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Render Unto Caesar: How Misunderstanding a Century of Free Exercise Jurisprudence Forged and Then Fractured the RFRA Coalition

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submitted to

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“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof […]”

– The Establishment and Free Exercise Clauses of the

First Amendment to the Constitution

“Tell us therefore, What thinkest thou? Is it lawful to give tribute unto Caesar, or not?

But Jesus perceived their wickedness, and said, Why tempt ye me, ye hypocrites?

Shew me the tribute money. And they brought unto him a penny.

And he saith unto them, Whose is this image and superscription?

They say unto him, Caesar's. Then saith he unto them, Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's.

When they had heard these words, they marvelled, and left him, and went their way.”

-Matthew 22: 17-22

ABSTRACT

This thesis provides a comprehensive history of Supreme Court Free Exercise Clause jurisprudence from 1879 until the present day. It describes how a jurisdictional approach to free exercise dominated the Court's rulings from its first Free Exercise Clause case in 1879 until *Sherbert v. Verner* in 1963, and how *Sherbert* introduced an accommodationist precedent which was ineffectively, incompletely, and inconsistently defined by the Court. This thesis shows how proponents of accommodationism furthered a false narrative overstating the scope and consistency of *Sherbert*'s precedent following the Court's repudiation of accommodationism and return to full jurisdictionalism with *Employment Division v. Smith* (1990). It then shows how this narrative inspired a massive bipartisan coalition in favor of codifying accommodationism, and how this coalition succeeded in passing the Religious Freedom Restoration Act (RFRA) in 1993. The RFRA coalition eventually fractured, as RFRA's implications began to conflict with principles and objectives of liberal interest groups and the Democratic Party. This thesis posits that the fracture of the RFRA coalition can be traced back directly to confusions over *Sherbert*'s precedent.

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CHAPTER ONE: INTRODUCTION

On March 11, 1993, Congressman Charles Schumer (D-NY-9) introduced the Religious Freedom Restoration Act (RFRA) to the floor of the Senate.[1] Both Schumer and RFRA had auspicious futures ahead. RFRA received remarkably broad support from interest groups left and right, religious and secular, and would pass the House and Senate by 435-0 and 97-3 margins, respectively. On November 16, 1993, President Bill Clinton signed RFRA into law. Congressman Schumer became Senator Schumer in 1999, after serving nine full terms in the House. Following Senate Minority Leader Harry Reid's (D-NV) retirement in November 2016, Senator Schumer became leader of the Senate Democratic Caucus.

But today, Minority Leader Schumer opposes his own bill. Schumer's political positions have not changed appreciably, and neither have RFRA's contents; other than no longer applying to the states, the current RFRA is verbatim from the bill that Schumer introduced in 1993. It still stipulates that a government regulation may "substantially burden a person's exercise of religion" only if the regulation is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." And yet, while Democrats overwhelmingly supported RFRA in 1993, today they, like their Senate leader, oppose RFRA by a similarly huge margin. Liberal interest groups, too, now oppose RFRA: most notably the American Civil Liberties Union, which prominently supported RFRA in 1993.[2]

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[1] H.R. 1308, 103rd Cong. (1993).

[2] Melling, Louise. "ACLU: Why we can no longer support the federal 'religious freedom' law." *The Washington Post*, June 25, 2015.

The impetus for the left wing's shift from support of RFRA to opposition was the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores*.[3] In a decision reviled by the vast majority of Democrats, the *Hobby Lobby* Court interpreted RFRA's "person" requirement as including closely held for-profit corporations with religious mission statements. Less than a month after *Hobby Lobby*, Senator Schumer spoke about RFRA and *Hobby Lobby* on the Senate floor:

> "As the author of the bill, I can say again with absolute certainty that the Supreme Court got the *Hobby Lobby* case dead wrong. When we wrote RFRA back in 1993, we did so to protect that which individuals with strong religious beliefs had always enjoyed—the presumption that they should be able to exercise their religious beliefs without interference from the government. But the Court took that protection and misapplied it to for-profit companies that exist for the purpose of benefiting from the open market."[4]

Today, Democrats and liberal interest groups almost unanimously oppose RFRA as currently interpreted by the Court. But while *Hobby Lobby* was the obvious catalyst of this outright opposition, I would, and do, argue that the seeds of this opposition were laid decades earlier. I argue that the left-wing opposition to RFRA and similar religious accommodations bills actually began in the mid-1990's, and that even that opposition can be directly traced back to confusion over the Supreme Court's interpretation of the Free Exercise Clause during the years spanning *Sherbert v. Verner* in 1963 to *Employment*

[3] *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ___ (2014).
[4] Senator Schumer, speaking on S. 2578, 133th Cong., 2nd sess., Congressional Record 160 (July 16, 2014): S 4531.

Division v. Smith in 1990.[5] I argue that the Court insufficiently explained its reasoning for applying the strict scrutiny standard to free exercise accommodations claims—the very same standard that RFRA would later codify into statute. Consequently, there was an implicit tension between the two different interpretations of free exercise accommodationism: a tension that finally came to the political forefront after *Hobby Lobby*, over half a century after its genesis.

Even more than a legal analysis, this thesis is a history, and it covers nearly 150 years of free exercise jurisprudence. First, in Chapters Two and Three, it will look at the Supreme Court's free exercise case law leading up to RFRA's passage. In Court case law, the jurisdictional approach to the Free Exercise Clause dominated the period from *Reynolds v. United States* (1879), the Court's first free exercise case, until *Sherbert* in 1963. For these 84 years, neutral laws were universally upheld, and only discrimination or hybrid claims with another constitutional protection were granted. *Sherbert v. Verner* (1963) started a new era of 27 years, detailed in Chapter Three, in which accommodationism was largely accepted.

In a sense, the story of the Court's Free Exercise Clause jurisprudence is largely the story of competition between these two perspectives. The jurisdictional view of free exercise posits that, because there are proper spheres for the state to regulate secular activity, its laws are valid and must be complied with so long as the state is regulating

[5] *Sherbert v. Verner*, 376 U.S. 398 (1963); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

those secular activities without targeting religious belief or religious practice as such.[6] Accommodationists, in contrast, contend that even indirect burdens from perfectly valid laws can unconstitutionally infringe upon religious liberty, as the Free Exercise Clause protects the right to practice religion even against neutral and constitutional laws. When religious practice conflicts with a law's requirements, and exemptions are not granted to those whose religious practices are affected, accommodationists place the burden of proof on the government, and require the state to provide justification for why it cannot provide an exemption from the law.[7]

One oversimplified conception of the two competing views is that jurisdictionalists see free exercise as a negative right, with the state prohibited from infringing upon the right to religious practice, while accommodationists see free exercise as a positive right, meaning the state is obligated to accommodate religious practice. The structure of the First Amendment would support the negative rights view, as the Amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," rather than making positive guarantees of liberty.[8] This view may not be entirely fair to accommodationists, however, as they consider themselves to only require government action to remedy previous government

