RATCHET PLUS? POSSIBLE CONSTITUTIONAL FOUNDATIONS FOR THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

In *Employment Division v. Smith*[1] the Supreme Court ended almost three decades of free exercise[2] jurisprudence and eliminated a substantial part of the First Amendment's protective power. The decision sent shockwaves through the legal community. A large group of law professors and religious groups petitioned the Court for a rehearing.[3] The Court refused[4] and immediately afterwards, a bill appeared in each chamber of Congress that purported to reverse the *Smith* decision.[5] In late 1993, President Clinton signed the culmination of this legislative effort, the Religious Freedom Restoration Act of 1993 (the RFRA).[6]

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1. 494 U.S. 872, *reh'g denied*, 496 U.S. 913 (1990). For a discussion of *Smith*, see *infra* notes 38-57 and accompanying text.

2. The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

3. James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1411 n.25 (1992). The group was comprised of over fifty legal scholars including Gerald Gunther, Kent Greenawalt, Michael McConnell, and Laurence Tribe, as well as many diverse public interest and religious groups. *Id.*

4. 496 U.S. 913 (1990).

5. *See* Ryan, *supra* note 3, at 1411 (citing H.R. 5377, 101st Cong., 2d Sess. (1990); S. 3254, 101st Cong., 2d Sess. (1990)).

6. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to bb-4 (Supp. V 1993). The RFRA provides:

(a) The Congress finds that —

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

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990)[,] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) The purposes of this Act are —

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963)[,] and Wisconsin v. Yoder, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

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

§ 2000bb-1. Free Exercise of Religion Protected

(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —

(1) is in furtherance of a compelling governmental interest; and

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

(c) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article [sic] III of the Constitution.

. . .

§ 2000bb-3. Applicability

(a) This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

The RFRA outlines the congressional interpretation of the Free Exercise Clause[7] and instructs courts to revert to a pre-*Smith* interpretation of the Clause.[8] Since *Marbury v. Madison*,[9] however, it has been the judiciary's prerogative to interpret the Constitution, not the legislature's.[10] This Recent Development explores Congress' constitutional authority to enact the RFRA and whether that authority further empowers Congress to interpret the Free Exercise Clause more expansively than the Supreme Court.

Part I of this Recent Development reviews Free Exercise jurisprudence during the past thirty years. Part II examines three possible sources of Congress' power to enact the RFRA, which altered existing constitutional law. Finally, Part III concludes that the RFRA is a sound and valid exercise of legislation to undo a restrictive constitutional decision.

I. FREE EXERCISE JURISPRUDENCE 1963-1993: FROM COMPELLING INTEREST TO DEFERENCE

A. *The Sherbert Era*

For almost three decades, courts analyzed free exercise claims under the test articulated in *Sherbert v. Verner*.[11] In *Sherbert*, a member of

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Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C. §§ 2000bb to bb-4; *see* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

7. 42 U.S.C. § 2000bb(a) (Supp. V 1993).

8. 42 U.S.C. § 2000bb-1; *see* 42 U.S.C. § 2000bb(b) (stating that the purpose of the act is to restore the pre-*Smith* interpretation of the Free Exercise Clause); *see supra* note 6 for the text of the statute.

9. 5 U.S. (1 Cranch) 137 (1803) (announcing the principle that the Court must apply the Constitution in determining the validity of statutes).

10. *But see infra* notes 69-122 and accompanying text (discussing the "ratchet" theory, under which Congress can interpret the Constitution to create greater rights than those recognized under judicial interpretations).

11. 374 U.S. 398 (1963).

the Seventh-Day Adventist Church was discharged from her employment when she refused to work on Saturday, the Sabbath according to her religion.[12] She filed for unemployment compensation benefits under the South Carolina Unemployment Compensation Act[13] with the state Employment Security Commission.[14] The commission denied her benefits because it found that her refusal to work on Saturday constituted a refusal to accept suitable work from her employer, an act that was grounds for exclusion under the statute.[15]

Sherbert appealed to the South Carolina Supreme Court, challenging the commission's denial on the grounds that it infringed upon her right to free exercise of religion under the First and Fourteenth Amendments.[16] The state supreme court held that the commission's denial of unemployment benefits did not impermissibly burden her right to free exercise of religion.[17]

The United States Supreme Court reversed, finding the application of the statute invalid under a two part balancing test.[18] First, the Court announced that a party claiming a religious exemption must show that the challenged statute imposes a burden on the free exercise of his or her religion.[19] Then, if such a burden is found, the Court concluded that the statute would only be upheld if a state interest justified the infringement.[20] The Court implied that a challenged statute's burden upon the

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12. *Id.* at 399. The challenger sought other work in the area but could find none that did not require her to work on Saturdays. *Id.*

13. S.C. CODE ANN. §§ 41-27-10 to 41-50 (Law Co-op. 1986), formerly S.C. CODE, tit. 68, §§ 68-1 to 68-404 (1962).

The Act disqualified an applicant for benefits if the Unemployment Commission found that he or she "has failed, without good cause, . . . to accept available suitable work when offered to him by . . . [an] employer . . . ." 374 U.S. at 400 n.3 (quoting S.C. CODE tit. 68, § 68-114).

14. 374 U.S. at 400-01.

15. *Id.* at 401; *see supra* note 13 (discussing the statutory exclusion).

16. Sherbert v. Verner, 125 S.E.2d 737 (1962). The Free Exercise Clause applies to state and local governments through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940).

17. 125 S.E.2d at 746.

18. 374 U.S. at 403, 410.

19. *Id.* at 403.

20. *Id.* In its analysis of the state's interest, the Court considered the possible effects of the state recognizing "religious objections to Saturday work," and concluded that the state's fears of fraudulent claims of such objections were unwarranted. *Id.* at 407. Justice

challenger's exercise of religion must be balanced against the state's interest and the degree to which that interest would be undermined by accommodating the challenger's religious practices.[21]

From 1963 to 1990, the Supreme Court, although not overruling *Sherbert*,[22] often ruled against parties claiming religious exemptions from statutes of general applicability.[23] Only in two areas did the Court consistently rule in favor of people invoking their rights to free exercise of religion: unemployment benefits eligibility and compulsory school attendance.[24]

The Supreme Court has, in two cases, defined the scope of religious practices and beliefs protected under *Sherbert*. In *Thomas v. Review Board*,[25] the Court held that the denial of unemployment benefits to a Jehovah's Witness who quit his job to avoid manufacturing weapons violated the Free Exercise Clause.[26] The Supreme Court of Indiana found that Thomas' beliefs were not religiously based.[27] The United

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Brennan's opinion for the Court further noted that even if recognizing religious objections to Saturday work had a detrimental effect on the state's interest in avoiding fraud, the state would be required to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.*

21. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.8, at 1221 (4th ed. 1991).

22. *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574, 603 (1983) (citing the *Sherbert* line of opinions but concluding that the asserted government interest was sufficiently compelling); 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."). *But cf.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-53 (1988) (holding the *Sherbert* test inapplicable to the particular facts); Bowen v. Roy, 476 U.S. 693, 707 (1986) (same); Goldman v. Weinberger, 475 U.S. 503, 506-07 (1986) (holding the *Sherbert* test inapplicable and adopting a "far more deferential" standard of review for military regulations).

