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A Holy Mess: School Prayer, the Religious Freedom Restoration Act of Texas, and the First Amendment.

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A HOLY MESS: SCHOOL PRAYER, THE RELIGIOUS FREEDOM RESTORATION ACT OF TEXAS, AND THE FIRST AMENDMENT

DAVID S. STOLLE

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I. Introduction

Since the end of World War II, the United States has enjoyed an unprecedented period of economic, social, and cultural transition. As a result, the driving philosophy underlying the American conscious has changed from that of a great melting pot, encouraging the assimilation of different cultures and ideas into the dominant American culture, to a new and still developing acceptance of cultural pluralism. Not surprisingly, this transition has occurred with its share of difficulties. Issues that once seemed settled have reemerged with an entirely new significance, creating new webs of complexity. As with most periods of growth and cultural change, challenges to traditional ways of thinking occur contemporaneously with uncomfortable periods of tension among contending forces. Perhaps best indicative of this phenomenon is the swirl of litigation over the past decade surrounding issues of religion and its free exercise.

Traditionally a Protestant society, the United States was not confronted with many issues of exercising religion freely during the country's first century and a half because the dominant cultural force was also the predominant political force. Those who made the rules also had the power to enforce them, and those who opposed the rules often did so silently. As science and technology advanced in the latter half of the 20th century, however, emerging economic and social horizons created new opportunities for many Americans. Ideas never before confronted or even considered now demanded attention. Darwinism replaced Creationism in many science classrooms, while *Time* magazine asked if God was dead.[1] Mass numbers of Southern and Eastern Asians migrated into the country bringing with them a renaissance of Eastern religious thought. Artists and activists questioned established ways of thinking on a wide variety of issues. These, of course, represent only a sampling of the numerous cultural waves that swept over the collective American consciousness and helped to shape the modern United States. As the United States sits at the beginning of a new millenium, each of these changes signify that this is not the same country as that of our mothers and fathers.

One of the results of this new, pluralistic society is a revitalized interest in the First Amendment and its two religion clauses.[2] As often happens when one generation examines the regulations of another, Americans are asking new questions and replacing old ways. Issues once taken for granted are now unsettled as the country tries to mold its law to reflect society's knowledge and beliefs. One area arousing great passion re-

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1. *See* John T. Elson, *Toward a Hidden God*, TIME, Apr. 8, 1966, at 82 (investigating the declining role of religion in the lives of many Americans).

2. *See* U.S. CONST. amend. I (stating "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

volves around the tinder box of religion and public education. Assumptions that previously prevailed unquestioned, such as whether to permit prayer before the local Friday night high school football game or before a public school graduation ceremony, have entered the court system seeking determinative answers.[3] As in most areas of the law, however, issues such as these are the culmination of a long and complex history.

In 1990, the Supreme Court issued one of its most controversial decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*,[4] a case which ignited a firestorm of activity that lasted throughout the decade. In *Smith*, the Court held that the traditional compelling state interest standard for Free Exercise Clause jurisprudence should be replaced by a new test requiring a statute or government action to be facially neutral and generally applicable.[5] Under this doctrine, once the court determines that statutory or government action is both facially neutral and generally applicable, collateral restrictions on the free exercise of religion alone will not violate the First Amendment.[6] In response to *Smith*, Congress, relying on its Enforcement Clause powers under the Fourteenth Amendment, attempted to resurrect the compelling state interest standard by passing the Religious Freedom Restoration Act (RFRA).[7] Thereafter, the Supreme Court struck down RFRA in *City of Boerne v. Flores*[8] on grounds that Congress exceeded its Enforcement

3. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 814 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (determining whether a policy allowing nonproselytizing, nonsectarian prayers at a graduation ceremony may be extended to cover prayers at athletic events).

4. 494 U.S. 872 (1990) (examining whether general drug possession laws violate the Free Exercise clause as applied to the ceremonial ingestion of peyote).

5. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877-79 (1990) (establishing that the Court's interpretation of its precedent leads to the use of a broader test). Within the context of religion, the compelling state interest test states that any governmental interference with an individual's right to freely exercise religion must be justified by a compelling interest. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (citing to *Thomas v. Collins*, 323 U.S. 516, 530 (1945) and noting that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation"). In establishing a new, less strict standard of review, the Court states that because it values the "religious divergence" of the country's pluralism, "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." *Smith*, 494 U.S. at 888.

6. *See Smith*, 494 U.S. at 890 (holding constitutional an Oregon statute prohibiting the ceremonial use of peyote, despite its adverse effect on the free exercise of religion because the statute was facially neutral and of general applicability).

7. *See* 42 U.S.C. § 2000bb (1994) (invalidated by *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997)) (expressing Congress' justifications for RFRA, including a direct reference to the Court's holding in *Smith*).

8. 521 U.S. 507 (1997).

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Clause authority under the Fourteenth Amendment.[9] In Texas, however, the battle merely shifted to the state level, and in June 1999, the Texas legislature passed a state version of RFRA virtually identical to the federal version rejected by the Supreme Court.[10]

This Comment argues that the Texas Religious Freedom Restoration Act is unnecessary legislation that violates the Establishment Clause of the First Amendment. Part II discusses the background and evolution of the principles currently dominating First Amendment jurisprudence concerning both the Establishment Clause and the Free Exercise Clause. Part III reviews the recent history of the Religious Freedom Restoration Act from its inception in 1993 to its 1997 demise in *Boerne*. Part III also presents the Texas Religious Freedom Restoration Act of 1999.[11] Part IV analyzes the Fifth Circuit's recent and highly controversial decision in *Doe v. Santa Fe Independent School District*,[12] which held that invocations and benedictions at public high school graduation ceremonies must be nonsectarian and nonproselytizing in order to satisfy the First Amendment Establishment Clause separation between church and state.[13] Part V discusses the conflict between the Texas Religious Freedom Restoration Act of 1999 and the Fifth Circuit's holding in *Doe* regarding school prayer at graduation ceremonies, concluding that the Act is an unconstitutional infringement of the Establishment Clause. Part V also analyzes the Texas Religious Freedom Restoration Act from a policy standpoint, concluding that the Act is inappropriate and bad public policy. Finally, Part VI suggests that both national and state governments should allow the Supreme Court's Free Exercise doctrine to develop under *Smith*, as

9. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (determining that Congress exceeded its remedial power under the Enforcement Clause of the Fourteenth Amendment by enacting legislation designed to "attempt a substantive change in constitutional protections").

10. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon Supp. 2000) (reestablishing the compelling state interest standard at the state level, basing the state legislation on the language of the failed national RFRA).

11. *See id.*

12. 168 F.3d 806 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000). Santa Fe Independent School District appealed the Fifth Circuit's decision to the Supreme Court in regard to the decision banning any form of pre-game prayer before high school football games. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2771 (2000). In a 6-3 decision, the Court ultimately affirmed the Fifth Circuit's ban on prayer before football games. *See id.* The scope of this Comment, however, focuses on the aspect of the Fifth Circuit's holding permitting nonsectarian, nonproselytizing prayers at public school graduation ceremonies.

13. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 824-25 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (explaining the holding of the court as dependent on the nonproselytizing, nonsectarian language established by the Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992) and developed by the Fifth Circuit in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992)).

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opposed to continuing attempts at reestablishing the compelling state interest standard.

II. Establishment Clause v. Free Exercise Clause

The jurisprudence of the Establishment Clause and the Free Exercise Clause has undergone drastic changes during the past half century. In the years following World War II, the culture of the United States began to evolve. Through technological advances in virtually all aspects of life, America's educational and cultural base of knowledge expanded, and the country found prosperous times coupled with the promise of a bright future. Consequently, Americans started to recognize the diversity of their country and began to acknowledge the value of pluralism. The area of religion naturally displayed this awareness. Because of the dualistic nature of religion—at once one of the most unifying, yet most divisive forces affecting mankind—it is no surprise to see more judicial wrangling over religion throughout the past fifty years of cultural expansion than in the country's first century and a half.

A. *Judicial Review Under the Establishment Clause*

The First Amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[14] The Supreme Court currently uses three tests in its Establishment Clause review: the *Lemon* Test, Endorsement Test, and Coercion Test.[15] The Court announced the *Lemon* Test in 1971; however, this test has fallen into disrepute without formally being abandoned.[16] The *Lemon* Test was amended by the addition of the Endorsement Test in 1989.[17] Finally, the Court adopted the Coercion Test in 1992.[18]

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14. U.S. Const. amend. I.

15. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (establishing what became known as the *Lemon* Test by holding that a constitutionally valid statute must meet three criteria: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion"); County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989) (stating that government unconstitutionally endorses religion when it favors, prefers, or promotes religion over other beliefs); Lee v. Weisman, 505 U.S. 577, 586 (1992) (developing the Coercion Test by stating that unconstitutional coercion occurs when the government directs a formal exercise in such a manner as to encourage or influence the participation of objectors).

16. *See Lemon*, 403 U.S. at 612 (establishing the standard which would eventually be called the *Lemon* Test); *see also County of Allegheny*, 492 U.S. at 592 (creating an additional test to supplement the *Lemon* Test); *Lee*, 505 U.S. at 587 (establishing another test diluting the force of the *Lemon* Test).

17. *See County of Allegheny*, 492 U.S. at 592 (introducing the Endorsement Test as a variant of and supplement to the *Lemon* Test).

18. *See Lee*, 505 U.S. at 587 (utilizing the Coercion Test).

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The Supreme Court first undertook the task of defining the contemporary parameters of its Establishment Clause jurisprudence in *Everson v. Board of Education*.[19] In *Everson*, the Court examined whether a New Jersey statute violated the First Amendment's Establishment Clause. Specifically, the statute authorized public school districts to reimburse parents of parochial school students for the cost of the students' use of public transportation in lieu of providing publicly funded bus transportation.[20] In determining the proper method of interpreting the Establishment Clause, the Court invoked Thomas Jefferson's image of the First Amendment embodying a "wall of separation" between church and state.[21] Although the Court adopted the Jeffersonian model, it raised the level of generality with a caveat stating that the First Amendment requires neutrality in the state's actions between religion and non-relig-

19. *See* Everson v. Bd. of Educ., 330 U.S. 1, 17-18 (1947) (holding that because New Jersey parochial schools satisfy state educational requirements, a resolution providing for the state transportation of both public and private school students did not violate the Constitution).

20. *See id.* at 3.

21. *See id.* at 15-16 (utilizing the Jeffersonian metaphor as an indication of the framers' original intent). Reflecting upon the First Amendment in 1802, Jefferson stated:

> [R]eligion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.

Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Jefferson in holding that a polygamist has no Free Exercise Clause right to violate state marriage laws).

In delivering the opinion of the Court in *Everson*, Justice Black adopted the oft quoted metaphor which established the Court's law for Establishment Clause jurisprudence:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State".

Everson, 330 U.S. at 15-16; *see also County of Allegheny*, 492 U.S. at 591 (invoking the history of the Establishment Clause); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (tracing the origin of the Establishment Clause to its Jeffersonian roots).

ion.[22] The Court then concluded that the State may neither favor nor deter religion, and must remain impartial at all times.[23]

Within a year of *Everson*,[24] the Court, using its revised Jeffersonian model, declared a law unconstitutional on Establishment Clause grounds for the first time.[25] For the next twenty years, the Court kept the Jeffersonian "Wall of Separation" doctrine as its basis for deciding questions involving the Establishment Clause.[26] Finally, *Lemon v. Kurtzman* mandated a change.[27]

Facing a rapidly evolving society, the Supreme Court undertook a dramatic shift in its Establishment Clause jurisprudence in 1971 by formally abandoning Jefferson's doctrine in favor of a new standard.[28] Citing a

22. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (invoking Jefferson in establishing the limits placed on government action by the Establishment Clause).

23. *See Everson*, 330 U.S. at 18 (stating that "[the First] Amendment requires the [S]tate to be a neutral in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them").

24. 330 U.S. 1 (1947).

25. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 209-12 (1948) (holding that a public school program allowing religious teachers employed by religious groups access to public school buildings and students during the course of a regular school day violates the Establishment Clause pursuant to the rule developed in *Everson*).