[6] For examples of the jurisdictional perspective, see Marshall, William P. "In Defense of Smith and Free Exercise Revisionism," *University of Chicago Law Review*: 58: Iss. 1 (1991); Muñoz, Vincent Phillip. "Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion." *American Political Science Review* 110, no. 2 (May 2016).
[7] For examples of the accommodationist perspective see Laycock, Douglas. "The Remnants of Free Exercise." *The Supreme Court Review* 1990 (1990); McConnell, Michael W. "Free Exercise Revisionism and the Smith Decision." *University of Chicago Law Review* 57 (1990).
[8] U.S. Const. amend. XI.

action; in contrast to, for example, the positive right to counsel found in the Sixth Amendment.[9]

There is a lively debate over the original intent of the Free Exercise Clause. Many well regarded scholars, such as Michael McConnell, have argued that accommodationism was the common practice at the time of the founding, while others, such as Vincent Phillip Muñoz, have argued that the framers intended the Free Exercise Clause to be jurisdictionalist in nature.[10] In general, while I am convinced by McConnell that religious exemptions from neutral laws were prevalent before, during, and shortly after the founding, I am further convinced by arguments from others that, while religious accommodations were present in statutes, they were never considered constitutionally required until the 20th century. These originalist debates are important, and have a role in national discussions on the proper ways to ensure the First Amendment's guarantee of religious liberty. They have even made their way into Court opinions: see, for example, Justice O'Connor and Justice Scalia's warring opinions in *Boerne v. Flores* (1997).[11] But these debates are beyond the scope of this thesis, which concerns itself only with the free exercise decisions of the Supreme Court and the impact those decisions have had on each

[9] See *Gideon v. Wainwright*, 372 U.S. 335 (1963). Of course, even the right to counsel can be framed as a negative right; the Sixth Amendment protects citizens *from* being jailed without a fair trial, and an attorney can be seen as nothing more than a necessary means to that end. For an in-depth comparison of positive and negative rights in American constitutional law, see Currie, David P. "Positive and Negative Constitutional Rights," *University of Chicago Law Review* 53 (1986).

[10] See McConnell, Michael W. "The Origins and Historical Understanding of Free Exercise of Religion." *Harvard Law Review* 103, no. 7 (1990); Muñoz, Vincent Phillip. "The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress." *Harvard Journal of Law and Public Policy* 31, no. 3 (2008); Muñoz, Vincent Phillip.

[11] *City of Boerne v. Flores*, 521 U.S. 507 (1997). Justice Scalia's opinion at 537, Justice O'Connor's opinion at 544.

other and on current public policy. The intentions of the framers are ambiguous, but Court opinions are binary. They have a winner and a loser, and have the force of law and precedent. This is not to say that these opinions are pellucid, or even consistent; indeed, one of the main points of my thesis is that the Court's ambiguity and inconsistency when applying strict scrutiny to free exercise claims led to the confusion which fractured the bipartisan RFRA coalition. As decisions they are flawed, but nevertheless they serve as judicial precedent, and so form the backbone of my thesis.

From *Sherbert* in 1963 until *Smith* in 1990, the jurisdictional and accommodationist positions were in constant tension on the Court. *Sherbert* established a new, accommodationist standard for evaluating free exercise claims for exemptions.[12] This standard became known as the *Sherbert* Test or the Compelling Interest Test. During the period of 1963-1990, the Court usually accepted the *Sherbert* Test, and therefore, to at least some extent, the accommodationist position. But while justices usually agreed in theory on accepting *Sherbert*'s precedent, they interpreted the *Sherbert* Test differently, disagreeing on its scope and application and often declining to apply it at all.

At the root of this confusion was an unspoken confusion within the accommodationist camp. The *Sherbert* Test was closely based on strict scrutiny, a heightened standard of review established by the Court in *United States v. Carolene Products* (1938).[13] The strict scrutiny test assumes unconstitutional all statutes that fall into at least one of three groups: laws abridging fundamental rights, laws infringing upon

[12] For purposes of this thesis, the *Sherbert* Test, the compelling interest test, and strict scrutiny can be considered identical and interchangeable unless otherwise specified.
[13] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

the democratic political process, or the laws affecting "discrete and insular minorities." In *Sherbert* and in following cases, the Court never explicitly said *why* it was applying strict scrutiny (in the form of the *Sherbert* Test). Much of the Court's language suggests that it is applied as a protection for discrete and insular minorities. So does the record of the test's beneficiaries: the Court never applied the *Sherbert* Test to a claim from a mainline Christian before RFRA.

Not all saw the *Sherbert* Test as applying only to religious minorities, however; there was a competing but similarly unarticulated strain of thought that a holder of any religious belief, no matter how popular, politically powerful or integrated into society, would be entitled to an exemption from a valid and neutral law if said law failed the *Sherbert* Test against the claim. These right-wing accommodationists have a less contextualized conception of the Free Exercise Clause, and see free exercise as a monolithic, positive right to act in a religiously motivated manner so long as the government does not have a compelling interest in curtailing said action.

I have decided to call these two interpretations of free exercise accommodationism left-wing accommodationism and right-wing accommodationism. Left-wing accommodationists hold the minority protections view: that the purpose of free exercise exemptions is to protect discrete and insular religious minorities that are often disadvantaged by the political process. Right-wing accommodationists hold the fundamental rights view that free exercise is a positive right to action regardless of the political process.

This is not to say that all members on the political left hold the minority protections view of free exercise, or that all members of the political right hold the positive fundamental rights view of free exercise. For elected officials and interest groups, however, this tends to almost always be the case. Particularly now, in an era of heightened polarization, nearly all Democrats in Congress hold the minority rights view, and nearly all Republicans hold the fundamental rights view. Current party platforms reflect these differences: the 2016 Democratic Party Platform has a whole section on religious minorities, and proclaims that "We support a progressive vision of religious freedom that respects pluralism and rejects the misuse of religion to discriminate."[14] The 2016 Republican Party Platform makes more generalized statements about free exercise, such as that "[r]eligious freedom in the Bill of Rights protects the right of the people to practice their faith in their everyday lives," while also including pro-*Hobby Lobby* language like "[w]e support the right of the people to conduct their businesses in accordance with their religious beliefs."[15]

Scholars, however, have a more eclectic mix of views, that cannot neatly fit on an ideological spectrum. Michael McConnell, a prominent conservative appointed to a judgeship by President George W. Bush, speaks in favor of accommodationism largely because of its protections for religious minorities. Douglas Laycock is left of center on many issues, for example supporting gay marriage prior to *Obergefell*, but nevertheless promotes a right-wing accommodationist view that endorses *Hobby Lobby* and the more

[14] 2016 Democratic Party Platform. http://www.presidency.ucsb.edu/papers_pdf/117717.pdf, at 47, 19.
[15] Republican Platform 2016. https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf, at 11, 12.

sweeping state RFRAs. Meanwhile, scholars from across the ideological spectrum, from Marci Hamilton on the left to Vincent Phillip Muñoz on the right, have rejected accommodationism entirely, in favor of a jurisdictional view. Regardless, the minority protections view has correlated nearly perfectly with the positions of liberal interest groups and politicians, while the fundamental rights view has correlated nearly perfectly with conservative interest groups and politicians, so the left-wing/ right-wing distinction has some merit beyond its brevity.