23. *See, e.g., Lyng*, 485 U.S. 439 (upholding Forest Service's plan to build a road through, and to permit timber harvesting in, an area that was sacred to several Native American tribes); *Bowen*, 476 U.S. 693 (rejecting parents' argument that they should not be required to disclose their daughter's social security number to the government when they believed that to do so would rob their child of her soul); *Bob Jones University*, 461 U.S. 574 (upholding IRS's denial of tax exempt status to a university that practiced racial discrimination in accordance with its religious beliefs); *Lee*, 455 U.S. 252 (requiring the Amish to pay social security taxes).

24. NOWAK & ROTUNDA, *supra* note 21, § 17.8 at 1221-29.

25. 450 U.S. 707 (1981).

26. *Id.* at 720.

27. Thomas v. Review Bd., 391 N.E.2d 1127 (Ind. 1979).

States Supreme Court reversed, ruling that courts should not inquire into the substance of an individual's religious beliefs.[28] The Court reaffirmed *Sherbert* and *Thomas* in *Hobbie v. Unemployment Appeals Commission*[29] and extended the holdings in the earlier cases to protect a person denied unemployment benefits for losing a job as a result of religious practices acquired after accepting employment.[30]

Wisconsin v. Yoder[31] was the only case not involving unemployment benefits in which the Supreme Court found that a party's free exercise interest outweighed the state's interest. In *Yoder*, members of the Amish religion challenged Wisconsin's compulsory school attendance statute[32] on the grounds that their religion forbade formal education

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28. 450 U.S. at 714. ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). *Id.* The Court further held that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715.

29. 480 U.S. 136 (1987).

30. *Id.* at 139-140. The majority also explicitly rejected the Florida Appeals Commission's invitation to overturn the *Sherbert* test, or, in the alternative, adopt the less rigorous standard articulated in Chief Justice Burger's opinion in *Bowen v. Roy*, 467 U.S. 693, 707-08 (1986). 480 U.S. at 141-42. Under Burger's test, "[T]he Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* at 141 (quoting *Bowen v. Roy*, 476 U.S. at 707-08). Such an approach, the majority opinion noted, would ignore precedent and relegate the First Amendment to the minimal level of scrutiny already afforded by the Equal Protection Clause. *Id.* at 141-42 (quoting *Bowen v. Roy*, 476 U.S. at 727 (O'Connor, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part)). In other words, the *Hobbie* majority felt that by reducing the affirmative power of the Free Exercise Clause to that of the Equal Protection Clause, Burger's approach would essentially render the Free Exercise Clause meaningless.

Three years after *Hobbie*, the Supreme Court effectively, though not explicitly, adopted Burger's test in *Employment Div. v. Smith*, 494 U.S. 872 (1990). For a discussion of *Smith*, see *infra* part I.B.

31. 406 U.S. 205 (1972).

32. WIS. STAT. ANN. § 118.15(1)(a) (West 1991). The statute reads, in pertinent part:

> [A]ny person having under control a child who is between the ages of 6 and 18 years shall cause the child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which the child should be enrolled is in session . . . .

Id.

beyond the eighth grade.[33] The Court employed the *Sherbert* balancing test[34] and concluded that the Free Exercise Clause forbade the state to compel the Amish from sending their children to high school.[35] Furthermore, the Court noted that the statute also infringed upon the Amish parents' right to control the upbringing of their children.[36]

Lower courts during the *Sherbert* era rarely found that government action violated the Free Exercise Clause.[37] Thus, in cases not involving compulsory education laws or unemployment benefits laws, the *Sherbert* test in practice provided a small safeguard against regulations of general applicability that infringed upon an individual's religious practices.

B. Employment Division v. Smith

The Supreme Court in *Smith*[38] partially overruled *Sherbert*, abandoning its balancing tests in certain circumstances.[39] *Smith* arose in the context of unemployment benefits, but unlike *Sherbert*,[40] *Thomas*,[41] and *Hobbie*,[42] the Court denied the party's claim of a free exercise exemption.[43]

In *Smith*, supervisors fired two Native Americans from their jobs at a drug rehabilitation program because they ingested peyote during a

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33. 406 U.S. 207-09.

34. *Id.* at 214-15; *see supra* notes 11-21 and accompanying text (describing *Sherbert*).

35. *Id.* at 234.

36. *Id.* at 232-34; *see* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (recognizing parents' right to control their childrens' upbringing); *see also infra* note 51 (discussing parents' continuing rights to control their childrens' educations).

37. Federal appeals courts rejected 85 of 97 free exercise claims brought from 1980 until the *Smith* decision in 1990. Ryan, *supra* note 3, at 1417; *see also id.* at 1459-62 (listing all such cases). This pattern mirrors the findings of studies of free exercise claims in the courts of appeal between 1944 and 1981. Ryan, *supra* note 3, at 1417 n.63 (citing EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 625-29 (9th Cir. 1988) (Noonan, J., dissenting), *cert. denied*, 489 U.S. 1077 (1989)).

38. 494 U.S. 872 (1990).

39. *See infra* note 51 (describing limits on *Smith*).

40. *See supra* notes 11-21 and accompanying text.

41. *See supra* notes 25-28 and accompanying text.

42. *See supra* notes 29-30 and accompanying text.

43. 494 U.S. at 890.

religious ceremony.[44] The Oregon Employment Division determined that because possession of peyote is a felony under Oregon law,[45] the plaintiffs engaged in misconduct, and should be denied unemployment benefits.[46]

Although not explicitly overruling *Sherbert*, the majority declined to employ the *Sherbert* balancing test.[47] Instead, the Court held that the Free Exercise Clause does not stand in the way of otherwise valid, neutral laws of general applicability, even if a particular law has the effect of interfering with an individual's religious practices.[48] Practically, this amounted to a per se validity rule for any generally applicable law challenged under the Free Exercise Clause.[49] The Court left accommodation of religious practices to the political process by suggesting that religions petition legislatures for religious exemptions to

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44. *Id.* at 874. Peyote is a hallucinogen derived from the plant *Lophophora Williamsii Lemaire. Id.*

45. *Id.*, citing ORE. REV. STAT. § 475.992 (4)(a) (1987) (classifying possession of controlled substance as a felony); OR. ADMIN. R. 855-80-021(3)(s) (1988) (listing peyote as a controlled substance).

46. 494 U.S. at 874.

47. 494 U.S. at 876, 884-85. "Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws . . . the sounder approach . . . is to hold the test inapplicable to [challenges of across-the-board criminal prohibitions]." *Id.* at 884-85. The majority continued its criticism of the test: "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 885 (quoting Reynold v. United States, 98 U.S. 145, 167 (1878)).

48. 494 U.S. at 879. "[T]he 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 grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

49. *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 226 (1993) [hereinafter Laycock, *RFRA*] ("There is simply no substantive constitutional right to religious liberty after *Smith*.").

statutes.[50] With a few exceptions,[51] the *Smith* Court eliminated what

50. 494 U.S. at 890. The majority noted that leaving religious freedom to the political process:

> [W]ill place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferable 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.

Id.

51. First, the *Smith* Court carefully limited its holding to otherwise valid laws of general application. 494 U.S. at 878-80. The test does not apply to those cases where government regulates religious beliefs directly. *Id.* at 876-80; *see Sherbert,* 374 U.S. at 402 (noting that the Free Exercise Clause forbids "governmental regulation of religious beliefs as such"). Therefore, government may not require affirmation of a particular religious belief, penalize expression of religious doctrine it believes to be false, impose disabilities on the basis of religious belief, or take sides in a religious controversy. 494 U.S. at 877; *see* McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating a state law prohibiting ministers from serving in the legislature); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-25 (1976) (prohibiting judicial interference with internal church affairs); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-52 (1969) (holding that the courts cannot determine ecclesiastical questions); Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that a state may not deny public office based on a refusal to affirm a belief in God); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (invalidating a statute as applied to single out a particular religion); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952) (invalidating a regulation of religious organizations); United States v. Ballard, 322 U.S. 78, 86-88 (1944) (holding that the issue of the truth of religious beliefs was properly excluded from a trial). Furthermore, free exercise challenges to facially neutral laws created to suppress a particular religious practice succeed unless the regulation is narrowly tailored to advance a compelling interest. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993).