26. *See generally* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 216-17 (1963) (noting that since *Everson*, the Court has held the First Amendment to broadly "create a complete and permanent separation of the spheres of religious activity and civil authority"); Engel v. Vitale, 370 U.S. 421, 425 (1962) (employing the "Wall of Separation" terminology in finding school-sponsored prayer unconstitutional); McGowan v. Maryland, 366 U.S. 420, 442-44 (1961) (referring to the use of the "Wall of Separation" metaphor in *Everson* as the standard for Establishment Clause jurisprudence in deciding whether Sunday Closing Laws violate the Constitution); Zorach v. Clauson, 343 U.S. 306, 312-13 (1952) (acknowledging the tradition established by *Everson* while still allowing some accommodation of religion by the state).

27. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (changing the Court's approach to Establishment Clause jurisprudence from the Jeffersonian "Wall of Separation" to a new three-step test developed from the "cumulative criteria" used by the Court over the years between *Everson* and 1971).

28. *See Lemon*, 403 U.S. at 612 (suggesting that the contemporary state of Establishment Clause jurisprudence necessitated a new approach). In writing the opinion of the Court, Chief Justice Burger stated that:

> [T]he language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law

long and convoluted history which had resulted in a "cumulative criteria developed by the Court," Chief Justice Burger clarified the Court's approach to Establishment Clause jurisprudence.[29] According to the Chief Justice, the *Lemon* Test simply represented the sum of three distinct tests developed over time: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . ., finally, the statute must not foster 'an excessive government entanglement with religion.'"[30] From its inception, lower courts have used the *Lemon* Test with great regularity and consistency.[31] Today, however, the *Lemon* Test has fallen into disrepute in lieu

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> might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.
>
> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Id. (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)) (establishing the need for an approach different than the Jeffersonian "Wall of Separation" approach).

29. *See Lemon*, 403 U.S. at 612-13 (recognizing the evolution of Establishment Clause jurisprudence between *Everson* and *Lemon*). Chief Justice Burger, relying on previous decisions in this area, announced what would become the first two prongs of the *Lemon* Test, determining the purpose and primary effect of the enactment. *See id.* at 612. If either of these is determined to be the advancement or inhibition of religion, then a First Amendment violation resulted. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (stating that "[t]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion"); *see also* Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (acknowledging the purpose and primary effects test from *Schempp* as controlling in its pre-*Lemon* Establishment Clause inquiry). The final prong of the *Lemon* Test, the excessive entanglement issue, had been established by the Court just a year prior to *Lemon*. *See* Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (holding that tax exemptions for religious organizations do not violate the Establishment Clause).

30. *Lemon*, 403 U.S. at 612-13 (1971) (citations omitted). The Fifth Circuit would later summarize the test by stating that "a government practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion." Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 814 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

31. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (employing the *Lemon* Test to determine the constitutionality of the Adolescent Family Life Act of 1981, which provided federal funds to religious organizations for assisting unmarried adolescents with children); Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987) (using the *Lemon* Test to declare a Louisiana statute unconstitutional that forbade the instruction of evolution in public schools unless accompanied by the instruction of creationism); Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481, 485 (1986) (applying the *Lemon* Test to reverse a state supreme court decision that held state assistance to a blind man unconstitutional because he was using the funds to train for the ministry); Aguilar v. Felton, 473 U.S. 402, 410 (1985)

of two notable Supreme Court modifications to its Establishment Clause jurisprudence.[32]

The *Lemon* Test remained the viable standard by which courts decided Establishment Clause cases until 1989,[33] when the Court adopted a sec-

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(invoking the *Lemon* Test to hold unconstitutional a New York City program sending public school teachers into parochial schools to provide remedial instruction); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382-83 (1985) (utilizing the *Lemon* Test to hold unconstitutional a publicly funded school program in which nonpublic school students attend classes taught by public school teachers in the nonpublic school facilities); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) (acknowledging the *Lemon* Test as the guide for the Court's decision that a Connecticut statute providing employees an absolute right to refuse to work on their Sabbath violates the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985) (relying on the first prong of the *Lemon* Test to determine that an Alabama statute authorizing public schools to begin the day with a moment of silence for voluntary prayer or meditation violates the Establishment Clause); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123-27 (1982) (recognizing the Court's consistent use of the *Lemon* Test in holding unconstitutional a Massachusetts statute granting churches and schools the power to block the issuance of a liquor license to a business within a 500 foot radius of a church or school); Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam) (concluding that a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms violates the secular purpose prong of the *Lemon* Test); Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980) (holding that a New York statute reimbursing nonpublic schools for expenses incurred from compliance with state-mandated testing does not violate the *Lemon* Test); Meek v. Pittenger, 421 U.S. 349, 358-59 (1975) (approving a district court's use of the *Lemon* Test and holding unconstitutional a Pennsylvania statute providing publicly funded "auxiliary services" such as counseling, testing, and therapy to nonpublic schools); Sloan v. Lemon, 413 U.S. 825, 832-33 (1973) (returning to its then recent *Lemon* decision to invalidate a Pennsylvania statute reimbursing parents for tuition paid to nonpublic schools); Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973) (citing the three part *Lemon* Test in holding unconstitutional a New York statute that provided publicly funded reimbursements to nonpublic schools for maintenance and repair costs and that provided parents with a tuition reimbursement); Levitt v. Comm. for Pub. Educ. and Religious Liberty, 413 U.S. 472, 481-82 (1973) (relying on *Lemon* to strike down a New York statute which provided publicly funded reimbursement to nonpublic schools for expenses incurred as a result of administering state-mandated examinations).

32. *See* Lee v. Weisman, 505 U.S. 577, 604-05 (1992) (Blackmun, J., concurring) (utilizing the Coercion Test to find that a school plan to allow clergy to give nonsectarian prayers at graduation ceremonies was unconstitutional); County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (employing the Endorsement Test in determining the constitutionality of a county's display of a crèche).

33. *See Lee*, 505 U.S. at 603 n.4 (stating that in the time between *Lemon* and *Lee*, the Court decided thirty-one Establishment Clause cases and only once failed to base its decision on the *Lemon* Test). *See generally* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (reversing a Texas Court of Appeals decision and holding unconstitutional a state tax scheme exempting periodicals published by religious entities); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (holding unconstitutional a Louisiana statute mandating the instruction of creationism when evolution is being taught in public schools); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 395 (1985) (declaring unconstitutional a state-

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ond test, complementing but not replacing the *Lemon* Test.[34] In *County of Allegheny v. ACLU*,[35] the Court established the Endorsement Test[36] by adopting Justice O'Connor's concurrence in *Lynch v. Donnelly.*[37] Writing the plurality decision, Justice Blackmun invoked the recent *Lynch* decision to introduce the new approach:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."[38]

Stating the Court's position further, Blackmun explained that the Establishment clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*."[39] Although the Endorsement Test has not replaced the *Lemon* Test, it has become an important addition to the Court's Establishment Clause doctrine.

Three years after *County of Allegheny*, a plurality of the Court added yet another approach to its Establishment Clause jurisprudence by adopting the Coercion Test.[40] In *Lee*, the Court held that a school district's policy of allowing religious officials, selected by the school, to give nonsectarian, nonproselytizing graduation invocations and benedictions violated the Establishment Clause.[41] The Court determined that unconstitutional coercion occurs when a situation or event satisfies three elements. First, a court must decide whether the government directed the

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funded program whereby public school teachers instructed remedial classes at nonpublic schools); Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985) (concluding that an Alabama statute authorizing a moment of silence for prayer and meditation in public schools violates the first prong of the *Lemon* Test).

34. *See County of Allegheny*, 492 U.S. at 592 (introducing the Endorsement Test as a refinement of the Court's approach to Establishment Clause jurisprudence).

35. 492 U.S. 573 (1989).

36. *See County of Allegheny*, 492 U.S. at 593-94 (acknowledging that Establishment Clause jurisprudence has continued to evolve, and so shall the Court's doctrinal approach).

37. 465 U.S. 668 (1984).

38. *County of Allegheny*, 492 U.S. at 593-94 (citing Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

39. *Id.* at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

40. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (establishing the Coercion Test).

41. *See id.* at 599 (stressing that the Court's past holdings suggest that a school may not compel or persuade a student's participation in religious exercises).

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event.[42] Second, a court must determine whether the event qualifies as a formal exercise.[43] Third, a court must decide whether the event occurred in such a manner as to encourage or influence the participation of objectors.[44]

Lee ultimately has had a twofold effect. First, the decision has created another test under which governmental action may be deemed to violate the Establishment Clause. Second, the Court's use of this new approach raises questions as to the future viability of the *Lemon* Test.[45] To date, however, all three tests remain in use by federal courts and show no signs of being abandoned in the immediate future.[46]

B. *Judicial Review Under the Free Exercise Clause*

Judicial review of the Free Exercise Clause has been as contentious over the past fifty years as that of the Establishment Clause. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[47] In order to understand the contemporary Court's approach to the Free Exercise Clause, one must begin in the early 1960's and trace the Court's development of its review to 1990.

Although the Court addressed Free Exercise Clause issues as early as 1878 in *Reynolds v. United States*,[48] modern Supreme Court jurisprudence began with the Court's 1963 holding in *Sherbert v. Verner*.[49] In *Sherbert*, the Court established a two-step balancing test through which it could

42. *See id.* at 586 (noting that state direction in religious conduct violates the Establishment Clause).

43. *See id.* (indicating that while attendance at the prayer was not necessary for graduation, it was still required, thus adding evidence of coercion).

44. *See id.* (stating that objectors still had to attend, thereby demonstrating the mandatory and coercive nature of state action in school prayer).

45. *See* Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 19 (1998) (stating that at least seven current Justices have questioned the *Lemon* Test either by explicitly expressing doubt or by implication in proposing new tests for the Court to consider).

46. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 817-19 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (analyzing a school prayer policy through all three tests); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 966-72 (5th Cir. 1992) (using all three tests in analyzing a graduation prayer policy). *See generally* Lee v. Weisman, 505 U.S. 577, 593-94 (1992) (utilizing the Coercion Test in forming the Court's conclusion in lieu of the *Lemon* Test without formally replacing it); County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (employing the Endorsement Test to "refine" the Court's approach to the Establishment Clause, not to abandon or replace the *Lemon* Test).

47. U.S. CONST. amend. I.

48. 98 U.S. 145 (1878) (addressing whether the First Amendment allows polygamy based on religious beliefs).

49. 374 U.S. 398 (1963).

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address Free Exercise problems.[50] The Court first determined whether a government action burdened a religious practice and then, if answered affirmatively, whether the state could justify this burden by a compelling interest.[51] If the state could not justify its action, a violation of the Free Exercise Clause resulted.[52]

The compelling state interest test remained viable for over twenty-five years. In 1990, however, the Court revisited its doctrine and adopted a new standard.[53] In *Smith*, the Court faced the question of whether a state law prohibiting the knowing or intentional possession of a controlled substance violated the Free Exercise Clause as applied to an individual whose religion requires the possession and use of the hallucinogen peyote.[54]

Between the Court's decision in *Sherbert* and *Smith*, the only examples of courts declaring neutral, generally applicable laws unconstitutional arose in cases where other constitutional protections joined the Free Exercise claim.[55] Recognizing the practical implications of applying a com-

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50. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (recognizing that the state may, at times, burden the exercise of religion, but this burdening must be balanced against the right to exercise one's religion freely).

51. *See id.* (establishing the compelling state interest rule).

52. *See id.* (explaining that a constitutional challenge based on the Establishment Clause must satisfy both elements of the compelling state interest test in order for that action to be valid).

53. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888-90 (1990) (declining to apply the compelling state interest standard and holding that when a statute or government action is facially neutral and generally applicable, it may incidentally burden the free exercise of religion even without a compelling interest justification).

54. *See id.* at 890 (upholding an Oregon law prohibiting the denial of employment benefits or discharge decisions based on drug use).