These two camps—the left-wing accommodationists, basing their exemptions claims on minority rights, and the right-wing accommodationists, basing their claim on a universal, fundamental right to exemptions from indirect burdens—stayed united in their cause during the decades after *Sherbert*, as the tension on the Court was between jurisdictionalists and all accommodationists in general. There was never occasion for the camps to split on a Court case, as each and every one of the Court's free exercise accommodationism cases before 1990 concerned minority religious practices.

Employment Division v. Smith (1990) changed everything. It was a pyrrhic victory for jurisdictionalism, temporarily reinstating the rule that the Free Exercise Clause does not mandate any exemptions from indirect burdens caused by secular and neutral laws, neutrally applied. *Smith* became wildly unpopular, however, as its opponents promoted an erroneous but remarkably successful narrative that accommodationism had been the normal interpretation of the Free Exercise Clause throughout the nation's history. In response to *Smith*, Congress drafted a law which codified strict scrutiny *Sherbert* Test protections for all free exercise accommodations claims against state, local and federal

laws. This law, RFRA, received overwhelming bipartisan support, as mentioned earlier and detailed in Chapter Four. Interest groups from across the political spectrum advocated for its passage, including left-wing interest groups like the ACLU and People for the American Way, right-wing interest groups like Coalitions for America and The Rutherford Institute, and 51 religious organizations from a broad swath of denominations: Mainline Protestant, Jewish, Muslim, Sikh, Native American Church and more. Remarkably, the final RFRA bill passed through the House 435-0, without even a single abstention. RFRA then passed the Senate 97-3, with the only objections coming from conservative Senators who agreed with the bill in principle.

Chapter Five begins with *Boerne v. Flores* (1997), in which the Court found RFRA an overreach of congressional authority and struck it down as applied to the states.[16] While RFRA still applied to federal law, Congress struggled to find an alternative means to apply strict scrutiny to state and local free exercise claims in the late 1990's. Complicating this quest were the burgeoning tensions between left-wing accommodationists and right-wing accommodationists, as the differing ideals of the two camps conflicted in practice for the first time. Religious claims were beginning to be used against other minority groups, most frequently in the form of religious landlords objecting to gay tenants. The nature and standards of the new RFRA replacements being proposed were no different: they codified the same version of the *Sherbert* Test that RFRA had. But, as shown in Chapters Five and Six, it was now becoming clear that RFRA and the Court's pre-*Smith* jurisprudence were not one and the same. Mainline

[16] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Protestants' RFRA claims succeeded more frequently than those of religious minorities, and new claims, such as landlords objecting to their tenants' practices, were sprouting up every month. The ACLU opposed the state-applicable RFRA replacement, and Democrats were skeptical, so the bill was dropped in favor of a more limited, compromise solution: the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which applied only to land use regulations and prison inmates. Several states took action to pass their own RFRA's, which mirrored the federal RFRA in form. Free exercise accommodationism became less of a national concern, as the few free exercise bills that were introduced were low priority and died in, or even before, committee.

In *Burwell v. Hobby Lobby Stores, Inc.* (2014), the Court ruled that for-profit corporations were capable of free exercise and therefore were covered by RFRA's protections, a holding which forced the tensions between left-wing accommodationists and right-wing accommodationists to the surface. Hobby Lobby's claim was foreign to a left-wing accommodationist's view of the Free Exercise Clause for two main reasons: first, the owners of Hobby Lobby's stated values were Protestant, and therefore not of a discrete and insular minority, and second, Hobby Lobby was a corporation, and therefore ineligible for religious protections. Jurisdictionalists had a third, additional qualm with the ruling, as the law from which Hobby Lobby was exempted was valid, neutral and generally applicable. *Hobby Lobby* was consistent with right-wing accommodationism, however, as right-wing accommodationism holds a fundamental rights view of free exercise with claims contingent on time, place and manner of the state's burden rather than individualized personal context.

Following *Hobby Lobby*, Republicans began, for the first time, carving out free exercise exemptions for specific beliefs, rather than creating a general test that applies to all religious claims against all government policies. Today, free exercise accommodationism has become partisan and highly polarized, with most Democrats and left-wing accommodationists denouncing RFRA as it is currently interpreted. Free exercise accommodations are more of a broad national policy issue than they have ever been, and show no signs of getting less controversial in the foreseeable future. Therefore, it is critically important to understand the basis of free exercise accommodationism, and the legal reasoning for, and against, its implementation. This thesis will attempt to complement such essential discourse.

CHAPTER TWO: THE JURISDICTIONAL ERA, 1879-1963

For the first century and a half of government under the Constitution, what would later be known as the Free Exercise Clause of the First Amendment stayed out of the limelight of Supreme Court jurisprudence.[17] Indeed, the Free Exercise Clause itself was scarcely mentioned until the 1950's, as the Court did not distinguish the Free Exercise and Establishment clauses from each other, or often even from the other provisions of the First Amendment, until the 1940's and 1950's.[18] The defining religious liberty case of the era was *Reynolds v. United States* (1879),[19] in which the Court heard the case of George Reynolds, a member of the Church of Latter-Day Saints living in the federal territory of Utah. Reynolds had been convicted, fined and sentenced to hard labor for practicing polygamy, a practice which he claimed was religiously mandated and therefore protected by the religious provisions of the First Amendment. Chief Justice Morrison Waite, writing for a unanimous Court, rejected Reynolds's claim, and in doing so established a jurisdictionalist "belief/conduct barrier" that would stand as precedent for 61 years. The barrier established the doctrine that, while the Federal Government could not regulate religious belief, it had legitimate authority to regulate conduct: "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." [20] The *Reynolds* Court held that the First Amendment's true guarantee of religious liberty was to prevent the Federal Government

[17] At this time, the Free Exercise and Establishment clauses were not seen as separable (see pages 16-17).
[18] Muñoz, Vincent Phillip. *Religious Liberty and the American Supreme Court*. 2nd ed. Lanham, MD: Rowman & Littlefield, 2015. at xiii.
[19] *Reynolds v. United States*, 98 U.S. 145 (1879).
[20] Ibid, at 166.

from intruding into private beliefs or outlawing religious minorities. Any further protections would prove impossible to apply in practice, as there was such a plethora of religious doctrines that few laws could be universally applied without exemptions. The Court rejected outright the notion that religious exemptions could be required, as "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[21]

The Court's opinion did, however, leave some indication that Congress could not target a religious practice because of its religious nature itself, but only because of its effect on secular civil society. It spent significant effort proving that Western societies had viewed polygamy as "an offense to society," since the "earliest history of England," going back to common law practice under King James I.[22] Such historical background would not be necessary if the Court had permitted Congress to regulate all religious conduct. One could plausibly read this portion of the opinion as a tacit admission that such regulation would not be permissible if the primary motive for the legislation were animus towards a religious group.