Second, the *Smith* decision does not apply to the "hybrid cases" in which the law at issue infringes upon an individual's religious practices as well as another right, such as the right to free speech or the right of parents to direct the education of their children. *Smith,* 494 U.S. at 881-82; *see* Wisconsin v. Yoder, 406 U.S. 205 (invalidating a compulsory school attendance law as applied to Amish parents who refused to send their children to school on religious grounds); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a tax on solicitation as applied disseminating religious ideas). *See supra* notes 31-36 and accompanying text (discussing *Yoder*); The Court's opinion in *Smith* does not specify what level of scrutiny a regulation must withstand when it interferes with hybrid rights, but cites *Yoder* as an example of a successful hybrid claim. 494 U.S. at 881. The *Yoder* court followed the *Sherbert* test. 406 U.S. at 220; *see* NOWAK & ROTUNDA, *supra* note 21, § 17.8 at 1224-26 (describing the Court's application of the balancing test in *Yoder*); *supra* notes 18-21 and accompanying text. Thus, the *Sherbert* test probably remained the standard for hybrid claims against neutral laws of general application even before the RFRA.

Some courts distinguished *Smith* on the basis of a third exception, holding that the rule is limited to criminal cases. *See* American Friends Service Committee Corp. v.

had been, at least in form, an entire area of First Amendment protection.[52]

In the years immediately following *Smith*, most courts consistently upheld laws of general applicability against Free Exercise Clause challenges.[53] While under the *Sherbert* test the Free Exercise Clause had in form, though generally not in practice, some affirmative power, under the *Smith* formula the clause became virtually toothless.[54] As a result, parties who wished to claim that a regulation infringed upon their rights to the free exercise of religion were forced to resort to state constitutional guarantees, some of which retained a balancing approach

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Thornburgh, 961 F.2d 1405 (9th Cir. 1991); NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2955 (1992); United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991); Church of Scientology v. City of Clearwater, 756 F. Supp. 1498, 1514-15 (M.D. Fla. 1991). The majority of jurisdictions, however, apply *Smith* equally to civil and criminal contexts. *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991); St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991); Salvation Army v. Dept. of Community Affairs of New Jersey, 919 F.2d 183 (3d Cir. 1990); United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends, 753 F. Supp. 1300, 1304 (E.D. Pa. 1990); Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

52. *See* Laycock, *RFRA, supra* note 49, at 225 ("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.").

53. *See, e.g.*, Murray v. City of Austin, 947 F.2d 147, 152 (5th Cir. 1991) (rejecting the argument that a religious symbol in a city's insignia represented "subtle coercion" to adhere to the majority faith and thereby infringed upon the right to freely exercise other religions); NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991) (holding that the Free Exercise Clause does not protect a Catholic school from unions); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 934 (6th Cir. 1991) (holding that the Free Exercise Clause does not compel a state to give academic credit in public schools to religious home tutoring); Salvation Army v. Department of Community Affairs, 919 F.2d 183, 196 (3d Cir. 1990) (refusing to grant the Salvation Army an exemption to state housing regulations); *In re* Chinske, 785 F. Supp. 130, 133-34 (D. Mont. 1991) (holding that a witness' refusal to testify due to his religious beliefs is not protected by the Free Exercise Clause); United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends, 753 F. Supp. 1300, 1306 (E.D. Pa. 1990) (finding that the Free Exercise Clause does not allow a religious congregation to refuse to pay taxes on the grounds that the funds will support policies contrary to their beliefs); Hill-Murray Federation of Teachers v. Hill-Murray High School, 487 N.W.2d 857, 863 (Minn. 1992) ("In accordance with *Smith*, we hold that the right to free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution.").

54. The judicial deference embodied in *Smith*, however, does have limitations. *See supra* note 51.

similar to the one articulated in *Sherbert*.[55] Some courts, uncertain of the scope of various exceptions that may be read into the *Smith* opinion,[56] continued to employ the stricter *Sherbert* test to assess the validity of regulations facing Free Exercise Clause challenges.[57]

II. THE RELIGIOUS FREEDOM RESTORATION ACT

In reaction to the Supreme Court's *Smith* decision, Congress enacted the Religious Freedom Restoration Act of 1993 (the RFRA).[58] The legislation was overwhelmingly popular[59] and was supported by a surprisingly broad coalition of political and religious groups.[60]

The RFRA does not reveal what constitutional power Congress relied on to enact the legislation.[61] The President, upon signing the act, presupposed congressional authority to correct the Supreme Court's

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55. *See, e.g.*, Attorney General v. Desilets, 663 N.E.2d 233, 236 (Mass. 1994) ("In interpreting art. 46, § 1 [of the Massachusetts Constitution], we prefer to adhere to the standards of earlier First Amendment jurisprudence . . . .").

56. *See supra* note 51 (discussing limits on *Smith*'s deferential standard).

57. The courts that take this approach note that if a statute is valid under the *Sherbert* test, which imposes some restrictions on generally applicable laws, it surely must be valid under the more permissive *Smith* formula. *See* EEOC v. First Baptist Church, No. S91-179M, 1992 U.S. Dist. LEXIS 14479, *21 (N.D. Ind. June 8, 1992) ("Because neither party has asked the court to decide whether the reasoning of *Smith* applies to this case, and the result of this case is the same under either *Smith* or *Sherbert*, the court will presume that the *Sherbert* balancing test continues to apply."); State by Cooper v. French, 460 N.W.2d 2, 15-16 n.2 (Minn. 1990) (Popovich, C.J., dissenting) (arguing that the *Smith* test was unnecessary because the challenged antidiscrimination statute was valid under *Sherbert*).

58. 42 U.S.C. §§ 2000bb to bb-4 (Supp. V 1993); *see supra* note 5 (quoting the statute).

59. The bill was approved ninety-seven to three in the Senate and passed in the House by voice vote without objection. Steinfels, *supra* note 6.

60. The legislation was cosponsored by Senators Edward Kennedy and Orrin Hatch. *Id.* It was supported by a diverse mix of organizations such as the National Association of Evangelicals, the American Civil Liberties Union, the National Islamic Prison Foundation, B'nai B'rith, the Traditional Values Association, and the People for the American Way, among others. Vice President Albert Gore, Remarks at the Signing Ceremony of the Religious Freedom Restoration Act of 1993 (November 16, 1993) (available in LEXIS, Nexis library). At the signing ceremony, the President suggested that only divine intervention could explain the broad coalition that supported the bill. President William Clinton, Remarks at the Signing Ceremony of the Religious Freedom Restoration Act of 1993 (November 16, 1993) (available in LEXIS, Nexis library).

61. *See supra* note 6 (quoting the statute in full).

erroneous interpretations of the Constitution.[62] In actuality, Congress' authority to overrule the Supreme Court's constitutional decisions is not quite so clear. Since *Marbury v. Madison*,[63] the Court has reaffirmed its role as the supreme arbiter of the Constitution.[64] As a result, at least one court has already questioned whether the RFRA is constitutional.[65] Despite this history of the Supreme Court's pre-eminence in the field of constitutional interpretation, several possible justifications for the statute exist. The remainder of this Recent Development examines these justifications and evaluates their ability to sustain the Act against a constitutional attack.