55. *See id.* at 881 (stating that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections"); *see also* Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (finding a Wisconsin compulsory education statute an unconstitutional violation of an Amish parent's free exercise right and a violation of their right to oversee their child's education when that child has completed the eighth grade). *See generally* Follett v. McCormick, 321 U.S. 573, 577-78 (1944) (declaring unconstitutional a flat license tax as applied to an evangelist's selling religious materials); Murdock v. Pennsylvania, 319 U.S. 105, 115-16 (1943) (declaring a city ordinance requiring solicitors, including two Jehovah's Witnesses, to procure a license before selling their wares an unconstitutional violation of the Free Exercise Clause and the Free Speech Clause); Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) (declaring a conviction for breach of the peace an unconstitutional violation of a street orator's free exercise right and free speech right); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (holding an Oregon statute requiring attendance at public schools a violation of the constitutional rights of parents and guardians to oversee a child's education).

pelling state interest standard to any regulation that has a tangential effect on religion, the Court applied a new approach that initially appeared to dilute protections afforded by the Free Exercise Clause.[56] The ruling in *Smith* stated that statutory or governmental action that infringes upon the Free Exercise of one's religion is constitutional if: (1) the law is neutral; and (2) the law is applied generally (*i.e.* directed at no specific group).[57] Assuming the law or government action satisfies these two requirements and the effect of the law only indirectly limits the free exercise of religion, a reviewing court should find the law constitutional.[58]

Thus, *Smith* held that a neutral, generally applicable law may infringe upon religious practices even if it is not supported by a compelling governmental interest.[59] *Smith* set off a firestorm of both legislative and judicial action, the effects of which permeate the foundations of today's Free Exercise jurisprudence.[60] Specifically, the Court's decision compelled Congress to seek the reestablishment of a higher standard of review through legislation, and in 1993, Congress passed RFRA.[61]

III. History of Legislation Protecting Religious Freedom During the 1990s

In response to *Employment Division v. Smith*, both federal and state legislatures passed laws attempting to reestablish the compelling state interest standard. The United States Congress acted first with the passing of the Religious Freedom Restoration Act in 1993.[62] The Supreme Court, however, declared RFRA unconstitutional in *City of Boerne v.*

56. *See Smith*, 494 U.S. at 890 (creating a test that allows some state actions which have an incidental negative effect on the free exercise of religion).

57. *See id.* at 879-80 (holding that a general prohibition of the use of the hallucinogenic drug peyote may not be avoided on free exercise grounds).

58. *See id.* at 878-79 (stating that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate").

59. *See id.* at 885 (stating that "[t]o 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' . . . contradicts both constitutional tradition and common sense").

60. *See generally* 42 U.S.C. § 2000bb (1994) (legislating a return to the compelling interest standard at the national level) (invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997)); Tex. Civ. Prac. & Rem. Code Ann. § 110.003 (Vernon Supp. 2000) (reestablishing the compelling state interest standard at the state level); City of Boerne v. Flores, 521 U.S. 507, 534-35 (1997) (addressing the constitutionality of a statute passed specifically to reverse the holding in *Smith*).

61. *See* 42 U.S.C. § 2000bb(b) (1994) (codifying the legislative intent of RFRA as restoring the compelling state interest test) (invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997)).

62. 42 U.S.C. § 2000bb (1994) (invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997)).

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Flores.[63] Nevertheless, in an attempt to reestablish the compelling state interest standard in Texas, the Texas legislature passed a state RFRA in 1999.[64]

A. *Religious Freedom Restoration Act of 1993*

Following the Supreme Court's decision in *Smith*, Congress quickly addressed the Court's controversial opinion. Indeed, as the Supreme Court noted in *City of Boerne v. Flores*, Congress passed RFRA "in direct response to the Court's decision in *Employment Div., Dep't of Human Resources of Ore. v. Smith*."[65] The Act's proponents sought to return the law to a form they believed the founders desired—the unalienable right to exercise freely one's faith—by returning the Free Exercise Clause standard of review back to its Pre-*Smith*, *Sherbert* standard.[66] While the stated purpose of RFRA was "to restore the compelling interest test"[67] in cases where the government substantially burdened the free exercise of religion, the statute's practical effect was to prohibit the government from burdening an individual's exercise of religion in any way.[68] The only pos-

63. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

64. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon Supp. 2000).

65. *See Boerne*, 521 U.S. at 512 (citations omitted).

66. *See id.* at 515 (citing the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a) (1994)). The Act's stated findings read:

> (1) [T]he 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.

42 U.S.C. § 2000bb(a) (1994) (invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997)). Congress went on to explicitly state that its purpose was "(1) to restore the compelling interest test as set forth in Sherbert v. Verner . . . and Wisconsin v. Yoder . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened." 42 U.S.C. § 2000bb(b) (1994) (invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997)).

67. 42 U.S.C. § 2000bb(b)(1) (1994) (invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997)).

68. *See Boerne*, 521 U.S. at 534 (acknowledging that the compelling state interest standard is "the most demanding test known to constitutional law"); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 226 (1994) (recognizing that under a compelling state interest test "most governmental interests are not compelling").

sible exception to this rule arose when the government could show that the burden furthered a compelling governmental interest and applied the least restrictive means available to further that interest.[69]

As expected, the question of RFRA's constitutionality quickly rose to the Supreme Court in *City of Boerne v. Flores*.[70] In *Boerne*, the Court held that by passing RFRA, Congress exceeded its constitutional authority under the Enforcement Clause of the Fourteenth Amendment.[71] Justice Kennedy's majority opinion reinforced the standard of review established by the Court in *Smith*, by saying that to require:

> a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. . . . Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise.[72]

Justice Kennedy further emphasized that the costs associated with RFRA, such as additional litigation at the state level and the government's infringement on the state's traditional authority to regulate the health and welfare of its citizens, far exceeded the statute's usefulness.[73] Moreover, Justice Kennedy acknowledged that some laws will have the incidental effect of limiting the free exercise of religion as the realities of a modern regulatory state demand laws which may impose a substantial burden on a large class of individuals. Justice Kennedy concluded, however, that such incidental limitation did not automatically result in a constitutional violation.[74] Furthermore, Justice Kennedy stated that the additional "least restrictive means" requirement expanded the scope of the legislation to prevent and remedy constitutional violations beyond an

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69. *See Boerne*, 521 U.S. at 515-16 (citing the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1994), and reemphasizing the components of the compelling state interest test).

70. *See id.* at 507.

71. *See id.* at 536 (stating that "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance").

72. *Id.* at 534 (reinforcing the Court's prior holding in *Smith* and concluding that a higher standard would have a considerable undesired effect on the present state of the law).

73. *See id.* (arguing not that efficiency demands that the government remain out of the debate, but rather that the Act impinges on the state's police powers over the health and welfare of its citizens as a result of an increased number of state laws being challenged).

74. *See Boerne*, 521 U.S. at 535 (stating that "[w]hen 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 . . . because of their religious beliefs").

appropriate level.[75] As evidenced by the deeply divided 6-3 decision, however, the ultimate effect of the holding simply refueled the Free Exercise Clause debate ignited seven years earlier in *Smith*.[76]

Struck down at the national level, the RFRA debate began anew at the state level. In many respects, the battle simply shifted from Washington D.C. to various state capitols.[77] In *Boerne*, Justice Kennedy implied that what the United States Congress could not do, perhaps the states could.[78] Consequently, in direct response to *Boerne*, several states quickly followed Congress's lead by passing legislation mirroring RFRA, such as the Texas Religious Freedom Restoration Act.[79]

B. *Texas Religious Freedom Restoration Act of 1999*

In June 1999, Texas Governor George W. Bush signed Texas Senate Bill 138 into law, thus creating the Texas Religious Freedom Restoration Act (TRFRA).[80] Working under the authority bestowed upon the states to adjust the state constitutional bar above that required by the federal constitution,[81] the Texas Legislature adopted a law mirroring the rejected RFRA struck down by the Supreme Court in *Boerne*.[82] As a result,

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75. *See id.* (noting that the least restrictive means component was "not used in the pre-*Smith* jurisprudence RFRA purported to codify").

76. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

77. *See* John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 349 n.459 (1999) (noting that shortly after *Boerne*, two states had already adopted their own RFRAs and seven others had a statute in the planning stages).

78. *See Boerne*, 521 U.S. at 534 (noting that RFRA was "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens"); *see also* Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 18 (1998) (stating that *Boerne* does nothing to preclude states from enacting RFRA-type legislation.)

79. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon Supp. 2000); *see also* John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 349 n.459 (1999) (identifying Connecticut, Rhode Island, New York, Michigan, California, Ohio, Texas, Maryland, and Virginia as states either having or planning a state RFRA as early as one year after *City of Boerne v. Flores*).

80. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon Supp. 2000) (establishing an act virtually identical to the national RFRA that was struck down by the Supreme Court in *Boerne*).

81. *See* Crawford v. Bd. of Educ., 458 U.S. 527, 535 (1982) (holding that California citizens have a constitutional right to lower the standard of review for Equal Protection claims after a state supreme court decision raised the standard above that required the Fourteenth Amendment as long as the statute does not fall below the floor established by the Constitution).

82. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon Supp. 2000) (applying the language of the national RFRA in establishing a state version); *see also* SEN. COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 138, 76th Leg., R.S. (1999) (justifying the state

Texas effectively raised the standard of review for Free Exercise claims above the standard established by the Supreme Court in *Smith* by restoring the compelling state interest standard originally established in *Sherbert*.[83] As applied, however, this action directly conflicts with the Fifth Circuit's holding in *Doe v. Santa Fe Independent School District*,[84] which approves of school districts limiting speech to nonproselytizing and nonsectarian prayers during invocations and benedictions at high school graduation ceremonies.[85]

IV. SCHOOL PRAYER IN TEXAS: THE FIFTH CIRCUIT'S DECISION IN *DOE V. SANTA FE INDEPENDENT SCHOOL DISTRICT*

The Fifth Circuit's decision in *Doe* must be divided into two separate and distinct holdings regarding school prayer. First, as to graduation prayer policies, the court held that any policy permitting prayer at graduation ceremonies must contain language limiting the speech to nonsectarian, nonproselytizing prayers.[86] Second, the court held that public,

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RFRA and establishing its purpose). In introducing the bill, Senator David Sibley specifically referred to RFRA and the *Boerne* decision, while stating that S.B. 138 "would prohibit a government agency from substantially burdening a person's free exercise of religion, unless the agency can demonstrate that the burden is the least restrictive means of furthering a compelling governmental interest." SEN. COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 138, 76th Leg., R.S. (1999). Section 110.003 of the Act expresses this protection by saying that a government agency may not substantially burden a person's free exercise of religion unless the agency can prove that it had a compelling governmental interest and used the least restrictive means possible of furthering that interest. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon Supp. 2000) (establishing the compelling state interest standard for Texas).

83. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (establishing the compelling state interest standard for Free Exercise jurisprudence); *see also Boerne*, 521 U.S. at 513 (examining the Court's rejection of the compelling state interest standard in *Smith*). Justice Kennedy further noted in *Boerne* that according to the *Smith* Court, applying the compelling state interest doctrine in situations like *Smith* "produced an anomaly in the law, [creating] a constitutional right to ignore neutral laws of general applicability." *See id. See generally* Michael J. Frank, Note, *Safeguarding the Consciences of Hospitals and Health Care Personnel: How the Graduate Medical Education Guidelines Demonstrate a Continued Need for Protective Jurisprudence and Legislation*, 41 ST. LOUIS U. L.J. 311, 340 (1996) (recognizing that RFRA is "for all practical purposes, a codification of the compelling (state) interest test of *Sherbert*").

84. 168 F.3d 806 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000).

85. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 824 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (affirming the district court's holding that "the words 'nonsectarian,' [and] 'nonproselytizing' are constitutionally necessary components" of a school prayer policy for graduation invocations and benedictions).

86. *See Doe*, 168 F.3d at 822-23 (finding that the school district's prayer policy lacked the necessary components set forth in *Clear Creek II* and extending the policy restrictions to prayers at football games).

pre-game prayer at high school football games violates the Establishment Clause.[87] Subsequently, the Supreme Court granted certiorari on the second holding without comment on the first.[88] The Court eventually upheld the Fifth Circuit's ban on prayers at football games.[89] By refusing to rule on the Fifth Circuit's graduation prayer policy in *Doe*, however, the Court created a conflict in the law between the Fifth Circuit's holding and TRFRA. To understand this conflict, a discussion of the Fifth Circuit's *Doe* prayer policy and the court's reasoning becomes necessary.