Reynolds remained the sole landmark religious liberty case, and controlling precedent, until *Cantwell v. Connecticut* (1940).[23] *Cantwell* proved critical for two reasons. First, *Cantwell* "incorporated" the religious provisions of the First Amendment through the liberty provision of the 14th Amendment's Due Process Clause, meaning that

[21] Ibid, at 167.
[22] Ibid, at 164-166.
[23] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

state and local governments would now be held to the same standards as the Federal Government for religious liberty claims. Second, the *Cantwell* Court unanimously overturned the jurisdictional belief/conduct barrier that had been accepted since *Reynolds*, ruling that "the [First] Amendment embraces two concepts—freedom to believe and freedom to act."[24] While the Court provided no clear standard for evaluating what constitutes a violation of the right to religious action, it voided the Connecticut law because the statute in question required state actors to make judgements on the validity of religious beliefs. The statute prohibited persons from soliciting money or subscriptions for any religious or philanthropic cause before receiving a certificate from a state official. This gave state officials discretion over which alleged religious beliefs were valid, a point which the Court found violated the First Amendment, as incorporated through the Due Process Clause of the Fourteenth Amendment: "[the state actor] is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."[25] Thus, the only bright line test established by *Cantwell* was that the government could not place itself in the position of deciding what is or is not a valid religious belief.

While *Cantwell* set critical free exercise precedent, it is important to remember that it is not only a religious liberty case: in some ways, it is just as much a free speech case. The Court held "that defendant's conviction of the common law offense of breach of

[24] Ibid, at 303.
[25] Ibid, at 305.

the peace was violative of constitutional guarantees of religious liberty and freedom of speech."[26] Since *Near v. Minnesota* (1931), the Court had ruled that censorship of speech before publication, known as prior restraint or previous restraint, violated the free speech guarantee of the First Amendment.[27] In some cases, such as *Near*, licensing requirements were found to qualify as prior restraint. *Cantwell* is such a case, as "the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible."[28]

In *Murdock* v. *Pennsylvania* (1943) and *Follett v. Town of McCormick* (1944), the Court gave its first indication that a neutral law, neutrally applied could violate the First Amendment's guarantee of religious liberty: the first crack in the jurisdictional wall. [29] In both *Murdock* and *Follett*, city ordinances required door-to-door salesmen to purchase a vending license before soliciting from the public. In these cases, as in *Cantwell*, the petitioners were Jehovah's Witnesses who believed evangelizing to be a religious obligation. The Court, by a 5-4 margin in *Murdock* and a 6-3 margin in *Follett*, found these licenses to be an undue burden on religious practice,[30] because "distribution of

[26] Ibid, at 299.
[27] *Near v. Minnesota*, 283 U.S. 697 (1931).
[28] *Cantwell*, at 306.
[29] *Murdock v. Pennsylvania (City of Jeannette)*, 319 U.S. 105 (1943); *Follett v. Town of McCormick, South Carolina*, 321 U.S. 73 (1944).
[30] These decisions departed from the Court's opinion, just one year prior, in the consolidated cases *of Jones v. Opelika; Bowden v. Fort Smith; Jobin v. Arizona*, 316 U.S. 584 (1942), where the court ruled 5-4 that such licensing fees were permissible: "[w]hen proponents of religious or social theories use the ordinary commercial methods of sales of article to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvasing." (J. Reed, opinion of the Court, at 597.)

religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment and therefore immune from interference by the requirement of a license."[31] For the first time, the Court hinted at accepting the accommodationist position that a religiously motivated action had more inherent constitutional protection than an act motivated by secular ideology and motivations.

But again, as in *Cantwell*, there were secular aspects to *Murdock* and *Follett*. Since *Cantwell*, the Court had ruled in *Valentine v. Chrestensen* (1942) that regulations of commercial speech be subject to lesser scrutiny than regulations of other speech.[32] Therefore, conflation of commercial speech with religious speech (with noncommercial purpose) was a free speech issue even aside from the religious elements of the cases. The Court says as much; in *Murdock*, it finds the challenged ordinance "invalid under the Federal Constitution as a denial of freedom of speech, press and religion."[33] The jurisdictional view of religious liberty still dominated; no neutral law, neutrally applied had yet been found unconstitutional on purely religious grounds.

In the decades following *Follett*, the Court transitioned from its conception of a general guarantee of religious liberty under the First Amendment to separate and distinct conceptions of the Free Exercise Clause and the Establishment Clause.[34] While the previously mentioned cases tended towards a general conception of "religious liberty," by

[31] *Follett*, at 578 (J. Reed, concurring in judgment.)
[32] *Valentine v. Chrestensen*, 316 U.S. 52 (1942).
[33] *Murdock*, at 105.
[34] Muñoz (2015), at xiii.

McGowan v. Maryland (1961), justices spoke of their distinct "reading[s] of the Establishment Clause and the Free Exercise Clause."[35] In *Braunfeld v. Braun* (1961), for example, Justice William Brennan wrote in dissent that while "there is no merit in appellants' establishment and equal-protection claims [there is] as to the claim that Pennsylvania has prohibited the free exercise of appellants' religion."[36] This new conception of free exercise rights created the potential for new claims against neutral laws, neutrally applied as unconstitutional burdens on religious liberty.

This potential was realized with *Sherbert v. Verner* (1963).[37] Adell Sherbert, a Seventh-Day Adventist, was fired by her employer for refusing to work on Saturdays, and could not find other work for the same reason. Sherbert filed a claim to receive unemployment insurance, but it was rejected by the South Carolina Employment Security Commission because state law mandated that candidates who refused to accept employment were ineligible for unemployment insurance. Because Sherbert's sole reason for refusing to work was religiously motivated, she challenged the rejection of her claim as a violation of her free exercise rights.

In a 7-2 decision authored by Justice William Brennan, the Court held that the South Carolina Unemployment Commission had violated Sherbert's positive liberty to the free exercise of religion. The Court stated that South Carolina had forced Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the

[35] *McGowan v. Maryland*, 366 U.S. 420, 575 (1961). (J. Douglas, dissenting).
[36] *Braunfeld v. Braun*, 366 U.S. 599 (1961).
[37] *Sherbert v. Verner*, 376 U.S. 398 (1963).

other hand, [which] puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[38] Just as a direct penalty on religious action would clearly violate the Free Exercise Clause, so would any provision of law which indirectly compromises a citizen's ability to practice his religion without due cause. Critically, the Court found no distinction in free exercise claims between being denied a privilege, such as the unemployment insurance in question, and being denied a government-provided right or liberty.[39] Therefore, any citizen whose religious practices are in any way impeded by state action, would be entitled to an exemption even to a perfectly neutral and constitutional law, provided the claim in question pass a two-pronged test.

This test, henceforth known as the *Sherbert* Test or the Compelling Interest Test, would dominate the discussion, if not the results, of the Court's Free Exercise Clause jurisprudence for the next 27 years. It comprises two parts: the former places the burden of proof on the claimant, while the latter places the burden of proof on the government. First, the claimant must show he has a sincerely held religious belief that the state has substantially burdened his ability to act upon. If this is found to be true, an exemption must be granted unless the government can prove that its law both furthers a compelling state interest and does so in the manner least burdensome to religious practice. The Court did not pull the *Sherbert* Test out of thin air; it was essentially just an appropriation of the strict scrutiny standard first introduced in the famous Footnote Four of *United States v.*

[38] Ibid, at 404.
[39] Ibid at 404, Ibid at Footnote 6.

Carolene Products Co. (1938),[40] and then solidified in *Skinner v. Oklahoma* (1942),[41] and *Korematsu v. United States* (1944).[42] These cases established strict scrutiny as a three-pronged test for statutes that requires the government to prove that there is a compelling government interest for the statute, that the statute in question is narrowly tailored to achieving said interest, and that the statute is the least restrictive means of achieving said interest.

