neglect laws, environmental protection laws, discrimination laws, and others).

37. *See id.* at 886-88.

38. *Id.* at 885.

39. 374 U.S. 398 (1963).

40. *See id.* at 399-401.

41. *See id.* at 402-03, 410.

42. *See Smith*, 494 U.S. at 884.

43. *See id.*

benefits based on the violation of a generally applicable *criminal* law, where no individualized determinations regarding the validity of religious practices were involved.<sup>44</sup> According to the Court, this distinction was crucial to whether or not the strict scrutiny test should be applied.<sup>45</sup> Yet, this explanation did not save the Court's reasoning, for the Court subsequently admitted applying the strict scrutiny test in the past to criminal laws that were challenged on free exercise grounds.<sup>46</sup> The Court excused such past indiscretions, however, by stating that it had at least "never applied the test to invalidate [such a law]."<sup>47</sup>

It is noteworthy that much of the reasoning of *Smith's* lead opinion, authored by Justice Scalia, was not supported by a substantial number of the Court's members. Justices Blackmun, Brennan, and Marshall dissented,<sup>48</sup> while Justice O'Connor concurred.<sup>49</sup> Each of these justices disagreed with the majority's refusal to apply the strict scrutiny test in the free exercise context.<sup>50</sup> They based this disagreement primarily on a contrary reading of precedent,<sup>51</sup> with the three dissenters compiling a sizable list of cases that seemed to readily support their conclusion.<sup>52</sup>

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44. *See id.*

45. *See id.*

46. *See id.* at 884-85 (admitting that in both *United States v. Lee*, 455 U.S. 252 (1982), and *Gillette v. United States*, 401 U.S. 437 (1971), the Court applied the test in the free exercise context).

47. *Id.* at 885.

48. *See id.* at 907.

49. *See id.* at 891.

50. *See id.* at 891-903, 907-09.

51. *See id.*

52. *See id.* at 907 n.1 (citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden"); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (state laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *Bowen v. Roy*, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part) ("Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption"); *United States v. Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"); *Thomas v. Review Bd. of Ind.*

To the extent that the majority failed to adequately address these precedential arguments, O'Connor and the three dissenters likewise failed to adequately address the majority's more practical concerns regarding the effects of using strict scrutiny in the free exercise context. For example, in his opinion for the majority, Scalia discussed how such a use of the strict scrutiny test would be equivalent to "courting anarchy."<sup>53</sup> Specifically, the Justice feared the potential scope of the Religious Freedom Restoration Act, stating that in a society as religiously diverse as ours, "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."<sup>54</sup> Scalia then listed a number of laws that, he feared, could have been successfully challenged under RFRA, such as tax laws, environmental protection laws, animal cruelty laws, laws prohibiting racial discrimination, and even manslaughter and child neglect laws.<sup>55</sup> In addition, Scalia pointed to the inappropriateness of charging judges with the task of determining just what is "central" to a given religion,<sup>56</sup> as would be required if there were to be any limit to RFRA's use. The Justice stated that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."<sup>57</sup>

O'Connor's concurrence responded to Scalia's concerns by merely labeling them a "parade of horrors."<sup>58</sup> Yet, like Scalia's

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*Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (question is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right") as support for the proposition that strict scrutiny applies to all statutes that burden the free exercise of religion).

53. *Id.* at 888.

54. *Id.* (emphasis in original).

55. *See id.* at 888-89.

56. *See id.* at 886-87.

57. *Id.* at 887 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)).

58. *Id.* at 902 (O'Connor, J., concurring).

assertion that RFRA would create a "constitutional anomaly,"<sup>59</sup> O'Connor failed to support her ultimate assertion that "courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."<sup>60</sup> The three dissenting Justices, meanwhile, did not even respond to Scalia's concerns.<sup>61</sup>

One observation regarding the merits of the holding in *Smith* is worth mentioning. In her concurrence, Justice O'Connor lists a number of cases cited by the majority and states that although the constitutional claims in those cases were unsuccessful, the cases nevertheless involved use of the strict scrutiny test to reach that result.<sup>62</sup> The cases cited involved "compelling" state interests in the form of "regulating children's activities," an "interest in [a] uniform day of rest," an "interest in military affairs," and an "interest in [a] comprehensive Social Security system."<sup>63</sup> Also, although Justice O'Connor applied the strict scrutiny test to the law challenged in *Smith*, she nonetheless held the law invalid along with the majority.<sup>64</sup>