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62. "The power to reverse by legislation a decision of the United States Supreme Court is a power that is rightly hesitantly and infrequently exercised by the United States Congress. But this is an issue in which that extraordinary measure was clearly called for." President William Clinton, Remarks at the Signing Ceremony of the Religious Freedom Restoration Act of 1993 (November 16, 1993) (available in LEXIS, Nexis library).

63. 5 U.S. (1 Cranch) 137 (1803).

64. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); Baker v. Carr, 369 U.S. 186, 211 (1962) (stating that the Supreme Court is the "ultimate interpreter of the Constitution"); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[Marbury v. Madison declared that] the federal judiciary is supreme in the exposition of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

The framers also believed that the judiciary was the ultimate authority on the meaning of the Constitution.

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

THE FEDERALIST No. 78, at 467 (Alexander Hamilton (Clinton Rossiter ed., 1961)); *see also* Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73 (1993). Even following an original intent theory of constitutional interpretation does not necessarily mean that the RFRA must be rejected. The enactment of the Fourteenth Amendment (subsequent to the above quote) significantly altered the role of Congress in enforcing substantive rights. *See infra* part II.A.; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (O'Connor, J., plurality opinion) ("The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race.").

65. *See* Swanner v. Anchorage Equal Rights Commission *ex. rel.* Bowles, 874 P.2d 274, 280 n.9 (Alaska); *cert. denied*, 115 S. Ct. 460 (1994).

A. *The Ratchet Theory: Section Five of the Fourteenth Amendment*

The most obvious candidate for congressional authority to enact the RFRA is Section Five of the Fourteenth Amendment.[66] Indeed, at the congressional hearings to consider the Act, at least one constitutional scholar suggested that Section Five would provide the necessary foundation for the statute.[67]

How can Congress' authority to "enforce" the Fourteenth Amendment[68] justify its expanding a First Amendment right beyond the scope of the Supreme Court's interpretation? Justice Brennan's "ratchet theory"[69] provides the answer. The Free Exercise Clause applies to the states through the Fourteenth Amendment.[70] Thus, under the ratchet theory, Congress may enforce the Free Exercise Clause as it pertains to the states pursuant to Congress' Section Five authority.[71]

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

67. Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section Five of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1031 n.22 (1993) (citing *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 24-30 (1992) (statement of Professor Douglas Laycock)).

Virtually all commentators have also concluded that the RFRA may be enacted under Section Five of the Fourteenth Amendment. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895 (1994) [hereinafter Laycock, *Free Exercise*] (stating that the RFRA was enacted pursuant to Section Five of the Fourteenth Amendment); Laycock, *RFRA supra* note 49, at 245 ("Congress has power to enact RFRA under section five of the Fourteenth Amendment."); Lee, *supra* note 64 at 90 (stating that the RFRA was enacted under Section Five of the Fourteenth Amendment); Pawa, *supra*, at 1097 ("[T]he RFRA would clearly be enacted to enforce a Fourteenth Amendment due process right — the incorporated right to the free exercise of religion.").

68. *See supra* note 66 (quoting the Fourteenth Amendment).

69. Prof. William Cohen coined this term in William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975), to describe Justice Brennan's theory that Congress may expand, but not contract, Fourteenth Amendment rights pursuant to the Enforcement Clause.

70. Cantwell v. Connecticut, 310 U.S. 296 (1940).

71. Congress' authority under Section Five does not include the power to enforce Fourteenth Amendment constraints against the national government, however. *See infra* notes 119-22 and accompanying text.

The Supreme Court originally articulated the scope of Section Five in *Ex Parte Virginia*.[72] The Court echoed Chief Justice Marshall's description of the Necessary and Proper Clause in *McCulloch v. Maryland*.[73] Similar to the Necessary and Proper Clause, the Enforcement Clause of the Fourteenth Amendment is a broad grant of congressional power. This grant of power entitles Congress to a great deal of judicial deference.

In addition to Congress' extensive power under Section Five, the language of enforcement clauses in other amendments to the Constitution is virtually identical.[74] Therefore, judicial interpretations of the scope of those enforcement clauses are logically coextensive with Section Five of the Fourteenth Amendment.[75]

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72. 100 U.S. 339 (1880).

73. 17 U.S. 316 (1819). The Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, reads: "The Congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In *McCulloch,* the Chief Justice explained the scope of the clause: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to the end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 17 U.S. at 421.

The *Ex Parte Virginia* Court explained that Congress' Section Five power encompasses:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

100 U.S. at 345-46.

74. *See* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); U.S. CONST. amend. XV, § 2 (same) ; U.S. CONST. amend XVIII, § 2, *repealed by* U.S. CONST. amend. XXI ("The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."); U.S. CONST. amend. XIX, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); U.S. CONST. amend. XXIII, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); U.S. CONST. amend. XXIV, § 2 (same); U.S. CONST. amend. XXVI, § 2 (same).

75. *See* City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."); *see also* Lee, *supra* note 64, at 92 (stating that various Supreme Court opinions indicate that Congress' enforcement powers under the Civil War Amendments are coextensive).

In *South Carolina v. Katzenbach*,[76] for example, the Court found that the Voting Rights Act of 1965's[77] ban on literacy tests at the polls was a proper exercise of Congress' enforcement powers under the Fifteenth Amendment.[78] Only seven years earlier, however, the Court held that the Fifteenth Amendment does not, by its own force, prohibit literacy tests.[79] Rather than reverse its earlier decision, the Court reached its conclusion because it found that Congress' remedial powers under the Enforcement Clause allowed Congress to ban literacy tests.[80]

More recently, in *City of Rome v. United States*, the Court held that Congress could enact legislation to prohibit voting schemes with discriminatory effects.[81] In the same term, however, the Court held that the Fifteenth Amendment, without any legislative action, does not forbid such voting arrangements.[82] The *Rome* Court employed the appropriateness test from *McCulloch* and *Ex Parte Virginia*[83] and held that Section Two of the Fifteenth Amendment authorizes Congress to prohibit practices beyond those that are barred by Section One alone.[84]

The Supreme Court reached a similar conclusion regarding Section Five of the Fourteenth Amendment in *Katzenbach v. Morgan*.[85] Prior to the decision, New York laws required that all voters read and write English,[86] and an earlier decision by the Court indicated that such a

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76. 383 U.S. 301 (1966).

77. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 177 (1988)).

78. 383 U.S. at 337.

79. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

80. 383 U.S. at 325-29.

81. 446 U.S. 156 (1980).

82. City of Mobile v. Bolden, 446 U.S. 55 (1980). A plurality of four Justices found no Fifteenth Amendment violation, and Justice Stevens agreed in a separate concurring opinion. *Id.* at 61-65, 83-94 (Stevens, J., concurring).

83. *See supra* notes 72-73 and accompanying text.

84. *City of Rome*, 446 U.S. at 177.

> It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in *McCulloch v. Maryland* and *Ex Parte Virginia*.

Id. (citation omitted).

85. 384 U.S. 641 (1966).