The *Sherbert* Court's justification for using strict scrutiny is of paramount importance here. By *Sherbert* in 1963, the Court had totally accepted the tiered scrutiny standard of review established by *Carolene*. Tiered scrutiny was, at this point, a bipolar standard.[43] For most challenged laws, particularly "legislation affecting ordinary commercial transactions," the Court would apply the deferential rational basis test.[44] As described by Justice Harlan Fiske Stone in Footnote Four of *Carolene,* a law under rational basis review would not "be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[45] This rational basis review represented a departure from the Court's jurisprudence of the early 20th century, which more thoroughly challenged the

[40] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
[41] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942): "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." (J. Douglas, opinion of the Court, at 541).
[42] *Korematsu v. United States*, 323 U.S. 214 (1944): "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" (J. Black, opinion of the Court, at 216).
[43] In 1976, the Court would create a new standard, intermediate scrutiny: see page 24.
[44] *Carolene*, at Footnote Four.
[45] Ibid, at Footnote Four.

government's legitimate power to pass laws. *Cantwell, Murdock* and *Follett*, despite coming shortly after *Carolene*, represent the kind of scrutiny that the court applied in the pre-tiered era.

But *Carolene* also established the converse of rational basis review: strict scrutiny, the most exacting standard of review the Court uses or has ever used to test the constitutionality of a law. Footnote Four of *Carolene* specifically outlined the three scenarios in which the Court would use strict scrutiny. Justice Stone wrote that that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation" either "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments" or "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or contains "prejudice against discrete and insular minorities." [46]

This first trigger, concerning "specific prohibition[s] of the Constitution," has been interpreted by the Court as mandating strict scrutiny when a law abridges a "fundamental right." Justice Stone's Footnote Four lists some of these fundamental rights, such as freedom of speech (citing *Stromberg and Lovell*), freedom of the Press (citing *Lovell*), the right to vote (citing *Herndon* and *Condon*), and the right to assembly (citing *De Jonge*).[47] Critically, *Carolene* makes no mention of any sort of a fundamental right to religious liberty or free exercise of religion. Fundamental rights are not solely

[46] Ibid, at Footnote Four.

[47] *Stromberg v. California*, 283 U.S. 359, 369-370 (1931). *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). *Nixon v. Herndon*, 273 U.S. 536 (1927). *Nixon v. Condon*, 286 U.S. 73 (1932). *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). All cases cited in *Carolene* at Footnote Four.

those enumerated in the Constitution, however; the Court has since also recognized unenumerated fundamental rights such as those to privacy,[48] to procure an abortion,[49] to marry,[50] to travel,[51] and to make parenting decisions for one's children.[52]

The second trigger listed in *Carolene*, concerning "restrict[ions] on those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," often overlaps with the first and third triggers outlined in *Carolene*, and almost never pertains to free exercise cases. But the third trigger, "prejudice against discrete and insular minorities," may be the key to understanding the confusion around *Sherbert*'s logic and precedent. Footnote Four of *Carolene* states:

> "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, […] or racial minorities, […]: *w*hether prejudice against discrete and

[48] *Griswold v. Connecticut*, 381 U.S. 479, 487-493 (1965). "[T]he right of marital privacy is protected as being within the protected penumbra of specific guarantees of the Bill of Rights." (J. Goldberg, concurring opinion, at 487); *Eisenstadt v. Baird*, 405 U.S. 438, 443-446 (1972). "[T]he constitutionally protected right of privacy inheres in the individual, not the marital couple." (Syllabus, at 439).

[49] *Roe v. Wade*, 410 U.S. 113, 152-153 (1973). "We, therefore, conclude that the right of personal privacy includes the abortion decision." (J. Blackmun, opinion of the Court, at 154).

[50] *Loving v. Virginia*, 388 U.S. 1 (1967) "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (C.J. Warren, opinion of the Court, at 12).

[51] *United States v. Guest*, 383 U.S. 745 (1966). "[The] rights secured to [citizens] by the Constitution and laws of the United States [include] the right to use state facilities without discrimination on the basis of race, the right freely to engage in interstate travel, and the right to equal enjoyment of privately owned places of public accommodation." (Syllabus at 745)

[52] *Stanley v. Illinois*, 405 U.S. 645 (1972). "The rights to conceive and to raise one's children have been deemed 'essential'" (J. White, opinion of the Court, at 651). *Troxel v. Granville*, 530 U.S. 57 (2000). "The Fourteenth Amendment's Due Process Clause has a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests' […] including parents' fundamental right to make decisions concerning the care, custody, and control of their children." (J. O'Connor, opinion of the Court, at 530).

> insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Interestingly, Justice Stone cites *Pierce v. Society of Sisters* (1925) for an example of religious minorities as discrete and insular minorities deserving of strict scrutiny.[53] *Pierce* was not omitted from above discussions of the Court's religious liberty jurisprudence by accident, as it was not a free exercise case. *Pierce* involved a challenge from a Catholic organization to an Oregon ballot initiative that mandated all children attend public schools. The Court ruled unanimously for the Society of Sisters, striking down the Oregon initiative. But Justice James McReynolds's unanimous and solitary opinion in *Pierce* recognized no religious grounds for ruling the law unconstitutional; rather, it "[thought] it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children."[54] Therefore, *Pierce* is a pure Fourteenth Amendment Due Process case. Justice McReynolds's opinion makes nary a mention of the Free Exercise Clause, religious liberty, or even the First Amendment.[55]

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[53] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[54] *Pierce*, at 534.

[55] The Free Exercise Clause had not yet been incorporated by *Pierce*; it did not apply to the states until *Cantwell* in 1940. Instead, the Due Process Clause of the Fourteenth Amendment served as the guarantor of fundamental rights against the states. In his opinion of the Court in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), Justice James McReynolds said that the liberty provision of the Due Process Clause "denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, *to worship God according to the dictates of his own conscience*, and generally to enjoy those privileges

The Warren Court of 1953-1969 used strict scrutiny extensively in cases dealing with discrete and insular minorities, also known as suspect classes.[56] Most frequently, discrete and insular minorities meant racial minorities,[57] but the Court also granted suspect status to classes such as children of unwed parents.[58] Starting in 1976, the Court recognized gender as a suspect class, although it applied a novel standard, intermediate scrutiny, to apply to gender classifications, rather than strict scrutiny.[59] Never, however, did the Court explicitly list religious minorities as "discrete and insular," and therefore qualifying for judgement under strict scrutiny on those grounds.

Justice Brennan's Court opinion in *Sherbert* is ambiguous as to why strict scrutiny is applied. Its most direct claims suggest the Court viewing free exercise as a fundamental right, as it repeatedly affirms Sherbert's "constitutional right to the free exercise of her religion."[60] But on a more granular level, Justice Brennan's analysis suggests that his application of strict scrutiny may be more motivated by Sherbert's status as a discrete and insular minority, and therefore consistent with *Carolene*, than his Court opinion explicitly states. In particular, Justice Brennan speculates that Sherbert's minority

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long recognized at common law as essential to the orderly pursuit of happiness by free men." (emphasis mine).