As explained, the Fifth Circuit addressed two primary issues in *Doe*. First, the court considered whether Santa Fe Independent School District's graduation prayer policy must incorporate the nonsectarian, nonproselytizing language of *Jones v. Clear Creek Independent School District*[90] (*Clear Creek II*) in order to pass constitutional muster.[91] Secondly, the court considered whether the *Clear Creek II* prayer policy may be extended to cover high school football games.[92]

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87. *See id.* at 822-23 (distinguishing football games from graduation ceremonies because graduations are a "sober type of annual event that can be appropriately solemnized with prayer").

88. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2266 (2000) (noting that certiorari was limited to the question of prayer at football games).

89. *See id.* (outlining the court's reasoning for upholding the ban on pre-game prayers).

90. 977 F.2d 963 (5th Cir. 1992).

91. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 815-16 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (concluding that any school policy that circumvents the *Clear Creek* limitations violates the Establishment Clause); *see also* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 967 (5th Cir. 1992).

92. *See Doe*, 168 F.3d at 809 (stating the two issues to be decided in the case). The factual background of both *Jones v. Clear Creek Indep. Sch. Dist.* decisions and the *Doe* case are relevant for the reader's understanding of the Fifth Circuit's decision in *Doe*. In *Jones v. Clear Creek Indep. Sch. Dist.* 930 F.2d 416 (5th Cir. 1991) (*Clear Creek I*), the court held that a public school district's policy of permitting graduating seniors to select student representatives to deliver nonproselytizing, nonsectarian invocations and benedictions at graduation did not violate the Establishment Clause under the *Lemon* Test. *See Clear Creek I*, 930 F.2d at 424, *aff'd*, 977 F.2d at 972 (5th Cir. 1992). The court reasoned that the policy had the secular purpose of solemnizing the event, that the primary effect was to underscore the importance of the occasion, and that there was no excessive entanglement because the policy did not prescribe any form of invocation or benediction. *See Clear Creek II*, 977 F.2d at 965 (citing *Clear Creek I*, 930 F.2d at 419-23 and applying the *Lemon* Test).

Following the *Clear Creek I* decision, however, the Supreme Court decided *Lee v. Weisman*, invalidating a school prayer policy which allowed clergy selected by school officials to deliver nonsectarian, nonproselytizing invocations and benedictions at graduation ceremonies. *See* Lee v. Weisman, 505 U.S. 577, 598 (1992) (holding the district's graduation prayer policy unconstitutional on Coercion Test grounds). The Court then granted certiorari on *Clear Creek I*, vacated the Fifth Circuit's decision, and remanded it for consideration in light of its decision in *Lee*. *See Clear Creek II*, 977 F.2d at 964-65. Upon remand, the Fifth

Responding to the first issue, the school district argued that a school prayer policy need not include the nonsectarian, nonproselytizing language of *Clear Creek II* in order to be constitutional.[93] The school district proceeded under two basic theories.[94] First, the district asserted that the nonsectarian, nonproselytizing restrictions "were irrelevant to the court's Establishment Clause holding."[95] Second, the district argued that its policy created a limited public forum which prevented it from restricting the viewpoint expressed pursuant to the Free Speech Clause of the First Amendment.[96]

A. *Establishment Clause Analysis of the Santa Fe Independent School District's Prayer Policy*

The Fifth Circuit responded quickly to the district's first argument regarding whether a valid prayer policy required the nonsectarian, nonproselytizing language found in *Clear Creek II.* In announcing the decision of the court, Circuit Judge Wiener first reviewed the decisions in *Lee* and *Clear Creek II*, determining that the controlling language of both decisions was the "nonsectarian, nonproselytizing" language missing from the

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Circuit held that the *Lee* decision did not render the Clear Creek prayer policy unconstitutional and affirmed its decision in *Clear Creek I. See Clear Creek II*, 977 F.2d at 965 (affirming its prior *Clear Creek I* holding and stating that "*Lee* does not render Clear Creek's invocation policy unconstitutional").

Despite the *Clear Creek II* decision, the Santa Fe Independent School District (SFISD) knowingly continued to allow overtly sectarian and proselytizing prayers at high school graduation ceremonies and at high school football games. *See Doe*, 168 F.3d at 812 (noting SFISD's policy to comply with the nonsectarian, nonproselytizing requirements of *Clear Creek II* only upon a court order, although SFISD was aware of the holding). At the onset of litigation over this apparent violation of *Clear Creek II*, SFISD began the development of a graduation policy which, after several incarnations, evolved into a final policy in July 1995, expressly allowing sectarian and proselytizing invocations and benedictions. *See id.* (finalizing its prayer policy for graduation ceremonies after drafting three versions over thirteen months). The policy, however, contained a proviso stating that only upon court order would a clause in the policy that included the Clear Creek nonsectarian and nonproselytizing prayer policy replace the initial policy lacking such language. *See id.* (quoting the school district's policy: "If the District is enjoined by court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district"). The following October, SFISD extended its graduation prayer policy to address prayers at football games. *See id.* (noting that the football game prayer policy was "essentially identical" to the district's graduation policy).

93. *See Doe*, 168 F.3d at 813 (outlining the school district's basic claims).

94. *See id.* at 814 (establishing the two primary claims issued by the school district).

95. *See id.* at 813-14 (stating that "SFISD primarily challenges the district court's determination that a Clear Creek Prayer Policy must require that prayers or statements be 'nonsectarian, nonproselytizing' to be constitutional").

96. *See id.* at 818-19 (seeking to establish an additional constitutional violation to defend the district's policy).

initial Santa Fe Independent School District (SFISD) policy.[97] The court chastised the district for ignoring the *Clear Creek II* holding and took exception to the district's policy statement that it would implement the nonsectarian, nonproselytizing language only upon a direct court order.[98] Having explained the importance of nonsectarian, nonproselytizing language, the court applied all three of the Supreme Court's Establishment Clause tests to the SFISD policy to determine whether a First Amendment violation existed.[99]

To begin, under the *Lemon* Test's first prong, SFISD argued that its initial graduation prayer policy, lacking the nonsectarian, nonproselytizing language, had the designed secular purpose of solemnizing graduation ceremony proceedings.[100] In response, the Fifth Circuit acknowledged that, although courts typically afford tremendous deference to a government's explanation of its purpose, such explanation cannot be a mere "sham."[101] The court reasoned that the district's policy had the effect of transforming the ceremony by "shifting focus—at least temporarily—away from the students and the secular purpose of the graduation cere-

97. *See id.* at 817-18 (finding that the SFISD's prayer policy which allows for sectarian and proselytizing prayers "obviously violates the Supreme Court's Endorsement Test").

98. *See Doe*, 168 F.3d at 815-17 (concluding that the SFISD reading of the policy was "specious at best" and that the court's "cynicism about the school board's proffered secular purpose is galvanized by SFISD's inclusion of the fall-back alternative that would re-insert the twin restrictions *ipso facto* should the district court invalidate the basic provision" of its modified policy). The court noted three reasons for its decision. *See id.* First, "the twin restrictions served the dual functions of enhancing the graduation ceremony's solemnization, thus permitting the policy to clear *Lemon*'s secular purpose hurdle, while simultaneously reducing the possibility of endorsing religion." *Id.* (citing Clear Creek II, 977 F.2d at 971). Second, in *Clear Creek II* the court relied on the nonsectarian, nonproselytizing factors to determine that the school district's policy survived *Lemon*'s second prong. *See id.* at 815 (citing Clear Creek II, 977 F.2d at 967 and stating that the two factors minimized the advancement of any religion). Finally, the court held that the Clear Creek policy passed *Lee*'s Coercion Test because of the nonsectarian, nonproselytizing nature of the prayer. *See id.* (citing Clear Creek II, 977 F.2d at 971).

99. *See Doe*, 168 F.3d at 816-18 (applying the *Lemon* Test, Endorsement Test, and the Coercion Test to determine the constitutionality of the policy).

100. *See id.* at 816 (raising SFISD's responses to the Court's use of the *Lemon* Test).

101. *See id.* (requiring that a government explanation be truly legitimate in order for it to be shown deference); Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (stating that "[w]hile the Court is normally deferential to State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham"); Wallace v. Jaffree, 472 U.S. 38, 64 (1985) (Powell, J., concurring) (stating that "a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham'"); *see also* Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (holding a school district's avowed secular purpose for displaying the ten commandments insufficient to avoid violating the First Amendment).

mony to the religious content of the speaker's prayers."[102] Moreover, the court aired its displeasure with the SFISD policy because of the irreverent nature of its proviso, which added the controversial nonsectarian, nonproselytizing language into the policy only upon court order.[103] Ultimately, the Fifth Circuit concluded that the district's policy had the apparent effect of promoting sectarian and proselytizing prayers.[104]

Upon declaring the lack of a secular purpose, the court further determined that the SFISD policy violated *Lemon*'s second prong, the primary effect test.[105] The court began by noting that the policy allowed prayers at a government-organized and -sponsored event in which the government entity retained control of the property and equipment.[106] Therefore, the delivery of a sectarian or proselytizing prayer in such a situation not only conveys a message of government religious endorsement, but also appears to endorse a particular form of religion.[107] The court then added that the SFISD policy violated the Endorsement Test for the same reasons it violated *Lemon's* second prong.[108]

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102. *Doe*, 168 F.3d at 816 (detailing the court's shift in focus from the students to the religious content).

103. *See id.* at 817 (stating that the court's "cynicism about the school board's proffered secular purpose is galvanized by SFISD's inclusion of the fall-back alternative that would re-insert the twin restrictions *ipso facto* should the district court invalidate the basic provision" of its modified policy).

104. *See id.* at 816 (seeing the district's final policy as "an attempt to encourage sectarian and proselytizing prayers").

105. *See id.* at 817 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984)). The court quoted *Lynch* to support its position that "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Lynch v. Donnelly, 465 U.S. 668, 690 (1984).

106. *See Doe*, 168 F.3d at 817 (indicating that a government entity raises Establishment Clause concerns when it facilitates the delivery of prayers).

107. *See id.* at 817-18 (expressing the reasoning behind the court's opinion). Justice Stevens employed this same reasoning in the majority opinion in *Santa Fe Indep. Sch. Dist. v. Doe*. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2282-83 (2000) (striking down a school policy allowing prayer before high school football games as a violation of the Establishment Clause). The Court rejected prayer at athletic events based partially on the idea that allowing such prayer has the effect of endorsing the religion of the majority. *See id.* at 2283.

108. *See Doe*, 168 F.3d at 817-18 (noting the multiple avenues available to the court to invalidate the SFISD prayer policy under the Establishment Clause). The court noted that:

> [W]hen the school "permits" sectarian and proselytizing prayers – which, by definition, are designed to reflect, and even convert others to, a particular religious viewpoint and which, as stated above, do not serve . . . the permissible secular purpose of solemnizing an event – such "permission" undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion.

Id.

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Pronouncing the Establishment Clause issue resolved, the court, in dicta, nevertheless continued and applied the Coercion Test.[109] The court concluded that because a sectarian or proselytizing prayer attempts to "promote a particular religious viewpoint rather than solemnize an otherwise purely secular event," it cannot avoid the label of a formal religious exercise for Coercion Test purposes.[110] The court declined, however, to analyze the policy on the other two legs of the Coercion Test because of its decision that the policy was "so constitutionally deficient that it cannot stand."[111]

B. *Free Speech Clause Analysis of the Santa Fe Independent School District's Prayer Policy*

In addition to its Establishment Clause arguments, SFISD raised another First Amendment issue in defense of its prayer policy. SFISD argued alternatively that because it had created a limited public forum to which it gave all students access, the Free Speech Clause prevented any government intervention.[112] As such, the First Amendment protected the speakers from any viewpoint discrimination on the part of the district.[113] Nonetheless, the court rejected SFISD's contention on the ground that the district failed to create the kind of public forum necessary for such a First Amendment defense.[114]

The Fifth Circuit based its conclusion on the three forum classifications regarding governmentally owned property as established by the Supreme Court.[115] First is the traditional public forum, such as public parks and

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109. *See id.* at 818 (stating that the court addresses the Coercion Test merely for the sake of completeness).