These facts point to a possible unspoken justification for the majority's holding in *Smith*: Since, in the context of religious freedom claims against generally applicable laws, the Court has in the past applied such a low threshold for establishing a compelling interest, why have the requirement at all? In other words, perhaps the majority of the Court simply realized, after perusing the free exercise jurisprudence, that they had all along only been paying lip service to this usually ultra-strict requirement. After all, for a test that has adopted the reputation of being "'strict' in theory . . . [yet] fatal in fact,"<sup>65</sup> it seems like a state would be getting off easy if it could justify its law with an interest in "regulating children's activities" or in "a uniform day of rest." Compared to its use in other contexts, this

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59. *Id.* at 886.

60. *Id.* at 902 (O'Connor, J., concurring).

61. *See id.* at 907-21 (Blackmun, J., dissenting).

62. *See id.* at 896-97 (O'Connor, J., concurring).

63. *Id.* at 896 (citing *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944); *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961) (plurality opinion); *Gillette v. United States*, 401 U.S. 437, 462 (1971); and *United States v. Lee*, 455 U.S. 252, 258-59 (1982), respectively) (O'Connor, J., concurring).

64. *See id.* at 903-07 (O'Connor, J., concurring).

65. Gunther, *supra* note 8, at 8.

would be considered a low threshold indeed.<sup>66</sup> If the Court is thus prepared to reduce the strict scrutiny test to a mere moniker with no real bite, it should be equally prepared, and equally justified, to dismiss the test altogether.

### C. *From Smith to RFRA*

The *Smith* decision was met with a considerable amount of scholarly criticism, much of which focused on the Court's apparent disregard for what many believed to be the most sacred of rights protected by the Constitution—namely, the free exercise of religion.<sup>67</sup> One of the Court's strongest critics was Congress itself, which responded to *Smith* with RFRA.<sup>68</sup> In direct opposition to the Court's holding in *Smith*, RFRA required both federal and state governments to prove that "laws 'neutral' toward religion"<sup>69</sup> are justified by a compelling interest and are the least discriminatory means of achieving that interest whenever those laws are shown to "substantially burden" religious exercise.<sup>70</sup>

### D. *From RFRA to Boerne to State Religious Freedom Laws*

Despite initial enthusiasm regarding RFRA's passage, fueled in part by the embellishment of governmental oppression of religion

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66. Compare the interests found to be compelling in the cases cited by O'Connor to those found *not* to be sufficiently compelling in *Palmore v. Sidoti*, 466 U.S. 429 (1984) (the best interests of a child in avoiding the societal stigma caused by the interracial marriage of her parents), and *Craig v. Boren*, 429 U.S. 190 (1976) (the reduction of alcohol-related traffic accidents). Although these cases involve countervailing personal interests protected by the Equal Protection Clause, rather than the Free Exercise Clause, the difference in state success rates in the two contexts highlights the lower threshold for "compelling interests" in the latter.

67. See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 11; Kenneth Marin, Note, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1431 (1991); Karin M. Rebesch, Note, *The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test*, 69 N.C. L. REV. 1332, 1353 (1991).

68. See *supra* note 13.

69. 42 U.S.C. § 2000bb(a)(2) (1994).

70. See *id.* § 2000bb(b).

that was necessary to bring the passage about,<sup>71</sup> the Act led a short and not-so-glorious life. As noted in Part I, the Supreme Court eventually struck down the Act less than four years after its passage. Prior to that time, however, it was used in a number of contexts, some seemingly appropriate and others somewhat less in keeping with its originally exalted conception.<sup>72</sup> Some examples of the laws challenged under RFRA and the circumstances under which the challenges were made include *Hunt v. Hunt*,<sup>73</sup> where a father used RFRA to remove himself from the obligation to pay child support; *Cheema v. Thompson*,<sup>74</sup> where school children, after a successful RFRA challenge, were permitted to wear daggers to school for religious reasons; and *United States v. Gonzales*,<sup>75</sup> where RFRA exempted a Native American from prosecution under endangered species laws for the killing of a bald eagle. In addition to these cases, RFRA was also used extensively in the prison context.<sup>76</sup> Of such claims, only about ten percent were successful,<sup>77</sup> and successes usually involved such liberties as the ability of inmates to wear religious symbols and to wear their hair at certain lengths.<sup>78</sup>

RFRA eventually reached the U.S. Supreme Court in *City of Boerne v. Flores*.<sup>79</sup> In that case, a Catholic Archbishop in Texas used RFRA to challenge a local zoning ordinance that prohibited him from enlarging his church.<sup>80</sup> The Court dismissed the Archbishop's claim and declared RFRA unconstitutional, stating that Congress, in enacting the religious freedom law, had exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment.<sup>81</sup>

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71. See *supra* Part III.A.