[56] Paulsen, Michael Stokes, Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray. *The Constitution of the United States*. 2nd ed. St. Paul, MN: Foundation Press, 2013. at 1425-1428.

[57] *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[58] *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

[59] *Craig v. Boren*, 429 U.S. 190 (1976). Intermediate scrutiny, established by *Craig*, requires that classification must be "substantially related to the achievement" of "further[ing] important governmental objectives." (*Craig* at 190) As relating to gender classifications specifically, this intermediate scrutiny test has gradually been replaced by the stricter standard that the government must provide "exceedingly persuasive justification" for said classification. *United States v. Virginia*, 518 U.S. 515 (1996). Together, intermediate scrutiny and strict scrutiny are commonly known as heightened scrutiny, distinguishing them from rational basis review.

[60] *Sherbert*, at 414.

status was a necessary contributing factor to her rights being infringed, because the South Carolina code read that "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious . . . objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner."[61] Justice Brennan notes that "[n]o question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects."[62] This reads more like an argument for protection of a discrete and insular minority than a fundamental rights argument. And given that the overwhelming majority of free exercise claims from 1879-1963 had come from religious minorities,[63] many of whom were discrete and insular groups, religious liberty would seem to be a fitting arena to apply strict scrutiny for discrete and insular minorities, particularly given *Carolene*'s dicta.

The personalized nature of religion would also seem to place the right to free exercise exemptions more in the category of rights granted to minority groups than in the category of fundamental rights. A law that unconstitutionally violates one citizen's right

[61] S.C.Code, § 64-4. (Cited in *Sherbert* at 406).
[62] *Sherbert*, at 406.
[63] In each of the seven free exercise cases mentioned thus far in the chapter, the claimant was a religious minority: a member of the Church of Latter-Day Saints in Reynolds, Jehovah's Witnesses in *Cantwell, Jones*, *Murdock* and *Follett*, an Orthodox Jew in *Braunfeld*, and a Seventh-Day Adventist in *Sherbert*. This trend would continue after *Sherbert*. All of the Court's landmark free exercise accommodations cases from *Sherbert* up to *Smith* concerned exemptions claims from religious minorities: see page 71.

to Free Speech would violate each citizen's right equally, provided they spoke in the same time, place and manner.[64] Free exercise exemption rights, however, are personalized by definition.[65] The South Carolina Unemployment Commission's holding in *Sherbert* would not violate the free exercise rights of a Catholic whose Sabbath was on Sunday, and nor would the vending license fees like those in *Murdock* and *Follett* violate the free exercise rights of a reform Jew who felt no religious obligation to proselytize. While *Sherbert* does not explicitly grant religious minorities discrete and insular status, it also does not explicitly grant a fundamental right to free exercise, and the language of the *Sherbert* majority opinion itself seems to support the reading of exemptions as applying to discrete and insular minorities. Justice Brennan writes that "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[66] Because the more popular strands of Christianity had their Sabbaths on Sunday, those underrepresented religious groups which had different holy days needed exemptions to compensate for their lack of political power.

Indeed, there is some question of whether the South Carolina statute was neutral in the first place. The conventional, contemporary view is that *Sherbert* granted an exemption from a neutral law, neutrally applied; but the particulars of South Carolina's

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[64] "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). (J. Marshall, opinion of the Court).

[65] This causes for a disconnect between "facial neutrality" and "formal neutrality." Some hold that "a genuine neutrality toward minority religions is preferable to a mere formal neutrality." McConnell, "Free Exercise Revisionism and the Smith Decision." (1990), at 1153. See also Justice David H. Souter's concurrence in *Lukumi*, at 559.

[66] *Sherbert*, at 409.

unemployment scheme complicate that claim. Effectively, the state had already exempted Methodists, Baptists and member of other Christian sects who hold Sunday as their Sabbath from working on their holy day. The South Carolinian state legislature forbade state textile plants from operating on Sundays except during times of "national emergency," itself perhaps a display of religious preference. Justice William O. Douglas found that "Blue Laws"—laws like South Carolina's which restrict certain, usually commercial, activities on Sundays—were so preferential as to violate the Establishment Clause. In a solitary dissent in *McGowan v. Maryland* (1961), he noted that "[n]o matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment, and they serve and satisfy the religious predispositions of our Christian communities" at the expense of those who do not hold Sunday as a religious day of rest.[67]

South Carolina's code itself strongly implied that the choice of Sunday as a rest day was not neutral, but rather based on religious ideology—and therefore religious preference. State law mandated that "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious . . . objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner."[68] The requirement that a worker be "conscientiously opposed" to Sunday work to be

[67] *McGowan v. Maryland*, 366 U.S. 420, 574 (1961). Protestant Christians (with the exception of Lutherans) consider Exodus 20: 8-11 to be the Fourth Commandment. It reads: "Remember the Sabbath day, to keep it holy. Six days you shall labor, and do all your work, but the seventh day is a Sabbath to the LORD your God. On it you shall not do any work, you, or your son, or your daughter, your male servant, or your female servant, or your livestock, or the sojourner who is within your gates." Religious doctrine motivated the first "Blue Laws" in the pre-Revolution period. Today, 30 states have some form of limitation on business for Sundays; for example, twelve states ban outright the sale of liquor on Sundays.
[68] S.C. Code § 64-4 (Cited in *Sherbert*, at 406).

exempted from it proves some religious motivation for the exemption, particularly given that no days other than Sunday were granted similar status. Effectively, South Carolina had already granted a religious exemption to its laws—but only to the predominant religious group in the State, and to no other groups. Therefore, it is not unreasonable to argue that South Carolina's law was not neutral, and that granting an exemption to Sherbert "reflects nothing more than the governmental obligation of neutrality."[69]

But regardless of the Court's justification for the accommodationist *Sherbert* Test, it was certainly a major departure from the Court's previous Free Exercise Clause jurisprudence; Justice John Marshall Harlan II called Justice Brennan's majority opinion "disturbing both in its rejection of existing precedent and in its implications for the future" in his dissent.[70] Not only did *Sherbert* ramp up the scrutiny used for free exercise exemptions from the rational basis standard to strict scrutiny, but it also directly repudiated *Cantwell*'s mandate that no government official could pass judgement as to whether a religious belief was valid. The *Cantwell* Court found that Connecticut's "appraisal of facts, […] exercise of judgment, and […] formation of an opinion," in effect "[d]etermin[ing whether] the cause is not a religious one," qualified as "a censorship of religion as the means of determining its right to survive" in violation of the First Amendment.[71] And yet *Sherbert*, while citing and ostensibly upholding *Cantwell*,[72] went so far as to *require* the state to judge the sincerity of religious beliefs, and the necessities of religious conduct, through the first prong of its eponymous test. The jurisdictional

[69] *Sherbert*, at 409.
[70] Ibid, at 418.
[71] *Cantwell*, at 305.
[72] *Sherbert*, at 402, 413.

view, which dominated the Court's jurisprudence for the 84 years between *Reynolds* to *Sherbert*, was now in jeopardy.