110. *See id.* at 818 (rejecting the district's prayer policy on Coercion Test grounds). The court stated that:

> a religious practice derives its religious nature from its content and historical significance, not from whether it is permitted or required by the school. Neither a baptism nor a bar mitzvah, for examples, would be somehow transformed into a secular events [sic] if a school set up a procedure by which its students were permitted to vote to include such a ritual in its graduation ceremony.

Id. at 818 n.10.

111. *Doe*, 168 F.3d at 818 (referring to the Coercion Test's final two prongs—government direction and obligatory participation).

112. *See id.* at 818-19 (arguing that the district was prohibited from intruding upon its student's First Amendment free speech rights).

113. *See id.* at 819 (attempting to justify its prayer policy on free speech grounds).

114. *See id.* (relying on two prior circuit court decisions that school prayer policies allowing students to vote on whether to include a prayer "did not create a limited public forum").

115. *See id.* (noting the Court's traditional classifications for determining a particular type of fora); *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788,

streets, which have a long history as a proper venue for assembly and debate.[116] Second is the "public forum created by government designation," established when the government approves a place or mode of communication for public speech.[117] This type of forum, however, is "traditionally not open to assembly or debate."[118] Finally, there is the nonpublic forum, to which the protections of the First Amendment may not apply.[119]

The court cited two factors as key in determining whether the government has created a public forum.[120] First, the reviewing court must determine the government's intent.[121] Quoting *Estiverne v. Louisiana State Bar Ass'n*[122] the court inquired, "[d]oes the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an

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802 (1985) (stating the three public fora as "the traditional public forum, the public forum created by government designation, and the nonpublic forum").

116. *See Doe*, 168 F.3d at 819 (recognizing the Court's definition of the traditional public forum in *Cornelius*); *see also* Hague v. CIO, 307 U.S. 496, 515-16 (1939) (stating that "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied").

117. *See Doe*, 168 F.3d at 819 (describing a governmentally designated public forum).

118. *Id.* at 819 (citing Hobbs v. Hawkins, 968 F.2d. 471, 481 (5th Cir. 1992)); *see Cornelius*, 473 U.S. at 802 (stating that "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (recognizing that a limited public forum is bound by the same standards that apply in a traditional public forum). The *Perry* Court noted that under a limited public forum, the government can only place content-based prohibition on speech if it can prove a compelling state interest. *See id.*

119. *See Doe*, 168 F.3d at 819 (citing Hobbs v Hawkins, 968 F.2d. 471, 481 (5th Cir. 1992)); *Cornelius*, 473 U.S. at 803 (recognizing that not all government forums are open to the public); U.S. Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 130 n.6 (1981) (maintaining that just because a letterbox is owned or controlled by the government does not automatically confer a public forum status upon it).

120. *See Doe*, 168 F.3d at 819 (discussing the importance of determining governmental intent by examining its policies, practices, and the extent of the forum's use as granted by the government).

121. *See id.* (citing *Cornelius*, 473 U.S. at 802). In regard to determining the government's intent, the Fifth Circuit turned to its own precedent for guidance: "A designated public forum may, of course, be limited to a specified class of speakers or to discussion of specified subjects—thus the term 'limited public forum.'" *Id.* (citing Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 378 (5th Cir. 1989)). To create a limited public forum, the government must allow "general access" to and "indiscriminate use" of the forum "by the general public, or by particular speakers, or for the discussion of designated topics." *Id.* at 820 (citing *Cornelius*, 473 U.S. at 802 and *Perry Educ.*, 460 U.S. at 47).

122. 863 F.2d 371 (5th Cir. 1989).

appropriate place for communication of views on issues of political and social significance[?]"[123] The court concluded that under this test, the district's policy "flunks . . . hands down."[124]

The second factor in determining whether the government has created a public forum is to analyze to what extent the government has granted use of the property.[125] In particular, government may limit the use of a public forum to a specific class of speakers or to the discussion of specific subjects.[126] The public, however, must have "general access"[127] or "indiscriminate use" of the forum.[128]

Applying this standard, the court rejected the district's First Amendment argument and concluded that allowing individuals selected from a limited pool to deliver a limited address, such as an invocation or benediction, as opposed to a general speech of unlimited scope, allows neither general access to nor indiscriminate use of the forum.[129] Thus, under the circumstances, the district's policy did not create a limited public forum.

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123. Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 378-79 (5th Cir. 1989); *see Doe*, 168 F.3d at 820 (quoting Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 378-79 (5th Cir. 1989)).

124. *See Doe*, 168 F.3d at 820 (stating plainly that "[f]or obvious reasons, graduation ceremonies—in particular, the invocation and benediction portions of graduation ceremonies—are not the place for exchanges of dueling presentations on topics of public concern"); *see also* Brody v. Spang, 957 F.2d 1108, 1117 (3d Cir. 1992) (acknowledging that graduation ceremonies do not serve as forums for discussions, public debate, or a place for varying groups to voice their views). *But see* Hays County Guardian v. Supple, 969 F.2d 111, 116-17 (5th Cir. 1992) (concluding that a university campus was a limited public forum because the university's policy established a "general policy of protecting 'free speech activities' on campus"). The court eventually concluded, however, that "a graduation ceremony comprises but a single activity which is singular in purpose, the diametric opposite of a debate or other venue for the exchange of competing viewpoints." *Doe*, 168 F.3d at 820.

125. *See Doe*, 168 F.3d at 819-20 (establishing the criteria by which a court may define the extent of the use of the forum as granted by the government); *see also Cornelius*, 473 U.S. at 803 (stating that "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity"); *Estiverne*, 863 F.2d. at 376 (recognizing that "a forum may be considered *nonpublic* where there is clear evidence that the state did not intend to create a public forum or where the nature of the property at issue is inconsistent with the expressive activity, indicating that the government did not intend to create a public forum").

126. *See Doe*, 168 F.3d at 819 (citing *Estiverne*, 863 F.2d at 378 n.10).

127. *Id.* at 820 (quoting *Cornelius*, 473 U.S. at 801).

128. *Id.* at 819-20 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

129. *See id.* at 820-21 (concluding that "even though the government may designate a forum only for particular speakers or for the discussion of particular topics, SFISD's restrictions so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a public forum—limited or otherwise—at least not without fingers crossed or tongue in cheek"). *But see* Capitol Square Review & Advisory

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C. *Fifth Circuit's Conclusion: Acceptable School Prayer Must be Nonsectarian and Nonproselytizing*

The court concluded that without the nonsectarian, nonproselytizing language of *Clear Creek II*, the SFISD policy could not withstand constitutional scrutiny under the Establishment Clause.[130] Furthermore, the court stated that SFISD could not shield itself behind the First Amendment's Free Speech Clause by declaring that it had created a limited public forum.[131] Additionally, the court held that the district court erred in broadly defining nonsectarian so as to include references to specific deities such as Buddha, Mohammed, Jesus, or Jehovah.[132]

The court also addressed the issue of whether SFISD could transfer its graduation prayer policy to pre-game ceremonies at athletic contests.[133] Relying on recent Fifth Circuit precedent in *Doe v. Duncanville Independent School District*,[134] the court distinguished its holding in *Clear Creek II* and held that such a transfer would be unconstitutional because the solemnity and importance placed on a ceremony such as graduation does not translate to an event such as an athletic contest.[135] The Supreme Court ultimately upheld the Fifth Circuit's decision regarding prayer at high school football games.[136]

Bd. v. Pinette, 515 U.S. 753, 770 (1995) (stating "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms").

130. *See Doe*, 168 F.3d at 824 (describing the nonsectarian, nonproselytizing language as "constitutionally necessary components of a viable" school prayer policy).

131. *See id.* at 822 (stating that "[t]he limited number of speakers . . . and the tightly restricted and highly controlled form of 'speech' involved, all militate against labeling such ceremonies as public fora of any type. Absent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck!").

132. *See id.* (labeling a nonsectarian, nonproselytizing prayer that invokes a specific deity as an "oxymoron").

133. *See id.* at 822-23 (discussing whether a constitutional prayer policy approved for a graduation ceremony may be extended to cover athletic events).

134. *See* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406-07 (5th Cir. 1995) (holding that a school district may not supervise student-initiated, student-led, pre-game prayers, because, in part, the event is not a solemn enough occasion to merit a constitutionally allowable school prayer).

135. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 822-23 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (emphasizing that a "high school graduation is a significant, once-in-a-lifetime event that could appropriately be marked with a prayer").

136. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2283 (2000).

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V. Conflict Between the Texas Religious Freedom Restoration Act and the Fifth Circuit's Decision in *Doe v. Santa Fe Independent School District*

Although TRFRA will affect many areas, this Comment focuses only on the issue of school prayer. However, one need look no further than this issue to see the inherent conflict which arises when state legislation broadly affects an area such as the free exercise of religion. Moreover, although it will be shown that TRFRA violates the Constitution, there are other remedies available for those who seek to protect the right to exercise religion free from governmental intrusion.

A. *Conflict Between the Courts and TRFRA*

The *Doe* doctrine clearly amounts to a governmental restriction on school prayer.[137] Because graduation is a formal occasion, the Fifth Circuit upheld its own precedent in protecting the right of schools to solemnize such ceremonies with an invocation and benediction.[138] These prayers, however, must be limited to using only nonsectarian, nonproselytizing language.[139] The conflict between the courts and the state of Texas arises when applying TRFRA to an acceptable school prayer pursuant to *Doe*.

TRFRA expressly establishes that the state must justify any limitation on the right to free exercise of religion with a compelling interest, and that this restriction must be done in the least restrictive manner possible.[140] Under the *Clear Creek II* doctrine reaffirmed by the Fifth Circuit in *Doe*, a school district may allow a representative of the student body to give an invocation or benediction at a graduation ceremony.[141] Nevertheless, the prayer must be nonproselytizing and nonsectarian or it will violate the Establishment Clause.[142] TRFRA, however, states plainly that a state official may not limit the free exercise of religion unless justi-

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137. *See Doe*, 168 F.3d at 824 (holding that although high school graduation ceremonies may include prayers, they must be limited to nonsectarian, nonproselytizing prayers).

138. *See id.* at 822 n.12 (invoking *Clear Creek II* to emphasize the unique nature of a high school commencement exercise).

139. *See id.* at 824 (limiting acceptable prayer only to those that are nonsectarian and nonproselytizing).

140. *See* Tex. Civ. Prac. & Rem. Code Ann. § 110.003 (Vernon Supp. 2000) (stating that "a government agency may not substantially burden a person's free exercise of religion . . . [unless the act] . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that interest").

141. *See Doe*, 168 F.3d at 811.

142. *See id.* at 824 (holding that constitutionally permissible school prayer policies must include the words "nonsectarian" and "nonproselytizing").

fied by a compelling state interest.[143] As a result, a conflict arises between the Establishment Clause and the Free Exercise Clause, as a school may permit students to pray under *Doe*, but only so long as this prayer is limited. In essence, Texas now faces a constitutional conflict between Supreme Court Establishment Clause precedent and TRFRA as it applies to public school graduation prayers.[144] By applying each of the three tests used by the Supreme Court to determine Establishment Clause violations, TRFRA ultimately fails constitutional scrutiny.

1. Failure of TRFRA Under the *Lemon* Test

As previously discussed, the *Lemon* Test consists of a three-prong analysis to determine whether a government action violates the Establishment Clause.[145] First, a government action must be deemed unconstitutional if it lacks a secular purpose.[146] Second, a governmental action will be held unconstitutional if its primary effect either advances or inhibits religion.[147] Third, a governmental action will be held unconstitutional if it excessively entangles government with religion.[148] Applying the *Lemon* Test to TRFRA demands that a court, faced with the issue, find TRFRA unconstitutional.

To begin, under *Lemon*'s "secular purpose" prong, the debate between proponents and opponents of TRFRA often results in a morass of political and syntactical arguments. For example, proponents argue that religious freedom legislation, at both the federal and state levels, promotes a secular purpose. Such an assertion, however, is arguable. Although at least one court has held that the federal RFRA promoted the secular purpose of protecting values inherent in the First Amendment,[149] the Supreme Court continues to warn against a "sham" secular purpose.[150] More specifically, in rejecting the district's secular purpose for prayer at football games, the Court noted that the secular purpose for which the

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143. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon Supp. 2000) (reestablishing the compelling state interest standard of review for free exercise claims).