72. For an extensive overview of the number and types of cases involving RFRA challenges, see Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 802-08 (1998) (noting that, of the 168 cases involving such challenges, less than seven percent concluded with a grant of relief).

73. 648 A.2d 843 (Vt. 1994).

74. 67 F.3d 883 (9th Cir. 1995).

75. 957 F. Supp. 1225 (D.N.M. 1997).

76. See Lupu, *supra* note 72, at 803.

77. See *id.* at 802-03.

78. See *id.* at 805.

79. 521 U.S. 507 (1997).

80. See *id.* at 511-12.

81. See *id.* at 519-20.

According to the Court, Section 5 gives Congress the power “to enforce” the Fourteenth Amendment but “not the power to determine what constitutes a constitutional violation,”<sup>82</sup> which, as the Court saw it, was exactly what RFRA was intended to do.<sup>83</sup> In determining that RFRA was in fact an attempt to expand the scope of rights guaranteed by the First Amendment and not merely an “enforcement” or “remedial” measure, the Court noted that the results achieved by the Act were far out of proportion to the alleged harm that Congress had intended it to remedy.<sup>84</sup> In the exact words of the Court, the Act failed to obtain the requisite “proportionality or congruence”<sup>85</sup> between the harm and the remedy, and thus it represented an expansive interpretation of the First Amendment by Congress.<sup>86</sup> Since interpreting the Constitution in order to determine its standards has traditionally been in the hands of the judiciary, the Supreme Court saw RFRA as contradicting “vital principles necessary to maintain separation of powers.”<sup>87</sup>

In addition to finding a violation of the separation of powers doctrine, the Court also intimated that RFRA violated principles of federalism. Specifically, the Court stated that RFRA represented “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”<sup>88</sup> It was most likely language such as this that led the California legislature, as well as the legislatures of other states, to conclude that it was free to enact a religious freedom act of its own. In fact, the official comments to the California bill quote its author as stating, “[t]he [*Boerne*] decision left the door open to the states to offer similar protections.”<sup>89</sup>

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82. *Id.* at 519.

83. *See id.* at 520-21.

84. *See id.* at 532 (stating that “RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior”).

85. *Id.* at 533.

86. *See id.* at 527-35.

87. *Id.* at 536.

88. *Id.* at 534.

89. *Hearing on A.B. 1617, supra* note 13, at 4.

*E. Prudential Concerns Revisited*

Recall that in *Smith*, Justice Scalia denoted a number of laws that might have come into conflict with the freedom of religious exercise should the strict scrutiny test be allowed in that context. According to Scalia, it would have been contrary to common sense to allow exemptions from tax laws, child neglect laws, environmental protection laws, etc., due to conflicts with a person's religious beliefs.<sup>90</sup> Cases such as *Hunt*, *Cheema*, and *Gonzales* seem to fulfill Scalia's prophecy as to RFRA's scope, since each of those cases was successful.

This result brings into striking clarity the concerns raised at the beginning of this Comment—that religious freedom legislation would allow individuals to disregard laws that society as a whole has determined to be in its best interests. When this occurs, those persons whom Congress intended to protect through the now-disregarded laws are the ones who will suffer. In *Hunt*, it was the child whose father was excused from paying child support; in *Cheema*, the children who attend public schools; in *Gonzales*, the endangered and protected bald eagle. If these entities are to enjoy the full protection of the law, and the enacted interests of the government to enjoy the weight of authority that they deserve, then religious freedom laws, whether passed by the federal government or by the states, cannot stand.

In regard to this concern about the scope of religious freedom legislation, one point is particularly distressing—a point, which in a somewhat inverted fashion, may call for the overturning of *Smith*. Specifically, there exists a disparity regarding the effectiveness of making a religious freedom challenge to generally applicable laws before and after RFRA's passage. *Hunt*, *Cheema*, and *Gonzalez* were all successful. Yet, as the majority in *Smith* pointed out, even if the strict scrutiny test *was* used in this context prior to that decision, laws were very rarely invalidated under it.<sup>91</sup> In fact, the majority noted that the test was *never* used to invalidate a *criminal* law.<sup>92</sup> Even Justice O'Connor, who spent a number of pages discussing the

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90. See *supra* Part III.B.

91. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 884-85 (1990).

92. See *id.*

appropriateness of using the strict scrutiny test against generally applicable laws, ultimately found that the religious rights of the two Native American respondents were not infringed since the state had a compelling interest in regulating the use of peyote.<sup>93</sup>

What this disparity suggests is that, in enacting RFRA, and thereby giving an affirmative legislative right to disregard laws that infringe upon religious practices, Congress increased both the frequency of such challenges and their effectiveness. As noted above in Part III.B, prior to *Smith*, and thus prior to the enactment of RFRA, assertions of free exercise rights against generally applicable laws often failed to overcome even the most modest interests of the states. During the life of RFRA, however, these claims gained strength. Moreover, there is no reason to think that similar state laws will not have the same degree of effectiveness, since federal precedent is the most likely source of guidance in this brand new area of state jurisprudence. Thus, for those who thought that the Court was correct in ousting the strict scrutiny test from the free-exercise-versus-general-laws context, it seems that the best alternative might be to *overturn Smith*, and thus return to the more lenient standard used by the Court before *Smith*.

#### IV. CHALLENGES

##### A. *Where There's a Will There's a Way: The Court's Desire to Strike Down Religious Freedom Laws*

The language of the Supreme Court in both *Smith* and *Boerne* indicate a desire to strike down even those religious freedom acts that come from the states. In *Boerne*, despite its reliance on principles of separation of powers and federalism, the Court continued the practice it began in *Smith* by giving significant weight to practical considerations. For example, the *Boerne* Court at one point returned to an argument made in the *Smith* case that contesting a claim that a law substantially burdens one's religious exercise would be considerably difficult.<sup>94</sup> Directly quoting *Smith*, the Court asked, "What principle of law or logic can be brought to bear to contradict a

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93. See *id.* at 891-903 (O'Connor, J., concurring).

94. See *Boerne*, 521 U.S. at 534-35.

believer's assertion that a particular act is "central" to his personal faith?"<sup>95</sup> So as not to reveal its disagreement with RFRA on the merits, however, the Court quickly iterated that it "make[s] these observations not to reargue the position of the majority in *Smith*,"<sup>96</sup> and justified the observations as proof of RFRA's infringement on state prerogative.<sup>97</sup>

Other practical considerations the Court mentioned as counseling against the validity of RFRA include the "heavy litigation burden" that it would cause<sup>98</sup> and the simple impracticality of the law in our religiously diverse society.<sup>99</sup> Once again echoing the concerns voiced by Scalia in *Smith*,<sup>100</sup> the *Boerne* Court stated:

It is a reality of the modern regulatory state that numerous state laws . . . impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.<sup>101</sup>

Similarly, in *Smith*, a majority of the Court voiced a strong distaste for use of the strict scrutiny test against generally applicable laws in the context of religious freedom.<sup>102</sup> What the *Smith* majority lacked in constitutional foundation, however, it made up for in sheer determination, as evidenced by its weighty reliance on practical concerns and equally weighty disregard of precedent<sup>103</sup>—and where there's a will, there's a way. Based upon *Smith* and upon *Boerne*'s undercurrents of continuing distaste for the strict scrutiny test in the free exercise context, it is likely that the Supreme Court will use all weapons in its arsenal to invalidate RFRA-like religious freedom laws that come before it. The remainder of this Comment will focus

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95. *Id.* at 534 (citing *Smith*, 494 U.S. at 887).

96. *Id.*

97. *See id.*

98. *Id.*

99. *See id.*

100. *See supra* Part III.B.

101. *Boerne*, 521 U.S. at 535.

102. *See supra* Part III.B.

103. *See supra* Part III.B.

on those challenges to religious freedom acts that are most likely to be successful if brought before the Supreme Court.