86. *Id.* at 644 n.2.

restriction was consistent with the Fourteenth Amendment.[87] The Voting Rights Act, however, bars the enforcement of such tests because Congress found them to violate the Fourteenth Amendment.[88]

Justice Brennan's opinion upholding the Voting Rights Act rested upon two alternative rationales. First, Brennan argued that the statute was Congress' means to implement a judicially determined constitutional right.[89] Under this reasoning, the Act was simply an attempt to ameliorate discriminatory treatment of Puerto Ricans that resulted from the literacy test requirement.[90] The scope of the substantive right, under this rationale, remained the same as it had been under earlier judicial decisions. The only difference was that Congress found a more effective method of enforcing the substantive right.

Brennan's second rationale went much farther. Specifically, the Court indicated that Congress may interpret the Fourteenth Amendment pursuant to Section Five, and that Congress' interpretation may differ from the judiciary's.[91] Strikingly, this rationale could potentially undermine the concept of judicial review.[92] If Congress may define the substance of the Constitution through its enactments, no federal statute would be unconstitutional. For example, if Congress enacted a statute that created racially segregated public housing, the Court would have to uphold the act because it merely reflected Congress' own interpretation of the Equal Protection Clause — that it allowed "separate but equal" housing units.[93]

The *Morgan* holding, however, does not extend quite that far. The majority carefully limited its holding to affirm only Congress' power to

87. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50-53 (1959).

88. 42 U.S.C. § 1973b(e) (1988).

89. 384 U.S. at 652-53.

90. Pawa, *supra* note 67, at 1061.

91. 384 U.S. at 648-51; *see* 384 U.S. at 668 (Harlan, J., dissenting) ("In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment.").

92. Justice Brennan's second rationale, "if carried to its extreme, . . . shakes the foundations of popular understanding of *Marbury v. Madison*." Lee, *supra* note 64, at 93; *see also* Pawa, *supra* note 67, at 1061 (noting that Brennan's approach "might be seen as endangering the fundamental constitutional principle of *Marbury v. Madison*").

93. The Supreme Court adopted the "separate but equal" doctrine under equal protection in Plessy v. Fergusson, 163 U.S. 537, 544 (1896) and subsequently rejected it in Brown v. Board of Education, 347 U.S. 483, 495 (1954).

expand rights, but admitted no congressional authority to restrict judicial interpretations of constitutional freedoms.[94] This notion that the Enforcement Clause allows Congress to ratchet up substantive rights beyond the scope of their judicial interpretation, but not cut them back, is known as the "ratchet theory."[95]

The Court has never explicitly endorsed the ratchet theory,[96] although on numerous occasions it has given Congress some authority to substantively interpret the Constitution. In *City of Richmond v. J.A. Croson Co.*,[97] the Court struck down, as a violation of the Equal Protection Clause, a city's plan to award thirty percent of its construction contracts to minority-owned businesses. Justice O'Connor's plurality opinion distinguished *Fullilove v. Klutznick*,[98] in which the Court found a similar federal plan to be valid, because Congress adopted the federal plan under Section Five of the Fourteenth Amendment. Justice O'Connor noted that whereas Congress may act to correct what it determines to be a threat to equal protection, the Court would not generally defer to a similar determination by a state or local government.[99] The reason that the Court was willing to defer to Congress in *Fullilove*, but not to a local government in *Croson*, is that Section Five

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94. 384 U.S. at 651 n.10.

> § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Id. (quoting 384 U.S. at 668 (Harlan, J., dissenting)).

One potential problem with the distinction between enforcing the due process and equal protection guarantees, on the one hand, and restricting, abrogating, or diluting those guarantees on the other, is that in some cases the expansion of one right might cause the contraction of another. Lawrence G. Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1231 (1978). Recognizing this problem becomes particularly important with respect to the right to free exercise of religion because an expansion of that right may infringe upon the scope of the First Amendment's Establishment Clause. *See infra* notes 114-15 and accompanying text. However, the Court could solve this problem by refusing to allow Congress to expand rights when such an expansion would interfere with other rights. Pawa, *supra* note 67, at 1062-63. *See infra* notes 105-13 and accompanying text.

95. *See supra* note 69.

96. Lee, *supra* note 64, at 94.

97. 488 U.S. 469 (1989).

98. 448 U.S. 448 (1980).

99. 488 U.S. at 490-92 (opinion of O'Connor, J.).

gives only Congress the right to enforce the Fourteenth Amendment. Thus, Congress gets to decide what the Amendment means.[100] State and local governments, on the other hand, cannot interpret the Amendment and thus are subject to the Court's interpretation of it.[101]

A year later, the Court, though divided on the outcome of *Metro Broadcasting v. FCC*,[102] unanimously recognized Congress' Section Five powers, stating the provision gives Congress the authority to interpret the Fourteenth Amendment more expansively than the courts.[103] Thus, although, the Court has never explicitly adopted the ratchet theory, the theory rests on a solid foundation of modern constitutional jurisprudence.[104]

For the ratchet theory to justify the Religious Freedom Restoration Act, the Act must fit within the theory's limits. Under the ratchet theory, Congress' Section Five power has three limitations.[105] First, Congress may not dilute or restrict a constitutional right recognized by the Court.[106] The RFRA expands the right to freely exercise one's religion. The Act only authorizes restrictions on this right when they further compelling governmental interests and when the chosen method is the least restrictive means to further that interest.[107] This compelling

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100. "The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten the principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* at 490 (opinion of O'Connor, J.).

101. Justice O'Connor wrote that state and local governments have authority "to eradicate the effects of private discrimination within [their] jurisdiction[s] [and] within the constraints of § 1 of the Fourteenth Amendment." *Id.* at 491-92 (opinion of O'Connor, J.). Chief Justice Rehnquist and Justice White joined in this section of Justice O'Connor's opinion. *Id.* at 476.

102. 497 U.S. 547 (1990).

103. 497 U.S. 547, 563-66 (1990) (majority opinion); *id.* at 605-07 (O'Connor, J., dissenting); *see* Laycock, *RFRA, supra* note 49, at 248 (noting the Court's unanimity on this point in *Metro Broadcasting*).

104. Lee, *supra* note 64, at 94 ("[The ratchet theory] is fully consistent with the theory of constitutional jurisprudence since *McCulloch*.").

105. Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970); Laycock, *RFRA, supra* note 49, at 249.

106. *Morgan*, 384 U.S. at 651 n.10; *Laycock, RFRA, supra* note 49, at 249; see *supra* note 93 (discussing the "separate but equal" doctrine).

107. 42 U.S.C. § 2000bb-1(b), quoted *supra* note 1.

interest test is stricter than the Court's free exercise standard.[108] Thus, the RFRA does not run afoul of the first restriction on the ratchet theory.

The ratchet theory's second limitation is that Congress may not use the Enforcement Clause to expand a right so that it interferes with another express allocation of power in the Constitution.[109] For example, in *Oregon v. Mitchell*,[110] the Supreme Court partially invalidated an amendment to the Voting Rights Act[111] that reduced the voting age in state and local elections to eighteen. A majority of the Court found that the Constitution left the power to determine the qualifications of voters in state elections to the states.[112] Thus, Congress lacked the power to lower the voting age for state elections under the Enforcement Clause.[113]

At first glance, the RFRA poses a similar threat. The Free Exercise Clause inherently antagonizes the religious Establishment Clause.[114] To some extent, the expansion of one means the curtailment of the other.[115] The text of the RFRA, however, prohibits its construction

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108. *See supra* notes 48-52 and accompanying text.

109. Oregon v. Mitchell, 400 U.S. 112, 117-18 (1980); Laycock, *RFRA, supra* note 49, at 249.

110. 400 U.S. 112 (1970).

111. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

112. 400 U.S. at 118, 124-31 (opinion of Black, J.); 154-213 (opinion of Harlan, J.); 293-96 (opinion of Stewart, J.).