144. *See* J. Michael Parker & Cecilia Balli, *Justices to Tackle Football Prayers*, SAN ANTONIO EXPRESS-NEWS, Nov. 16, 1999, at 1A (reporting the Court's grant of certiorari for *Doe v. Santa Fe Indep. Sch. Dist.*).

145. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (reviewing the criteria that the Court has developed for determining when government action violates the Establishment Clause).

146. *See id.* at 612.

147. *See id.*

148. *See id.* at 613.

149. *See In re* Young, 141 F.3d 854, 862 (8th Cir. 1998) (arguing that RFRA promotes the secular purpose of protecting the values inherent in the First Amendment).

150. *See* Santa Fe. Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2269 (2000) (pointing out a "policy's sham secular purposes").

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prayer was intended could have been accomplished by any kind of speech, not simply an invocation.[151]

Because the secular purpose prong may be the most political aspect of any religious freedom act, government justifications of a secular purpose frequently attempt to straddle the line drawn by Establishment Clause jurisprudence. Consequently, government justifications are often abstractions that can be manipulated to support either side of the debate.[152] As a result of this argumentative balance, a violation of *Lemon*'s first prong does not become immediately evident, and absolute proof of the unconstitutional nature of the Act does not exist.

The constitutional problems for TRFRA are no more evident under the *Lemon* Test's second prong—the primary effect test[153]—than they are under the first prong. In order to pass muster under the second prong, the primary effect of the Act may neither advance nor inhibit religion.[154] Arguably, the Act would be unlikely to pass this test because its primary purpose is to advance religion by prohibiting government interference.[155] The Act's defenders, however, emphasize that the First Amendment itself guarantees this very right.[156] Therefore, defenders ar-

151. *See id.* at 2279 (stating that "regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school").

152. *See* Edwards v. Aguillard, 482 U.S. 578, 612-13 (1987) (Scalia, J., dissenting) (noting that in the past the Court has "effortlessly discovered a secular purpose" in Establishment Clause controversies and has found an act only constitutionally deficient for lack of a secular purpose on three occasions); *see also* Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985) (declaring an Alabama statute authorizing public schools to begin the day with a moment of silence for prayer or meditation unconstitutional for lack of a secular purpose); Stone v. Graham, 449 U.S. 39, 39-40 (1980) (per curiam) (invalidating a Kentucky statute requiring schools to post the Ten Commandments in all public school classrooms for lack of a secular purpose); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding that the purpose of an Arkansas statute prohibiting the teaching of evolution in public schools and universities was to "blot out" a theory that conflicted with a religious view of creation).

153. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (establishing the second prong of the test as whether the primary effect of the act either advances or inhibits religion).

154. *See id.* (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) for the proposition that a New York law requiring school books to be loaned free of charge to all students had both a secular legislative purpose and a primary effect that neither advanced nor inhibited religion).

155. *See* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2349-50 (1997) (arguing that RFRA violates the Establishment Clause "[b]y seeking to dictate church-state relations").

156. *See* U.S. CONST. amend. I (stating "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

gue that any government act that merely promotes this right is not unconstitutional.[157]

Although the first two prongs of *Lemon* pose some interpretive problems, application of the third prong renders moot any ambiguity found in either of the first two prongs. Under the third prong, a court must determine whether the Act excessively entangles government with religion.[158] Here, the Act, on its face, seems to comply with the neutrality required of government actors in the context of a First Amendment inquiry. Such an assertion, however, proves untrue when applying the Act to an area such as school prayer.

Under TRFRA, a school may not limit a student's free exercise of religion without offering a compelling interest.[159] As schools commonly allow students to lead public announcements, the question of what the students can and cannot say becomes constitutionally relevant.[160] Pursuant to *Doe*, the law in the Fifth Circuit now requires schools to limit the exercise of religion in certain circumstances, but not in others.[161] Because schools must monitor the speech and free exercise rights of students in some circumstances but not in others, the school, and thus the government, has become excessively entangled with religion.[162] Consequently, TRFRA fails the third prong of the *Lemon* Test.

2. Failure of TRFRA Under the Endorsement Test

In addition to violating the *Lemon* Test, TRFRA also violates the Endorsement Test. As defined by the Supreme Court, the essential element in determining violations under the Endorsement Test is simply whether

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157. *Cf.* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2381 (1997) (stating that the First Amendment allows the privileging of religion, but that this privilege "requires no other constitutional justification").

158. *See Lemon*, 403 U.S. at 612-13 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) for the proposition that a "statute must not foster an excessive government entanglement with religion").

159. TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon Supp. 2000).

160. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 822 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (allowing student-led commencement prayers if they are nonsectarian and nonproselytizing).

161. *See id.* (approving a limited exercise of religion during a prayer at a graduation ceremony, but prohibiting it at an athletic contest); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406-07 (5th Cir. 1995) (noting the distinction between a prayer at a high school graduation ceremony and a middle school basketball game).

162. *See generally* Petitioner's Brief at 46-49, *Boerne* (No. 95-2074), 1996 WL 689630 (arguing that RFRA was an Establishment Clause violation under both the *Lemon* Test and the Endorsement Test). *But see* Respondent's Brief at 48, *Boerne* (No. 95-2074) 1997 WL 10293 (arguing that RFRA is simply a statutory protection of the free exercise of religion and would not require excessive entanglement on the part of the government).

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the state has appeared to take a position on issues of religious belief that cause opponents of this position to feel politically isolated.[163] As an official government entity entitled to control the flow of information at its own events, a school operates in a precarious position. On the one hand, a school wants to produce individually minded, responsible young adults with an independence that may ultimately include the open display of religious beliefs. At the same time, however, schools must not appear to support or promote any particular religious belief.[164] Allowing prayers at school-sponsored events tends to foster this image by, at the very least, favoring religion over non-religion, and at worst, favoring the religion of the clear majority when religious minorities are relatively few in numbers.[165] Indeed, in rejecting formal prayers at public school football games, Justice Stevens found the district's policy to violate the Endorsement Test.[166]

Likewise, when applying TRFRA to the context of public school graduation ceremonies, the statute fails Endorsement Test analysis. Should TRFRA apply to graduation ceremonies, the Act would prohibit schools

163. *See* Lee v. Weisman, 505 U.S. 577, 588-89 (1992) (noting that although a school is acting in good faith to provide an inclusive prayer, this is often not enough to shield itself from Establishment Clause violation); County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (citing Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring)) (defining the key element of the Endorsement Test); *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (emphasizing the feelings of political isolation experienced by nonadherents when a government endorses religion).

164. *See County of Allegheny*, 492 U.S. at 593 (noting the synonymous nature of the terms endorsing, favoring, and promoting within the context of the Endorsement Test).

165. *See* City of Boerne v. Flores, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring) (expressing briefly that RFRA violates the Establishment Clause by favoring religion over non-religion). The brevity of Justice Stevens' concurrence has not escaped critical notice. *See* John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 337 (1999). John Gatliff describes Justice Stevens' brevity as "a Justice's prerogative to ignore contrary authority and oversimplify issues." *Id. But see* Respondent's Brief at 45-47, *Boerne* (No. 95-2074), 1997 WL 10293 (arguing that an advancement of religious liberty is neither an advancement of religion, nor an endorsement of religion over non-religion).

166. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2277 (2000) (stating that the district's football game policy included both a "perceived and actual endorsement of religion"). In recognizing the value of prayer in individual's lives, Justice Stevens emphasized that such prayer must comply with the dictates of the First Amendment. *See id.* at 2278. In the case of SFISD, the invocation had always contained a religious message, and the students understood this as so. *See id.* at 2277-78. In addition, the setting of the prayer—a public high school stadium filled with a school's colors, students, images, and mascots—and the use of the school's public address system indicate either an actual or perceived endorsement of religion. *See id.* at 2278 (stating that "[i]n this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration").

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from limiting invocations and benedictions to nonsectarian, nonproselytizing speeches.[167] However, the Fifth Circuit, as previously discussed, deemed this limitation necessary for a graduation prayer policy to survive constitutional scrutiny.[168] In addition, by granting certiorari on the Fifth Circuit's holding as to football games, the Supreme Court implicitly approved the Fifth Circuit's holding pertaining to graduation prayer policies.[169] Without control over the religious content of graduation ceremony invocations and benedictions as required by the Fifth Circuit's doctrine, a graduation prayer produces the same effect the *Doe* Court found to violate the Establishment Clause at football games.[170] As a result, Justice Stevens's arguments apply equally to unchecked graduation prayers and pre-game prayers.[171] Thus, in the school setting TRFRA cannot survive scrutiny under the Endorsement Test.

3. Failure of TRFRA Under the Coercion Test

Besides the *Lemon* Test and Endorsement Test, TRFRA also violates the Establishment Clause per the Coercion Test. Under the Coercion Test, unconstitutional coercion occurs when: "the government directs a formal religious exercise in such a way as to oblige the participation of objectors."[172] A student-led prayer before a graduation ceremony clearly violates the Constitution under the Coercion Test. First, although the school temporarily relinquishes control of its public address equipment to the student, the government entity ultimately retains control of the ceremony. Therefore, it must be concluded that the government directs the exercise. Second, a prayer falls within the definition of a formal exercise because it falls within the ambit of a solemn exercise.[173] Finally, the issue of greatest debate and subjective determination is whether this government direction of a formal religious exercise is done in such a way as to oblige the participation of objectors.[174] Although the objector has the right not to participate in the prayer, the fact remains that a large, public

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167. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon Supp. 2000).

168. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 817 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000) (stating that a prayer policy that does not restrict such prayers to the nonsectarian, nonproselytizing variety will fail the second prong of the *Lemon* Test).

169. *See Doe*, 120 S. Ct. at 2266 (commenting that the granting of certiorari impliedly suggests a difference between prayers at football games and those at graduations).

170. *See id.* at 2279-81 (noting "the improper effect of coercing those present to participate in an act of religious worship").

171. *See id.* at 2283 (asserting that discretion given to students to formally engage in prayer at school-sponsored events constitutes a violation of the Establishment Clause).

172. *See Doe*, 168 F.3d at 814.

173. *See id.* at 818 (describing prayer as a "quintessential religious practice").

174. *See* Lee v. Weisman, 505 U.S. 577, 598 (1992) (noting that "the objecting student had no real alternative to avoid" participating in the school's religious exercise).

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audience is being lead in an exercise of religious faith; thus, any refusal will be obvious to others and may place the individual in the awkward position of feeling pressured into acting in opposition to sincerely held religious beliefs. As a result, TRFRA must fail constitutional muster as a violation of the Coercion Test.

B. *Conflict Between TRFRA and Public Policy*

In addition to violating the Establishment Clause, several public policy considerations raise questions regarding the appropriateness of a statutory protection beyond that which is stated in the Constitution. First, TRFRA is an overly broad, illegitimate government action that the Texas Legislature enacted without any real public debate. Second, TRFRA opens the Constitution to the problems associated with factional politics. Third, TRFRA is nothing more than a state-level enactment of constitutionally invalid federal legislation which has no real impact on the free exercise of religion. Fourth, other, more reasonable alternatives than TRFRA exist for protecting the First Amendment.

1. Illegitimate Legislative Action

TRFRA is inappropriate legislation because it violates the separation of powers doctrine, it was promulgated without any public debate, and it wields overly broad power. Critics and scholars view *Smith* as a watershed decision in the Court's Free Exercise jurisprudence, signaling a dramatic shift in the Court's interpretation of the Constitution.[175] A state

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175. *See* John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 105 (1997) (stating that "[t]he *Smith* decision . . . threatened the continued vitality of individual religious rights under the Bill of Rights by eliminating a pure religious liberty defense to generally applicable laws"). Most notably, Professor Michael W. McConnell argues that there are two views of interpretation for the Free Exercise Clause. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 157 (1997) (noting that even after more than two hundred years, the "meaning of the Free Exercise Clause remains in doubt"). The first view is the Pre-*Smith* view: seeing the Free Exercise Clause as protecting a specified freedom, that freedom being the right to worship freely, subject only to the barest possible government interference. *See id.* (analogizing this view to that of the Free Speech Clause). The other view of the Free Exercise Clause, inherent in the Court's controversial *Smith* decision, is analogous to the jurisprudence under the Equal Protection Clause, in which an individual is protected against government discrimination in the Free Exercise of religion. *See id.* (seeing the Free Exercise Clause as protection against being singled out by the government). The impact on religion is far from obvious, but it is nevertheless significant. Under a post-*Smith* rule, a state may limit religion in certain circumstances, whereas under the pre-*Smith* standard, the freedom being protected was an absolute that was, for all practical purposes, beyond the reach of government intervention.