### B. *The Establishment Clause*

In *Lemon v. Kurtzman*,<sup>104</sup> the Supreme Court enunciated three tests that a law must pass in order to avoid invalidation under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>105</sup> Even superficial analysis reveals that religious freedom acts such as RFRA and California's Religious Freedom Protection Act violate all three of the above tests. Unfortunately, the only Supreme Court Justice who appears to agree is Justice Stevens, who stated in his concurrence in *Boerne* that the "governmental preference for religion, as opposed to irreligion," that RFRA represents "is forbidden by the First Amendment."<sup>106</sup>

Of course, *Lemon* itself is not without its problems. The Court has used it sporadically since its pronouncement, and it has been met with much scholarly criticism.<sup>107</sup> When the Court used it in a 1993 case, Justice Scalia objected to its use by describing it as a "ghoul in a late-night horror movie"<sup>108</sup> and stating:

It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will . . . . When we wish to strike down a practice it forbids, we invoke it . . . ; when we wish to uphold a practice it forbids, we ignore it entirely.<sup>109</sup>

Yet, regardless of whether the Court has used the test sporadically in the past, the test remains "out there," ready to be utilized.

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104. 403 U.S. 602 (1971).

105. *Id.* at 612-13 (citations omitted).

106. *Boerne*, 521 U.S. at 537 (Stevens, J., concurring).

107. See, e.g., Thomas C. Marks, Jr. & Michael Bertolini, *Lemon Is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 *BYU J. PUB. L.* 1 (1997).

108. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

109. *Id.* at 399 (citations omitted).

Furthermore, based on the Court's noted desire<sup>110</sup> to use what weapons it has against religious freedom legislation, the *Lemon* test seems like a plausible, perhaps even likely, candidate. And if the *Lemon* test were so used, the outcome would be clear: the religious freedom legislation would not survive.

Consider, for example, the recently vetoed Religious Freedom Protection Act of California. Under the first prong of the *Lemon* test, a law must have a "secular legislative purpose." The California law clearly does not. That law was admittedly enacted in response to *Smith* and *Boerne*,<sup>111</sup> and its unambiguous words, mimicking those of Congress's RFRA,<sup>112</sup> inevitably lead to the conclusion that it was meant to inhibit the government from hindering the exercise of religion. The California legislature itself admitted that its Religious Freedom Protection Act had the "goal of strengthening the free exercise of religion in California."<sup>113</sup> Surely, no less secular a purpose can be imagined.

The second prong of the *Lemon* test prohibits laws that either "advance or inhibit religion." The California law violates this prong on grounds similar to those mentioned above. Even without the direct admonition of the California legislature as to the purpose of its own law, even a cursory reading of the law's unambiguous language reveals that it would necessarily have the effect of "advancing" religion. The law places the decisions of the majority, as embodied in a jurisdiction's legislative enactments, in a position inferior to the free exercise claims of individuals. Not only does this further religion, but it does so at the expense of those interests and persons which the majority has sought to protect through legislation.<sup>114</sup>

The third and final prong of the *Lemon* test requires that the challenged law not foster an "excessive governmental entanglement with religion." The California law violates this prong, as well. As the Supreme Court voiced in both *Smith* and *Boerne*, use of strict scrutiny in the free exercise context would place difficult decisions

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110. See *supra* Part IV.A.

111. See *Hearing on A.B. 1617, supra* note 13, at 4.

112. Compare A.B. 1617, 1997-98 Leg., Reg. Sess. (Cal. 1997), with 42 U.S.C. § 2000bb (1994) (each using similar language regarding *Smith* in the statement of the law's purpose).

113. *Hearing on A.B. 1617, supra* note 13, at 1.

114. For a further discussion of this point, see *supra* Part III.E.

regarding the religious significance of one's actions in the hands of the judiciary.<sup>115</sup> Such a rule creates the potential that judges would "entangle" themselves in debates over religious issues—issues that have potentially been debated for centuries, remaining unresolved by the world's foremost theologians. To expect the average judge to possess the individualized expertise necessary to resolve such debates not only defies reason, but under *Lemon* is contrary to the dictates of the Establishment Clause. As stated by Chief Justice Burger in *Lemon*, "state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction . . . of churches."<sup>116</sup>

Further support for the conclusion that state religious freedom legislation violates the Establishment Clause can be found in other Supreme Court cases. In the 1994 case of *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>117</sup> the Court stated that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' . . . favoring neither one religion over others *nor religious adherents collectively over nonadherents*."<sup>118</sup> Unless the Court had secretly decided to overrule *Kiryas Joel* when it decided *Boerne*—which it has given no indications of having intended—it would appear that any law that allows religious adherents to exempt themselves from generally applicable laws, while not allowing the same for "non-believers," would violate the mandate of that case.

### C. The Larson-Smith Paradox

*Larson v. Valente*<sup>119</sup> stands for the proposition that, under the Establishment Clause, "one religious denomination cannot be officially preferred over another."<sup>120</sup> In *Larson*, the Supreme Court

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115. See *supra* Parts III.B and III.D.