CHAPTER THREE: THE *SHERBERT* ERA, 1963-1990

Perhaps because of these departures from precedent, *Sherbert*'s own precedent had only a tentative hold over Free Exercise Clause decisions in ensuing years.[73] *Wisconsin v. Yoder* (1972), decided nearly a decade after *Sherbert*, was the Court's first strong affirmation of *Sherbert*, and a unanimous one.[74] But like *Sherbert*, *Yoder* was far from pellucid in its reasoning for applying strict scrutiny to the case at hand.

Yoder concerned a challenge to a Wisconsin law that mandated parents send their children to accredited schools until the age of 16. Jonas Yoder challenged the requirement as a violation of his (and his child's) free exercise rights, as he wanted to remove his child from school after the eighth grade in accordance with his traditional Amish beliefs. In a supremely odd unanimous opinion, Chief Justice Warren Burger affirmed Yoder's claim, striking down the Wisconsin statute. *Yoder* does engage with the Constitutional matters in question; for example, it explicitly rejects the belief conduct barrier,[75] it states that an accommodation would not violate the Establishment Clause,[76] it states that secular beliefs of conscience do not qualify for protection under the Free

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[73] Killilea, Alfred G. "Privileging Conscientious Dissent: Another Look at Sherbert v. Verner." *Journal of Church and State* 16, no. 2 (1974). "*Sherbert* had remained a rather lonely precedent and had virtually lain fallow for a decade." (at 197).

[74] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[75] "Wisconsin concedes that, under the Religion Clauses, religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause." (Ibid, at 219-220). It is somewhat telling that Wisconsin would still put forth such a claim, even after Sherbert, when it could have argued the case on narrower grounds; see Footnote 10 of *Yoder*.

[76] "Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement." (Ibid, at Footnote 22).

Exercise Clause,[77] and it espouses an accommodationist understanding of the Free Exercise Clause.[78] The majority of Chief Justice Burger's opinion, however, reads like a panegyric to the Amish people and their culture. He spends a remarkably long time discussing Amish customs and their value to society, stating that "the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society."[79] Value judgments such as these are uncommon in Court opinions, and were expressly denounced by the *Cantwell* ban on "appraisal of facts, […] exercise of judgment, and […] formation of an opinion" over the validity of religious beliefs. And yet, *Yoder* emphasizes again and again how the Amish provide a value to society. If one takes free exercise as a fundamental right, such discussions are irrelevant; the Amish are entitled to an exemption because it is their constitutional right, not because they are good. But the Chief Justice spends significant energy justifying his decision based on the Amish's societal value. In addition to the Jefferson's yeoman farmer comment, Chief Justice Burger comments that:

> "We must not forget that, in the Middle Ages, important values of the civilization of the Western World were preserved by members of religious orders who

[77] "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief […t]hus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, [those] philosophical and personal, rather than religious […] belief[s would] not rise to the demands of the Religion Clauses." (Ibid, at 215-216).

[78] "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." (Ibid, at 220).

[79] Ibid, at 225-226.

> isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right,' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[80]

The last sentence in the paragraph above is wholly tautological; any common reading of the Free Exercise Clause, whether jurisdictional or accommodationist, makes no allowance for the state to condemn a religiously motivated way of life merely because it is different. The passages cited above are telling, however, because they suggest that the Amish's value comes in large part from "their habits [which] do indeed set them apart from much of contemporary society"—in other words, habits which together form a discrete and insular lifestyle.[81] Sixteen years after *Yoder*, Justice Brennan stressed the importance of the Amish's discrete and insular status, writing that "in *Wisconsin v. Yoder*, 406 U. S. 205 (1972), we struck down a state compulsory school attendance law on free exercise grounds not so much because of the affirmative coercion the law exerted on individual religious practitioners, but because of "the *impact* that compulsory high school attendance could have on the continued survival of Amish communities."[82]

Yoder would later grow to be seen as the next strongest affirmation of the *Sherbert* Test and free exercise accommodationism after *Sherbert*, and the two cases

[80] Ibid, at 223-224.
[81] Ibid, at 217.
[82] *Lyng v. Northwest Indian Cemetery*, 485 U.S. 435, 466 (1988).

were often cited adjacently in Court opinions espousing accommodationist views.[83] But in general, the *Sherbert* Test's application between its inception and *Employment Division v. Smith* in 1990 was relegated to certain classes of free exercise accommodations claims, and even then not uniformly.[84] For example, claims by conscientious objectors appealing for exemptions from combat duty, such as in *United States v. Seeger* (1965), *Welsh v. United States* (1970), and *Gillette v. United States* (1971), did not have the *Sherbert* Test applied to them in any form,[85] while the decisions which most faithfully applied the *Sherbert* Test were, unsurprisingly, those from cases dealing with unemployment insurance, where its precedent was clearest: *Thomas v. Review Board* (1981) and *Hobbie v. Unemployment Appeals Commission* (1987).[86]

Beyond these arenas, application of the *Sherbert* Test wavered. This could be partially attributed to the dominance of Chief Justice Warren Burger over the Free Exercise Clause exemption decisions handed down by his Court. In *McDaniel v. Paty* (1978), *United States v. Lee* (1982), and *Bob Jones University v. United States* (1983), the Chief Justice, who had also authored *Yoder* and *Thomas*, authored decisions applying

[83] For example, *Yoder* is cited four separate times in *Goldman v. Weinberger*, 475 U.S. 503 (1986), at 506, 522, 525, and 529; and four separate times in *Lyng v. Northwest Indian Cemetery*, 485 U.S. 435 (1988), at 253, 258, 259, and Footnote 2/3. *Yoder* is also cited or mentioned 28 times in *Smith*.

[84] Michael McConnell went as far as to say that "at the Supreme Court level, the free exercise compelling interest test was a Potemkin doctrine." McConnell, "Free Exercise Revisionism and the Smith Decision." (1990), at 1110.

[85] *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437 (1971). These cases present a new wrinkle, as in all three the "religious" nature of the conscientious objection was questioned. In *Seeger*, the case was not even decided on Free Exercise grounds.

[86] *Thomas v. Review Board of the Indiana Employment Securities Division*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987).

different versions of the *Sherbert* Test.[87] In *Bowen v. Roy* (1986), however, his opinion directly refuted the *Sherbert* Test.[88] The facts of *Roy* were very similar to those in *Lee*: in *Roy*, parents objected to the federal government assigning their daughter a Social Security number and using it, whereas in *Lee*, an adult objected to being a participant in Social Security payments and benefits. In *Roy*, Chief Justice Burger explained not using the *Sherbert* Test by stating that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[89] How the claimant's participation in Social Security was any more "dictat[ing] the Government's internal procedures" than *Yoder* dictating education procedures, *Bob Jones University* dictating tax procedures or *Lee* dictating Social Security procedures remains unclear. Justice Sandra Day O'Connor, writing a separate concurrence, ascribed the Chief Justice's reluctance to apply the *Sherbert* Test in *Roy* to "[t]he fact that the underlying dispute involves an award of benefits, rather than an exaction of penalties," but rejected this distinction in favor of applying the *Sherbert* Test.[90] After all, the unemployment benefits in question in *Sherbert* were indeed benefits, and the Court there had no "doubt that the liberties of religion and expression may be infringed by the denial of or placing

[87] *McDaniel v. Paty*, 435 U.S. 615 (1978); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Bob Jones University v. United States*, 461 U.S. 574, 575 (1983). Chief Justice Burger extended the Sherbert precedent beyond free exercise accommodationism; *McDaniel* and *Bob Jones* were free exercise cases, but not exemptions cases.
[88] *Bowen v. Roy*, 476 U.S. 693 (1986).
[89] *Roy*, at 700.
[90] Ibid at 731.

of conditions upon a benefit or privilege."[91] Chief Justice Burger's most direct rejection of the *Sherbert* Test in *Roy* follows:

> "We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[92]

If this is not a departure from *Sherbert*, one wonders what instance of withholding a benefit could not be shoehorned into the category of "criminaliz[ing] religiously inspired activity."