Although standing on the other side of the RFRA debate, Professor Marci A. Hamilton shares Professor McConnell's bipolar view of the First Amendment. *See* Marci A. Hamil-

version of RFRA improperly permits legislatures to usurp the judiciary's constitutionally bestowed interpretative and enforcement powers.[176] Indeed, in *City of Boerne*, the Supreme Court held that RFRA attempted to change the interpretation of the Constitution rather than enforce it, directly infringing upon the judiciary's authority.[177] In delivering the opinion of the *Boerne* Court, Justice Kennedy expressly stated that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[178] This statement retains its vitality at the state level. A state legislature may enforce a constitutional right, but it may not alter the Constitution's meaning.[179] Therefore, altering the meaning of the Constitution without following the amendment

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ton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 622 (1998) (seeing the divide as being between the interests of religion and liberty on the one hand and the government's interests on the other). One view of the First Amendment treats religion as weak and the other treats it as strong. *See id.* (arguing that RFRA "is not in religion's interest because it depicts religion as a weak servant"). Hamilton contends that RFRA falls on the side depicting religion as weak and in need of protection, saying that the rhetoric of RFRA "marginalizes religion" and creates the message that religion is "anemic." *See id.* at 622-23 (noting that under this view, religion cannot protect its own interests and needs legislation to prevent governmental intrusion). Hamilton revisits the aftermath of *Smith*, when the federal government, Oregon, and numerous other states passed exemption statutes to allow the use of peyote in the exercise of religion, to demonstrate that such a notion of religion as weak and in need of protection is contrary to reality. *See id.* at 624 (describing the response to *Smith* as an open invitation to all states to legislate exemptions to its general statutes on religion's behalf). Contrary to this view of religion as a weak political force is the view Hamilton argues *Smith* creates—religion as a "responsible and accountable member of the political community." *Id.* (stating that even under *Smith*, "religion has the strength to enter the political battlefield and to secure the accommodations most important to it").

176. *See* Transcript of the Oral Argument at 3-4, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 87109 (arguing that *Boerne* was about the "ability of the United States Constitution to restrain Congress, the branch most likely to be controlled by interest groups and by opinion polls, from engaging in a hostile takeover of the Free Exercise Clause of the First Amendment").

177. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (stating that "RFRA contradicts vital principles necessary to maintain separation of powers"); *see also* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2348 (1997) (expressing the Court's reasoning behind its decision in *Boerne*).

178. *Boerne*, 521 U.S. at 519.

179. *See generally id.* (noting Congress' lack of power to alter the Constitution in exercising its Fourteenth Amendment Enforcement Clause powers). *But see* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 739 (1998) (asserting that if all legislation of rules "the Court has declined to adopt under the Constitution" is a usurpation of judicial authority, any accommodation statute—which the Court urged in its *Smith* decision—would be unconstitutional).

process established for such a change may be defined as nothing other than illegitimate.

In addition to violating the separation of powers doctrine, TRFRA was an overly broad, hastily drawn reaction to a Supreme Court decision and was promulgated without any significant debate.[180] In order to pass a legitimate and truly effective statute, the legislature should first examine the potential impact of the law on areas of religion that will be affected.[181] Nothing in the Texas legislative record suggests that this sort of investigation or debate occurred.[182] In fact, the only substantial change from the language of the original RFRA appears in a caveat prohibiting its use by prison inmates, a change which a simple review of the national RFRA's impact on the law would have revealed as necessary.[183] Furthermore, the Legislature promulgated RFRA too quickly and, in doing so, created an overly broad "constitution-like" statute that empowers all citi-

180. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 628 (1998) (stating that "[r]eligious liberty is too important to be adjusted in this slap-dash fashion, in the absence of evidence of its necessity . . . and in the absence of a sustained public debate"); *see also* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 575-76 (1998) (stating that the reasons for RFRA's failure at the national level was Congress' inadequate planning coupled with the lack of debate and deliberation which should have surrounded such a broad and sweeping act); John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 113 (1997) (stating that it is important for governments "to avoid hasty fixes to complex constitutional problems").

181. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 629 (1998) (listing potential conflicts in the law between religion and environmental law, religion and tax law, religion and copyright law, religion and national parks law, religion and governmental service provisions, and religion and federal drug law); *see also* John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 113 (1997) (stating that in issues such as this "prudent deliberation must be the order of the day").

182. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon Supp. 2000) (publishing the legislative history of the Act); S.J. of Tex., 76th Leg., R.S. 2340-41 (1999) (showing the Senate's rejection of four minor syntactical amendments proposed by the State House). What is noteworthy is the speed with which the Act went from being overwhelmingly passed by the Senate (with a rejection of proposed House amendments), through conference committees, and back to the floor of each house for final approval within fifteen days. *See* Texas Legislature Online, Bill Information, SB138, *at* www.capitol.state.tx.us (last visited on Sept. 27, 2000). This was done, of course, to allow approval before the legislative session adjourned. As a time saving measure, the legislature suspended the common requirement of having proposed legislation read before each house, on three separate days. It may be debated, but fifteen days at the end of a busy legislative session to finalize an act as sweeping and important as this, seems to be far less than adequate time.

183. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (1998) (documenting that ninety-four of one hundred forty-four federal cases filed under RFRA involved prison litigation).

zens at the expense of any governmental control.[184] Empowering citizens in such a manner creates a fundamental right in the individual to practice her religion freely without the specter of government intrusion. However, individuals already enjoy such a right. The First Amendment protects the rights addressed in RFRA, subject only to the interpretation of the Supreme Court. Like other guarantees in the Bill of Rights, the right to exercise one's religion freely cannot exist in an absolute vacuum. Nevertheless, the responsibility of establishing the boundaries as close to absolute as possible lies with the Supreme Court, not the legislature.[185] A legislative act passed without any real discussion or debate that has the sole, expressed purpose of circumventing a Supreme Court constitutional interpretation incurs tremendous difficulty avoiding the label of "illegitimate."

2. Problem of Factional Politics

A second policy argument raises the specter of factional power from which Alexander Hamilton sought to protect the government in Federalist Number 78.[186] Subjecting the Bill of Rights to majoritarian politics would set a dangerous precedent. While arguing before the Supreme Court on the City of Boerne's behalf, Professor Marci A. Hamilton stated that the case turned upon "the ability of the United States Constitution to restrain Congress, the branch most likely to be controlled by interest groups and by opinion polls, from engaging in a hostile takeover of the Free Exercise Clause of the First Amendment."[187] This argument applies equally to state legislatures. Relying on state legislation and the majoritarian politics inherent at the state level could end up harming more people than it helps, primarily those in the minority.[188]

184. *See id.* at 577 (noting that the effect of broad coverage resulted from the drafter's desire to find a simple, straight-forward policy that would attract and keep a majority of popular support).

185. *See id.* at 578 (noting congressional limitations beyond the Establishment Clause).

186. THE FEDERALIST No. 78 (Alexander Hamilton) (indicating that while the congress has authority to limit free speech, it is within the courts' jurisdiction to interpret those boundaries).

187. John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 309 (1999) (quoting Transcript of the Oral Argument at 3-4, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 87109).

188. *See* John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 112 (1997) (warning that state actions may dilute and devalue individual freedoms, especially those of minority religions, in the name of protecting religious liberty).

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Several other potentially harmful results occur when a legislative process open to the problems of factionalism defines constitutional dimensions. First, individual freedoms may be restricted.[189] Second, there will be an increase in confrontations between the judicial and legislative branches.[190] Third, and perhaps most dangerously, the Bill of Rights would become subjected to the political process.[191] Regardless of one's political or religious affiliations, none of these possibilities seem appealing.

RFRA, by its nature, is a majoritarian remedy designed to protect religious freedom. While this may not seem harmful on its own, subjecting the Bill of Rights to majoritarian politics undermines the power and structure of the Constitution. Notwithstanding his support for the compelling state interest standard, John W. Whitehead acknowledges that "[t]he wisdom of routinely subjecting the guarantees in the Bill of Rights to the majoritarian political process is doubtful."[192] Allowing majoritarian policies to determine constitutional changes brings politics into an area of the law that should remain free of such unstable influences.[193]

3. Lack of Accomplishment of RFRA at the National Level

Another policy argument against state RFRAs in general is that the national RFRA, before being held unconstitutional, did not have the success that its proponents had hoped. RFRA's record does not indicate "any substantial improvement in the legal atmosphere surrounding relig-

189. *See id.* (illustrating the evils associated with legislative intermeddling in religious affairs).

190. *See generally id.* at 105 (chronicling the fights between the judicial and legislative branches over religious freedom).

191. *See id.* at 112 (noting the problems of "turning to state politics to fill the void in religious liberty law now left by the" Supreme Court).

192. *See id.* (alluding to the flag burning legislative debates to further support his warning against majoritarian politics and discussing the issue of segregation to support the wisdom of the Judiciary). *But see* Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 17 (1998) (suggesting that *Smith* symbolizes an extreme majoritarianism on the part of the judiciary).

193. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 583-84 (1998) (surmising that the most likely reason state and local leaders failed to voice any opposition to a national RFRA, despite the legal headaches it could foreseeably produce, is the political backlash that opposing such an act could bring). *But see* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997) (arguing that the actions of Congress represent the will of the people and, therefore, are the truest expression of democracy in action).

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ious liberty in the United States."[194] Contrary to popular belief, the vast majority of cases decided on the merits during the RFRA era resulted in denials of relief.[195] Indeed, claimants won only fifteen percent of RFRA cases that were decided on the merits.[196] Furthermore, by an almost two-to-one margin, the majority of federal cases litigated under RFRA involved prison litigation.[197] Although states can avoid this dilemma with specific regulation against RFRA's use by prisoners, this problem demonstrates the types of unforeseen difficulties that arise from such broad and sweeping legislation. In addition to RFRA's unforeseen use by prisoners, its record also offers examples of the extreme and sometimes questionable cases of religious free exercise permitted under the Act that would arguably be deemed unacceptable under *Smith*.[198] The potential for abuse, as evident from the dearth of prison litigants under the original RFRA, provides the worst scenario of what happens when a state enacts overly broad, hastily promulgated legislation.

4. Existence of Other, More Reasonable Alternatives

The review of RFRA's record leads to another argument against its use: there are other, more prudent options a state may employ to guarantee the free exercise of religion. One such alternative is straightforward negotiation between the government and those groups or individuals affected by government action.[199] A group that believes the government has infringed upon its Free Exercise rights can approach the government,

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194. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 585 (1998) (cataloging the successes and failures of RFRA, in an appendix to his article, from the time of its inception until its fall in *City of Boerne v. Flores*).

195. *See id.* at 591 (noting that claimants won only fifteen percent of RFRA cases decided on the merits, and over a third of these were prison litigants).

196. *See id.* (asserting that of the twenty-five grants of relief, nine involved prison litigation).

197. *See id.* (documenting that ninety-four of one hundred forty-four federal cases filed under RFRA involved state prison litigation).

198. *See* Cheema v. Thompson, 67 F.3d 883, 886 (9th Cir. 1995) (affirming an order pursuant to RFRA, allowing a group of students to wear ceremonial knives to school under RFRA); United States v. Gonzales, 957 F. Supp. 1225, 1228-29 (D.N.M. 1997) (determining that the exemption applications required for Native Americans to kill bald eagles for religious purposes violates of RFRA's least restrictive means component); Hunt v. Hunt, 648 A.2d 843, 853-54 (Vt. 1994) (holding that an order to pay child support, despite a father's claims that it burdens the free exercise of religion, is valid under RFRA, but a contempt order for the failure to pay support is not the "least restrictive means of furthering the state's interest in parents supporting their children").

199. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 628 (1998) (suggesting negotiation and the granting of individual exemptions when a government act affects the free exercise of religion as an alternative to an overly-broad blanket RFRA-like act).