113. *Id.*

114. NOWAK & ROTUNDA, *supra* note 21, § 17.1, at 1157. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

115. For example, if a state forbids all prayer in school, it interferes with individual students' ability to freely exercise their religion. On the other hand, if the state allows prayer in school, it arguably violates the Constitution's prohibition on the establishment of religion. *See* Waltz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."); *Sherbert*, 374 U.S. at 414 (Stewart, J., concurring) ("[T]here are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause."); *see also* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 948 (1986) (arguing that the religion clauses are logically irreconcilable). *But see* Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285 (1994) (arguing that, correctly

from interfering with the establishment clause.[116] Furthermore, the Supreme Court, in *Corporation of the Presiding Bishop v. Amos,*[117] held that religious-based exemptions from otherwise generally applicable laws do not impermissibly establish a religion. Thus, because the RFRA in effect creates religious based exemptions from generally applicable laws, it avoids Establishment Clause problems.[118]

The final limitation on Congress' Section Five power is that Congress may not enact legislation unrelated to the goals of the Fourteenth Amendment.[119] The Free Exercise Clause is incorporated into the Due Process Clause of the Fourteenth Amendment,[120] and Section Five of the Amendment authorizes Congress to enforce incorporated rights as well as explicit rights. The Fourteenth Amendment, however, only applies to states.[121] But the RFRA purports to apply to both state and federal law.[122] Thus, while the ratchet theory provides an adequate basis for Congress to enact the RFRA as it applies to states and their subdivisions, the ratchet theory does not support the RFRA as applied to the federal government. A constitutional justifica-

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construed, the clauses can be reconciled); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378-88 (1981) (same).

116. 42 U.S.C. § 2000bb-4; *see supra* note 6 (quoting the statute).

117. 483 U.S. 327 (1987).

118. The current state of establishment clause jurisprudence is somewhat confused. For a number of years, the Court followed the "excessive entanglement" test articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In recent establishment cases, however, the Court has declined to follow the *Lemon* rule, but has not replaced it with any other test. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (finding that a religious based school district violates the Establishment Clause without applying the *Lemon* test). Two commentators have applied the *test to the RFRA — with opposite conclusions. Compare* Pawa, *supra* note 67, at 1098-99 (applying the *Lemon* test and finding that a RFRA-based exemption from a generally applicable law would not violate the Establishment Clause) *with* Blackman, *supra* note 115, at 402 n.400 (applying the test and finding a violation). Nevertheless, the majority in *Kiryas Joel* cited *Amos* with approval. 114 S. Ct. at 2492. So long as *Amos* remains good law, the RFRA does not violate the establishment clause.

119. Laycock, *RFRA, supra* note 49, at 249-50.

120. *See supra* note 16. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

121. *See supra* note 120.

122. 42 U.S.C. § 2000bb-3(a). See *supra* note 6 (quoting statute).

tion for applying the RFRA to federal law must come from another source.

B. *The Admiralty Analogy*

A second possible source of Congress' power to enact the RFRA can be found in a comparison to the source of Congress' authority to enact admiralty laws. Congress' power to legislate over matters of admiralty law is well established.[123] The Constitution, however, does not explicitly authorize Congress to enact admiralty legislation.[124] Originally, the Supreme Court held that Congress had no independent admiralty power[125] but indicated that maritime legislation was valid pursuant to Congress' authority over interstate and foreign commerce.[126]

Later, the Commerce Clause basis for legislation gave way to an understanding of an independent admiralty power. In 1886, Congress amended the Limited Liability Act to encompass all vessels on navigable waters of the United States, whether the waters were inter-, or intrastate.[127] Late nineteenth century Commerce Clause jurisprudence[128] generally held that Congress did not have the authority to regulate

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123. FRANK L. MARAIST, ADMIRALTY IN A NUTSHELL 5 (1988).

124. *See* U.S. CONST. art. I, § 8 (listing the powers of Congress).

125. The Passenger Cases, 48 U.S. (7 How.) 283, 292 (1849) (opinion of McLean, J.).

126. In The Daniel Ball, 77 U.S. 10 (10 Wall.) 557 (1870) the majority invoked the commerce power to sustain a federal statute that effectively imposed licensing requirements on intrastate shipping. *Id.* at 563-64. The opinion made no mention of any independent federal admiralty authority, which would have made its discussion of the commerce power unnecessary. Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century,* 67 HARV. L. REV. 1214, 1232 (1954); *see* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

127. Act of June 19, 1886, ch. 421, 24 Stat. 79 (1886) (codified as amended in scattered sections of 46 U.S.C.).

128. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (noting that internal state commerce lies outside the bounds of Congress' power); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (finding a distinction between "national" and "local" subjects of regulation); United States v. DeWitt, 76 U.S. (9 Wall.) 41, 44 (1870) ("[The Commerce Clause is] a virtual denial of any power to interfere with the internal trade and business of the separate states . . . ."); The Trademark Cases, 100 U.S. 82, 96-97 (1878) (holding that Congress exceeds its commerce power when it does not exempt entirely intrastate commercial transactions from a regulatory scheme).

intrastate commerce. Nevertheless, in *In re Garnett*[129] the Supreme Court declared the Limited Liability Act valid under the separate admiralty grant.[130]

The Court found a basis for the congressional power in Congress' authority to define the scope of the federal judiciary's appellate jurisdiction.[131] Article III, Section Two, Clause One of the Constitution gives the judiciary the power to hear admiralty cases.[132] The judiciary's power to hear cases involving admiralty flows from its

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129. 141 U.S. 1 (1891).

130. The court held:

> It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.

Id. at 12.

The Court had indicated earlier that it might find an independent admiralty power. In Butler v. Boston & Savannah S.S. Co., 130 U.S. 527 (1889), the majority found that because "the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislature." *Id.* at 557.

In Waring v. Clarke, 46 U.S. (5 How.) 441 (1847), the Court refused to limit the national government's admiralty jurisdiction to that recognized under English law at the time the Constitution was adopted, although "many in the first half [of the nineteenth] century thought admiralty constitutionally bound by the limits of its 1789 English counterpart." Note, *supra* note 126, at 1230-31. The *Waring* Court rejected that view in part because "[i]t would be a denial to Congress of all legislation upon the subject. It would make . . . a limitation which never could have been meant . . . ." 46 U.S. (5 How.) at 457.

Modern cases cite *Waring* as the earliest Court articulation of a separate admiralty power. *See, e.g.*, O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 41 (1942). *But see* Note, *supra* note 126, at 1231 (arguing that *Waring* should not be read to recognize a distinct congressional admiralty power).

131. Panama R.R. Co. v. Johnson, 264 U.S. 375, 386 (1923) ("Although containing no express grant of legislative power over the substantive [maritime] law, [Art. III, § 2, cl. 1] was regarded from the beginning as implicitly investing such power in the United States [Congress].").