116. *Lemon*, 403 U.S. at 620.

117. 512 U.S. 687 (1994).

118. *Id.* at 696 (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)) (emphasis added).

119. 456 U.S. 228 (1982).

120. *Id.* at 244 (stating that this proposition is "[t]he clearest command of the Establishment Clause").

invalidated a provision of the Minnesota Charitable Solicitations Act that exempted from its registration and reporting requirements any religious organization that received more than fifty percent of its contributions from its own members or related organizations.<sup>121</sup> The Court reasoned that religious equality, necessary for the Free Exercise Clause to have any effect, required that every religious denomination “be equally at liberty to exercise and propagate its beliefs.”<sup>122</sup> Since the Minnesota provision interfered with this equality, it was presumptively invalid.<sup>123</sup>

In addition to concluding that the Minnesota provision was invalid as granting a denominational preference to certain religions, the *Larson* Court also stated that it violated the third prong of the *Lemon* test (prohibiting excessive governmental entanglement of religion)<sup>124</sup> because it “engender[ed] a risk of politicizing religion.”<sup>125</sup> According to the Court, the “politicizing” occurred by virtue of the fact that the provision was intended to advance, and had the necessary effect of advancing, some religions over others.<sup>126</sup>

Arguably, each of the reasons for which the Court invalidated the denominational exemption in *Larson* applies with equal force to RFRA-like religious freedom legislation. Like the Minnesota provision, RFRA and its progeny would have the effect of preferring certain religions over others, since at most only a few—but certainly not all—religions could be granted exemptions in each suit brought under these laws. Moreover, by virtue of this preference, the laws would be violative of the third prong of the *Lemon* test, thus making them doubly suspect.

The Court’s decision in *Larson*, however, has important implications that go beyond its possible use to invalidate religious freedom legislation—implications raised by dicta from the *Smith* case. In *Smith*, Justice Scalia stated that while use of the strict scrutiny test against generally applicable laws would have been an inappropriate means of ensuring the religious freedom of the Native Americans

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121. *See id.* at 230-32, 255.

122. *Id.* at 245.

123. *See id.* at 246.

124. *See supra* Part IV.B.

125. *Larson*, 456 U.S. at 252 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 695 (1970)).

126. *See id.* at 253-55.

involved in that case, Oregon could have protected this freedom by way of a direct statutory exemption.<sup>127</sup> Yet, wouldn't this *certainly* be a violation of *Larson*? The answer to this question implicates, albeit indirectly, the future success of challenges to religious freedom laws—for if the answer is “yes,” then *Larson* has essentially removed the only means by which states can accommodate religious adherents against restrictions imposed by generally applicable laws. In the face of the societal criticism that would likely ensue once such an across-the-board invalidation was realized, the Supreme Court would be hard-pressed to justify its actions, which it may have a difficult time doing. If this were the case, then something—whether it be the constitutional invalidity of state religious freedom legislation, or the holding in *Larson*—would have to give.

## V. CONCLUSION

In a society that cherishes diversity, and considers the fostering of new ideas to be the bedrock of freedom, myriad and diverse religious denominations inevitably flourish. Such a society exists in America, where the First Amendment to the Constitution both protects religious freedom and promotes religious diversity.<sup>128</sup> America, however, is not just a nation of liberty and diversity. It is also a nation of laws—laws created to protect the rights of its citizens.

Religious freedom legislation, which subjects to strict scrutiny generally applicable laws that infringe upon religious liberty, has brought this nation to a crossroads where diversity and the law compete. While normally these competing interests can be reconciled, religious freedom laws make such reconciliation impossible, for they unjustifiably allow the complaints of religious adherents, however spurious or unfounded, to trump the will of the majority.

Fortunately, however, the Supreme Court has taken a definite side in this conflict. The Court's obvious disdain for the use of strict scrutiny against generally applicable laws challenged under the Free Exercise Clause is evident in both *Smith* and *Boerne*. Because of the strength of this disdain, clear from the Court's repeated reference to the practical concerns that the use of strict scrutiny in this context

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127. See *Smith*, 494 U.S. at 890 (stating that “a nondiscriminatory religious-practice exemption . . . [would be] permitted”).

128. See U.S. CONST. amend. I.

would raise, the Court is likely to use whatever precedent it can muster to invalidate any and all religious freedom laws that come before it.

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