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present its complaint, and ask the government to discontinue the offensive practice. Affected groups also may utilize the political process to seek the development of exemptions to a statute that infringes upon their Free Exercise rights.[200] Although some state exemptions may create problematic scenarios under the Establishment Clause, allowing states to carve out exemptions, such as the use of peyote in religious exercise, fosters the ability of the state to weigh the desired effect of generally applicable, neutral statutes against the rights of the individual.[201]

5. Anti-Slippery Slope Argument

A final argument against the use of RFRA addresses an argument often utilized in support of the statute. RFRA proponents argue that the Supreme Court's current Free Exercise doctrine allows governments to run roughshod over small, unpopular religions.[202] This fear, however, has not been substantiated by the caselaw following RFRA's demise.[203] In particular, the Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[204] indicates that the Court shall remain vigilant against statutes designed to impede the free exercise of a minority religion. In *Lukumi*, the post-*Smith* Court found a local ordinance against animal sacrifice unconstitutional because the statute was neither facially neutral, nor generally applicable.[205] This decision exemplifies the

200. *See id.* (recognizing exemptions as an alternative means to the same end that a RFRA-like statute reaches).

201. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (analogizing potential legislation protecting the free exercise of religion through general statutory exemption to that of additional protections given via legislation to the Freedom of Press). *But see* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 597 (1998) (suggesting that among the reasons RFRAs do not work is that legislatures do not adequately define the boundaries of exemptions and because of this, courts have a difficult time administering exemptions with consistency).

202. *Cf.* Ira C. Lupu, *The Failure of RFRA*, 20 U ARK. LITTLE ROCK L.J. 575, 602 (1998) (favoring RFRA as a support mechanism to protect religion against the governmental use of the Free Exercise Clause to affect religious practices).

203. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 545-47 (1993) (holding a local ordinance against animal sacrifice unconstitutional following *Smith* because the statute was not facially neutral, nor was it generally applicable); *see also* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 598-99 (1998) (citing the *Lukumi* decision as evidence that the legal system remains sensitive to blatant acts of religiously motivated discrimination); Robert P. George, *Protecting Religious Liberty in the Next Millenium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 34 (1998) (expressing that the *Lukumi* decision exploded the claim by *Smith* critics that *Smith* made the Free Exercise Clause a nullity).

204. 508 U.S. 520 (1993).

205. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 545-46 (1993) (noting additionally that the statute was motivated to specifically inhibit this particular religious belief).

Court's willingness to use *Smith* as a floor upon which to base its Free Exercise Clause jurisprudence rather than a ceiling prohibiting the free exercise of religion. *Lukumi* appears to give teeth to the rule articulated by the Supreme Court in *Smith.* While supporters of the compelling state interest standard continue to use the slippery slope argument, the basis for such an argument now appears illusory.

VI. ALLOWING A DOCTRINE TO DEVELOP UNDER *EMPLOYMENT DIVISION V. SMITH*

State RFRAs are highly suspect, both as a matter of constitutional doctrine and public policy. These limitations, however, have not kept supporters from suggesting drastic methods to reinstate the compelling state interest standard, such as amending the Constitution.[206] Recognizing that the Supreme Court did not attack religious liberty in *Smith*, however, is the first step towards developing an approach to the Free Exercise Clause that can satisfy all. From the vantage point of RFRA supporters, the least desired option actually offers the best protections for religious liberty—let the law develop under *Smith*, create legislative exemptions when legitimate conflicts arise under the law, and utilize the Free Exercise Clause through judicial interpretation when these two options fail.

While some commentators believe the Supreme Court inevitably must revisit *Smith*,[207] the Court's reversing *Smith* remains unlikely.[208] Al-

206. *See* Robert P. George, *Protecting Religious Liberty in the Next Millenium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 38-39 (1998) (suggesting a constitutional amendment because the Establishment Clause fails to offer effective guidance to the courts because the reasons for its original passage are no longer relevant); Nathan Lewin, *It's Time For a Religious Freedom Amendment*, WASH. POST, July 3, 1997, at A19 (calling for an amendment to redefine the religion clauses of the First Amendment). *But see* Kent Greenawalt, *Originalism and the Religion Clauses: A Response to Professor George*, 32 LOY. L.A. L. REV. 51, 56 (1998) (suggesting that amending the Constitution to reinterpret or reestablish original intent would be a "prescription for periodic wholesale amendment of the Constitution").

207. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 599 (1998) (citing O'Connor's criticism of *Smith* in *Boerne* as evidence that the Court may eventually overrule its *Smith* decision); John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 109-10 (1997) (arguing that it is unlikely that *Smith* will be the last word for the Court on this issue, as evidenced by statements made by the Justices themselves); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 154 (1997) (citing to several scholarly articles following *Smith* denouncing the decision, yet acknowledging and recognizing the body of scholars who believed the Court decided *Smith* correctly). McConnell further notes that several state supreme courts have rejected the reasoning in *Smith* and refused to apply it. *See id.* at 154-55. Professor Kent Greenawalt believes that *Smith* has nearly had the effect of writing the Free Exercise Clause out of the Constitution. *See* Kent Greenawalt, *Should the Religion Clauses of the Constitution Be*

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though the cry against *Smith* has been loud and fierce, the best solution to the "problem" is to realize that no problem exists. Allowing a doctrine to develop under *Smith* provides a balance of protection between the individual's interest in religious liberty and society's interest in prohibiting offensive behaviors through general, neutrally applicable laws. *Smith*'s rule does not damage the free exercise of religion as badly as feared. To the contrary, the strength of the decision is that it provides a clear rule that gives more protection than critics of *Smith* would care to admit.[209] First, the decision keeps the state away from "impos[ing], coerc[ing], or dictat[ing]" beliefs.[210] Second, *Smith* forbids the state from persecuting religions.[211] Third, due to the level of scrutiny that accompanies statutes which are not neutrally passed, *Smith* discourages the state from passing statutes aimed specifically at one group.[212] Finally, *Smith* still provides

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Amended?, 32 LOY. L.A. L. REV. 9, 17 (1998) (arguing that First Amendment challenges would probably produce the same result even if the Free Exercise Clause were absent). In *City of Boerne*, Justice O'Connor criticized the *Smith* holding, urging that the Court had established an "improper standard for deciding free exercise claims." City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor dissenting). Justice Souter encouraged the Court to "reexamine the rule *Smith* declared." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part in the judgment). Other commentators suggest that the best way to allow the Court to return to *Smith* is to forgo any future legislative attempts to revive the compelling state interest test, as the battles over this legislation will prevent the Court from having to address *Smith*. *See* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 716 (1998) (noting the strategical implication of clearing the path for the court to hear a challenge to *Smith*); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 142-43 (1996) (concluding that the national RFRA created more problems than it solved in Free Exercise jurisprudence by preventing a case to arise under the *Smith* rule, which could lead to the Court's revisiting its original holding); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 382 (1994) (suggesting that legislation affecting constitutional liberty interests may keep the Court from revisiting previous "errors" affecting the same interest).

208. *See* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 725 (1998) (describing the chances of the Court overruling or at least modifying *Smith* as "unlikely, although . . . not impossible").

209. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 624-25 (1998) (arguing that *Smith* established "some bright-line rules" for Free Exercise Clause jurisprudence).

210. *See id.* at 624 (recognizing the practical strengths of the *Smith* doctrine as it is presently applied).

211. *See id.* at 625 (arguing that the *Smith* doctrine still protects against the government "targeting a particular religion for disfavored treatment").

212. *See id.* (reinforcing the *Smith* doctrine's call for strict scrutiny when religious groups are singled out).

protection when statutes affect "hybrid rights"—combined constitutional rights, such as a Free Exercise Clause right and a Free Speech right.[213]

With time, the *Smith* standard will evolve into an applicable rule governing free exercise, and its balance will provide the protection guaranteed in the First Amendment.[214] *Smith* does not destroy the religious freedoms inherent in the First Amendment; rather, it merely establishes a standard of review for actions that are potentially illegal but still may be justified as the free exercise of one's faith.[215] Governments at both the state and national level should refrain from engaging the Supreme Court in any future battles over RFRA. The Court has struck a balance that, with time, will etch out its place in our First Amendment jurisprudence as an acceptable standard.[216] States can facilitate this evolution of the law, while specifically protecting religious freedom, by establishing exemptions from general laws when such laws threaten the right to freely exercise one's religion.[217] Supreme Court precedent has held that

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213. *See id.* (noting that when multiple constitutional issues are raised, the state action "will be closely monitored"). Hamilton sums up her argument by saying that:

> Under the *Smith* scenario, when the government is not persecuting, when it is not engaging in an attempt at mind-control or soul-control, when its individualized discretion is at a minimum, and when hybrid rights are not at stake, then religion is forced into the political process to justify itself and to attempt to find solutions that can benefit both the church and the community.

Id. But see Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 16 (1998) (arguing that if a constitutional right is strong enough to be protected when it is combined with another right, it should be strong enough to stand on its own).

214. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 630-31 (1998) (suggesting that with time and development a more flexible rule will arrive that accurately reflects the First Amendment). *But see* John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 105 (1997) (arguing that "[t]he *Smith* decision . . . threatened the continued vitality of individual religious rights under the Bill of Rights by eliminating a pure religious liberty defense to generally applicable laws").

215. *See* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2381-82 (1997) (analogizing that *Smith* establishes religion "on a par with political dissent"). Rubenfeld concludes that like Free Speech jurisprudence, *Smith* offers "profound constitutional protection," but points out that this protection is limited by laws of general application. *See id.* at 2382 (noting that some constitutional rights, such as free speech, may be limited, depending on the context). Even some forms of political speech—such as refusing to pay taxes—will land the speaker in jail. *See id.* (stating that although the refusal to pay taxes may have been a political act or form of political speech, this would not shield the individual from prosecution).

216. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 602-03 (1998) (encouraging legislatures to trust the courts and allow them to establish a reasonable law).

217. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (stating that "[j]ust as a society that believes in the negative protection accorded to

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accommodation statutes are not unconstitutional simply because the law benefits a religious entity.[218] For example, following *Smith*, both the federal and numerous state governments took action to protect the use of peyote in the exercise of religion.[219] Using exemptions produces the most protection for both sides of the argument while at the same time laying the foundation for a solid, long-lasting policy that allows our society to continue celebrating its burgeoning pluralism.[220]

VII. CONCLUSION

The protection of religious liberty is one of the most sacred rights in the Constitution. Ever since the European migration to this continent, people have come to America because of the rights afforded them to worship as they please. As society continues to evolve with more religions and philosophies coexisting within a crowded landscape, these rights become even more precious.

When confronted with what one believes to be a limitation on the right to free religious exercise, the initial reaction is to rise up in protest against any limitation of such a basic and fundamental right. Many times, however, our initial instincts do not steer us clearly. Sometimes, our first in-

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the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well").

218. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (stating that history and precedence has shown that "there is ample room for accommodation of religion under the Establishment Clause"); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987) (stating that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause"); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970) (stating that there is room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

219. *See Smith*, 494 U.S. at 890 (noting that a number of states had exceptions for the religious use of peyote even before *Smith*); *see also* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 624 (1998) (acknowledging that "Oregon, and other states passed laws exempting the use of peyote for religious purposes from general narcotics laws").

220. *But see* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 574 (1998) (inferring that neither the text nor the history of the Constitution or any legitimate policy argument supports the use of religious exemptions from laws of general applicability); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 593 (1998) (suggesting that the judiciary may favor a rule excluding the need for exemptions rather than a rule riddled with exemptions).

stincts, flooded with passions, are wrong, as is often proven with the passage of time. This may be one of those instances.

For nearly ten years, legislatures at both the state and federal level have battled the Supreme Court over its decision in *Smith*, and the fight shows no signs of abating. The problem with legislation is that the political solutions have far too many holes to become effective law. Short of a Supreme Court reversal, *Smith* will likely stand as good law, and any attempt to legislate a return to the compelling state interest standard will encounter objections under the Establishment Clause and as a matter of public policy. The most prudent solution is for states to work within the status quo by enacting specific legislation designed to exempt certain practices from its own existing general, neutrally applicable laws. Although this may result in a more complex body of law, for an area as important as religious liberty, complexity may be a necessary price for the protection of both society's interest in establishing a code of acceptable conduct and the individual's interest in religious freedom.

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