132. "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." U.S. CONST. art. III, § 2, cl. 1.

appellate jurisdiction.[133] The scope of appellate jurisdiction is defined by Congress.[134] Thus, the purpose of Congress' admiralty power is to define the scope of the judiciary's authority to review maritime legislation. When Congress passes a maritime law it is technically precluding judicial review of the Act's constitutionality. Maritime legislation involves a very selective removal of jurisdiction. Courts may review a maritime act on all other issues *except* whether Congress had the power to enact it in the first place.[135] As a result of this backdoor approach, Congress may legislate as if it had an explicit admiralty power.[136]

Could this argument also justify a congressional power to interpret the scope of the Free Exercise Clause? The admiralty argument rests on the premise that the judiciary's jurisdiction over an area of law, coupled with Congress' ability to define the scope of the courts' appellate jurisdiction, grants Congress the ability to legislate in that area. Like admiralty, the power to decide whether a law violates the Free Exercise Clause falls under the Supreme Court's appellate jurisdiction.[137] Congress has the power to define the scope of the Court's review. This power in turn allows Congress to confine the Court's substantive review and interpretation. Therefore, if the admiralty argument extends to other

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133. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . ." U.S. CONST. art. III, § 2, cl. 2.

134. "[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. Although that clause only authorizes Congress to regulate the appellate jurisdiction of the Supreme Court, other provisions extend that power over lower federal courts. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court.").

135. *See* Crowell v. Benson, 285 U.S. 22, 55 (1932) ("In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.").

136. *See, e.g., Panama R.R. Co.*, 264 U.S. at 388 ("Congress is empowered by [Art. III, § 2, cl. 1] to alter, qualify or supplement the maritime rules. . . .").

Three limitations restrict Congress' admiralty power. First, Congress may only legislate on matters clearly within the boundaries of admiralty law. *Id.* at 386. Second, admiralty legislation must apply uniformly throughout the United States. *Id.* at 386-87. Finally, the Constitution places limits on admiralty legislation. *Crowell*, 285 U.S. at 55.

137. The Court derives this jurisdiction from U.S. CONST. art. III, § 2, cl. 1-2; *see supra* notes 132-34 (discussing these provisions).

areas of the law, Congress has an implied "free exercise power"[138] that justifies its enactment of the RFRA.

Applying the argument beyond admiralty, either to free exercise or diversity,[139] could have profound consequences on our system of government.[140] Unlike the ratchet theory, which only allows legislative interpretations of the Constitution that expand constitutional guarantees,[141] an implied free exercise power has no such boundary. Taken to its logical extreme, such a power could enable Congress to dilute or even delete the Free Exercise Clause.

Thus, the admiralty argument, if applied to other areas of the law, could undermine both the doctrine of judicial review[142] and the judiciary's exclusive role as ultimate interpreter of the Constitution.[143] Not surprisingly, the Supreme Court never extended the admiralty argument beyond maritime law.[144] Indeed, while some evidence indicates that the framers intended Congress to have the power to enact admiralty laws,[145] even stronger evidence shows that the framers

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138. In theory, the admiralty argument could be used to create a congressional power over any constitutional right, because the judiciary has appellate jurisdiction over all constitutional claims, except those that happen to arise involving ambassadors, ministers, consuls, or states. *See* U.S. CONST. art. III, § 2, cl. 2, quoted *supra* note 133.

139. Some commentators have suggested that the same logic could be used to create a "diversity power." Such a power would arise by applying the same reasoning that resulted in recognition of Congress' admiralty power by virtue of the admiralty clause in Art. III, § 2, cl. 1 to the Diversity Clause, which provides that "[t]he judicial power shall extend . . . to controversies . . . between citizens of different states." U.S. CONST. art. III, § 2, cl. 1. Under a diversity power, Congress "could create rules of law on any subject that might arise in a diversity action — that is, any subject whatsoever." Martha A. Field, *Sources of the Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 918 (1986); *see id.* at 915-19 (discussing the bases for and ramifications of recognizing a diversity power); Note, *supra* note 126, at 1235 (same).

140. Legal commentators have largely ignored the possibility that the an analogy to admiralty law may justify an expansion of congressional lawmaking ability in other directions. *But see* Note, *supra* note 126, at 1235, n.155 (citing GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 150-202 (1911)).

141. *See supra* notes 94-95 and accompanying text.

142. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of judicial review).

143. *See supra* note 64.

144. Note, *supra* note 126, at 1235 (explaining why the admiralty argument has not been extended to recognize a diversity power).

145. *Id.*, citing Madruga v. Superior Court, 346 U.S. 556, 566 (1954) (Frankfurter, J., dissenting) ("[T]he need for a body of maritime law, applicable throughout the Nation . . .

intended the judiciary, not Congress, to define the scope of individual constitutional rights.[146] It is unlikely that the Court would ever extend the admiralty argument because doing so would dilute its own authority and radically redefine constitutional jurisprudence.

C. *The Commerce Clause*

Another possible justification for the RFRA, as it applies to federal law, is the interstate commerce power.[147] Although Congress cannot use the power to define the Constitution differently than the Supreme Court, the commerce power might allow Congress to create an independent statutory right.[148] If enacted pursuant to the commerce power, the RFRA might create a statutory right to freely exercise one's religion that goes beyond the minimal free exercise standard required by the Constitution.

The commerce power justification for the RFRA is entirely plausible. Congress' Commerce Clause power is extremely broad[149] and justifies noneconomic as well as economic regulations.[150] Con-

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was recognized by every shade of opinion at the Philadelphia Convention.").

146. *See supra* note 64. "[S]o important an assignment of legislative power could not fairly be hung on so inconspicuous a peg." Henry J. Friendly, *In Praise of* Erie — *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 394 (1964). Judge Friendly was not referring to the prospect of a congressional diversity power under the admiralty argument, but his statement applies equally well here.

147. U.S. CONST. art. I, § 8, cl. 3; *see supra* note 130.

148. *See, e.g.*, Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1988). Congress explicitly invoked its commerce power in § 1 of the Act, 29 U.S.C. § 141. Section 1 provides in part that "[i]t is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . ."

149. *See, e.g.*, Nevada v. Skinner, 884 F.2d 445, 450 (9th Cir. 1989) ("The Commerce Clause forms the broadest base of congressional power."), *cert. denied*, 493 U.S. 1070 (1990).

150. "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." United States v. Darby, 312 U.S. 100, 115 (1941). For example, in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the Supreme Court held that the Congress "possessed ample power" under the Commerce Clause to prohibit racial discrimination in a privately-owned motel. *Id.* at 250. Although the statute contained substantial findings concerning the effects of discrimination on interstate commerce, the Court noted that "the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denial of equal access to public establishments.'" *Id.* (quoting S. Rep. No. 872, 88th Cong., 2d Sess., at

gress may legislate under its commerce power in three circumstances: by regulating goods or services that travel interstate,[151] by integrating a nexus with commerce element into a statute,[152] or by regulating an activity that affects interstate commerce.[153] Religion is not necessarily a service that travels between state lines,[154] and the RFRA contains no explicit nexus with commerce requirement.[155] Therefore, in order for the commerce power to provide a suitable foundation for the RFRA, the exercise of religion must be an activity that affects commerce.

Determining whether every religious practice affects commerce would be a daunting task. Even under a very broad understanding of "affecting commerce," some religions may not affect commerce.[156] In *Perez v. United States*,[157] however, the Supreme Court held that an activity may be regulated under the commerce power if that activity *as a class* affects commerce, regardless of whether individual members of the class by themselves affect commerce.[158] Religions as a class have

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16-17 (1964)); *see also* Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Title II as applied to a restaurant because the food it served once travelled in interstate commerce).

151. *See, e.g.*, 21 U.S.C. § 952 (1988) (prohibiting the import or export of narcotics).

152. *See, e.g.*, 18 U.S.C. § 922(g) (1988) (prohibiting the possession of a firearm that is "in or affecting commerce"); United States v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989) (interpreting "affecting commerce" language of § 922(g) as a proper invocation of Congress' broad power under the Commerce Clause).

153. *See* Perez v. United States, 402 U.S. 146 (1971) (upholding a regulation of individual instances of a class of activities that as a whole affect commerce). For a more detailed discussion of *Perez*, see *infra* notes 157-60 and accompanying text.

154. One could imagine circumstances in which religious practices could be viewed as interstate operations. Most religious organizations exist in more than one state or engage in activities that cross state lines. However, if justification for the RFRA rested on this prong of the commerce power, it would leave those smaller religions that happen to be located entirely within one state's borders (for example, a Polynesian religion practiced only in Hawaii) outside of its protective zone. This would undermine the RFRA's purpose of shielding minority religions from laws that burden their religious expression.

155. *See supra* note 6 (quoting the RFRA).

156. *See supra* note 154.

157. 402 U.S. 146 (1971).

158. *Id.* at 154. "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985)).

a profound effect on interstate commerce.[159] Thus, religion meets the *Perez* "class of activities" test. Although religion's connection with commerce is purely hypothetical, it is sufficient under the Court's expansive reading of the Commerce Clause.[160]

Unlike other statutes enacted under the affecting commerce prong of Congress' commerce power, the RFRA contains nothing to indicate that Congress found a connection between commerce and religion.[161] However, Congress need not make particularized findings about the relationship between a class of activities and interstate commerce in order to legislate.[162] Thus, even though the RFRA does not even mention the word "commerce,"[163] it is a valid exercise of Congress' power to create a statutory right to the free exercise of religion.

The ability to create a statutory right that goes beyond a judicial interpretation of the Constitution is analogous to Congress' powers in enforcing the Civil War Amendments.[164] The statutory right is enforceable only if it expands protection already given by the Constitution, but not if it attempts to restrict, abrogate, or dilute a constitutional guarantee.[165] For example, if Congress enacted a law that fined anyone who did not believe in God, the statute would clearly violate the Free Exercise Clause, even under the permissive standards articulated in *Smith*.[166] Labelling such a restrictive provision as a new statutory right would do nothing to sustain it. Clearly, however, Congress' ratcheting-up of the extremely deferential *Smith* standard expands constitutional rights, allowing the RFRA to pass this last barrier.

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159. Most religious organizations operate interstate. Interstate shipment of religious books and ceremonial items further provides the necessary relationship between interstate commerce and religion as a class.

160. NOWAK & ROTUNDA, *supra* note 21, § 4.8, at 154-55.

161. *See supra* note 6 (quoting the RFRA); *cf., e.g.*, 16 U.S.C. § 2601 (1988) (finding a connection between commerce and local utility companies).

162. *See Perez*, 402 U.S. at 156 ("Congress need [not] make particularized findings in order to legislate."). *But cf.* United States v. Lopez, 115 S. Ct. 1624, 1631 (1995) ("[C]ongressional findings would enable us to evaluate the legislative jdugment that the activity in question substantially affected interstate commerce . . . .").

163. *See supra* note 6 (quoting the RFRA).

164. *See supra* note 91 and accompanying text.

165. *See Morgan*, 384 U.S. at 651 n.10. See *supra* note 94.

166. *See Smith*, 494 U.S. at 877 ("The government may not compel affirmation of religious belief.").

III. CONCLUSION

Congress had the power to enact the RFRA. As it applies to state and local government, the RFRA represents a valid exercise of Congress' Section Five enforcement powers. As applied to the federal government, the Act creates a statutory right to free exercise of religion under Congress' commerce power.

One should not rely on the Congress to cure every restrictive constitutional interpretation. Such legislation has serious disadvantages. First, statutes can always be repealed. Thus, individual rights become subject to the whims of the political process.[167] Furthermore, such statutes change an issue of constitutional interpretation into one of statutory construction. Therefore, after a statutory correction of a decision, the judiciary never gets the opportunity to undo its earlier constitutional error.[168]

Nevertheless, the RFRA is an instance where congressional intervention is justified. The Act's wide base of support, cutting across party lines, renders its repeal unlikely.[169] So long as the RFRA remains in place, the Court's inability to overrule *Smith* makes no practical difference.

The RFRA purports to restore free exercise jurisprudence to its pre-*Smith* condition.[170] It is not a restoration of the *Sherbert* era — when courts claimed to apply a compelling interest test that, in practice, resembled rational basis review.[171] Judging from the few cases that have been decided under the Act, the RFRA creates a compelling interest

167. Laycock, *RFRA, supra* note 49, at 254; *see also* Laycock, *Free Exercise, supra* note 67, at 897 ("That means that if an unpopular religion prevails in court and Congress gets excited enough about it, Congress can amend the statute to cut that religion out.").

168. Laycock, *RFRA, supra* note 49, at 254.

169. *See supra* notes 59-60 (discussing the RFRA's wide base of support).

170. *See* 42 U.S.C. § 2000bb(b)(1); *supra* note 6 (quoting the RFRA).

171. *See supra* note 37 and accompanying text (discussing results in pre-RFRA free exercise cases); *see also* Ryan, *supra* note 3, at 1412 ("[T]he free exercise claimant . . . rarely succeeded under the compelling interest test, despite some powerful claims.").

standard the courts will take seriously.[172] With the RFRA, Congress has successfully used its authority to remedy a damaging court decision.

Jeremy Meyer[*]

172. Of the 16 RFRA cases reported by January, 1995, five courts decided in favor of the party asserting a free exercise claim, eleven against. Cases ruling in favor of the free exercise claimant include: Cheema v. Thompson, No. 94-16097, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994); Smith v. Elkins, No. 93-15185, 1994 U.S. App. LEXIS 4293 (9th Cir. Mar. 2, 1994); Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994); Powell v. Stafford, 65 Fair Empl. Prac. Cas. (BNA) 1275 (D. Colo. 1994); Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994). Cases ruling against the free exercise claimant include: Bryant v. Gomez, No. 94-15178, 1995 WL 34272 (9th Cir. Jan. 31, 1995); Merritt-Bey v. Delo, No. 93-2194, 1994 WL 263780 (8th Cir. June 17, 1994); Robinson v. Koch, No. Civ. A. 94-1993, (E.D. Pa. Jan. 23, 1995); Levinson-Roth v. Pavvies, No. CIVIL L-91-3668, 1995 WL 10740 (D. Md. Jan. 5, 1995); Reily v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Bates v. Oregon Department of Correction, No. 93-674-FR, 1994 U.S. Dist. LEXIS 11423 (D. Ore. Aug. 11, 1994); Prins v. Coughlin, 94 Civ. 2053 (MBM), 1994 U.S. Dist. LEXIS 10564 (S.D.N.Y. Aug. 2, 1994); Germantown Seventh Day Adventist Church v. City of Philadelphia, No. 94-1633, 1994 U.S. Dist. LEXIS 12163 (E.D. Pa. Aug. 26, 1994); Boone v. Commissioner of Prisons, No. 93-5074, 1994 U.S. Dist. LEXIS 10027 (E.D. Pa. July 21, 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994); Allah v. Beyer, No. 92-0651, 1994 U.S. Dist. LEXIS 14340 (D.N.J. Mar. 29, 1994); United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994); Swanner v. Anchorage Equal Rights Comm'n *ex rel* Bowles (Alaska), 874 P.2d 274, *cert. denied*, 115 S. Ct. 460 (1994).

Although it may be too early to obtain an accurate sample, the decisions cited indicate that a post-RFRA claimant has approximately a 31% chance of success. In the ten years immediately preceding *Smith*, claimants succeeded only 12% of the time. *See* Ryan, *supra* note 3, at 1412.

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