Goldman v. Weinberger (1986), argued the same day as *Roy*, was also a textbook religious exemptions case, involving an orthodox Jew in the Air Force who requested to wear a yarmulke with his military uniform.[93] The Court rejected Goldman's claim by a narrow 5-4 vote, and the Court's opinion**,** joined by Chief Justice Burger but written by his heir apparent, Justice William H. Rehnquist, made no mention whatsoever of *Sherbert* or the *Sherbert* Test. Dissents by Justice Brennan and Justice O'Connor, both joined by Justice Thurgood Marshall, forcefully argued that the *Sherbert* Test should be applied, but Justice O'Connor admitted that the Court's test for free exercise exemptions was no settled matter, and that the *Sherbert* Test had not been consistently applied: "the Court in the past has had some difficulty, even in the civilian context, in articulating a clear

[91] *Sherbert*, at 404.
[92] *Roy* at 706.
[93] *Goldman v. Weinberger*, 475 U.S. 503 (1986).

standard for evaluating free exercise claims that result from the application of general state laws burdening religious conduct."[94] Justice O'Connor again declined to apply the *Sherbert* Test in *O'Lone v. Estate of Shabazz* (1987), when the court heard a claim from two Muslim inmates in a New Jersey prison who were unable to attend Friday worship services because of their prison's restrictive regulations.[95] Justice O'Connor joined Chief Justice Rehnquist's 5-4 majority opinion, which upheld the prison's regulations while making no mention of *Sherbert* or the Compelling Interest Test. Justice Brennan's dissent in *Shabazz*, joined by Justice Blackmun, Justice Marshall, and, oddly, Justice Stevens, did apply the *Sherbert* Test: Justice Brennan "would require prison officials to demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives."[96] The dissenters advocated remanding the case to the District Court, so the prisoners' claim could be reheard under the *Sherbert* standard. Again in *Lyng v. Northwest Indian Cemetery* (1988),[97] Justice O'Connor declined to apply the *Sherbert* Test. This time, she herself wrote the opinion which elected not to apply strict scrutiny:

> "[*Sherbert*] does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their

[94] *Goldman*, at 530.
[95] *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).
[96] *Shabazz*, at 354.
[97] *Lyng v. Northwest Indian Cemetery*, 485 U.S. 435 (1988).

> religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[98]

This argument is compelling given the facts of the case in *Lyng*, where Native American groups in Northwestern California objected to the Federal Government building a highway through Six Rivers National Forest, which they held sacred. But the public school system (*Yoder*), the state legislatures (*McDaniel*) and the military (*Goldman*) are all government owned and operated as well—and as shown in *Lee* and *Roy*, the distinction between government affairs and private affairs is no bright line. Illustrating this point, Justice Brennan, joined by Justices Marshall and Harry Blackmun, dissented in *Lyng* on the grounds that the *Sherbert* Test should be applied in the case at hand.[99]

This was the Court's context and precedent for *Employment Division v. Smith* (argued in 1989 and decided in 1990): a Free Exercise Clause jurisprudence in flux, with a somewhat clear test but no clear boundaries as to when to apply it. Amid this confusion, Justice Antonin Scalia's opinion of the Court in *Smith* provided an emphatic, albeit controversial, answer to the question of when exemptions from neutral laws were necessary. His opinion harkened back to *Reynolds*, stating that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[100] *Smith* held that government cannot regulate religious beliefs or practices as such, but where it has a legitimate interest in policing

[98] Ibid, at 450.
[99] Ibid, at 458.
[100] *Smith* at 879, citing *Lee* at 263 (J. Stevens, concurring in judgment).

secular behaviors, it has the authority to do so; even if such policing "prohibit[s] the exercise of religion [as an] incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[101] *Smith* returned the Court to a jurisdictional standard practically indistinguishable from *Reynolds*'s belief/conduct barrier, while also reinstating the *Cantwell* dictum that public officials shall pass no judgement on whether or not something is a valid religious belief.

Smith concerned a challenge from Alfred Smith and Galen Black, two members of the Native American Church. Smith and Black were fired from their jobs as drug counselors after it was discovered that they had ingested peyote, a federally classified Schedule I substance illegal under Oregon law, at a religious ceremony. When they applied for unemployment insurance, their claims were denied, as they had been fired for criminal activity. Smith and Black challenged this denial of unemployment benefits. The Oregon Supreme Court found that, while Oregon state law did prohibit sacramental drug use, this prohibition violated the Free Exercise Clause of the federal Constitution.

By a 5-1-3 margin, the Court disagreed. *Smith* was not decided on strict partisan lines; Justice Scalia's opinion was joined by conservative Chief Justice Rehnquist, moderate-conservative Justice Anthony Kennedy, liberal justice John Paul Stevens, and Justice Byron White, a Kennedy appointee who dissented in *Sherbert* and is best described as highly deferential to the political branches. The three outright dissenters were on the liberal wing of the court; Justices Brennan and Marshall joined Justice Blackmun's dissent. Justice O'Connor wrote an opinion, joined in part by the three

[101] Ibid, at 878.

outright dissenters, that, while scathingly critical of Justice Scalia's logic and refusal to apply the *Sherbert* Test, concurred in judgement with the Court based on her application of the *Sherbert* Test.

Regardless of his framework, the tortured reasoning of Justice Scalia's opinion in *Smith* left him open to criticism. Most egregiously, he claimed that "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[102] This is demonstrably false; of the cases mentioned above, at least *Yoder*, *Thomas*, and *Hobbie* all granted exemptions to neutral laws based on individuals' religious beliefs. Justice Scalia explained away *Sherbert, Thomas* and *Hobbie* by claiming that the *Sherbert* Test applies only to unemployment insurance claims, as the Court has "never invalidated any governmental action on the basis of the *Sherbert* Test except the denial of unemployment compensation."[103] Intriguingly, he refrained from arguing that *Sherbert*, the genesis of the unemployment insurance line of cases, did not concern a neutral law, neutrally applied; this would have been a strong and easy argument, given that the *Sherbert* Court itself found not neutrality, but rather "religious discrimination which South Carolina's general statutory scheme necessarily effects."[104]

Justice Scalia admitted that the Court "sometimes purported to apply the *Sherbert* Test in contexts other than [unemployment insurance]," but he equated the Court's reluctance to find laws in violation of the test with the test's limited applicability.

[102] Ibid, at 878-879.
[103] Ibid, at 883.
[104] *Sherbert*, at 406.

Instead, Justice Scalia forwarded the novel proposition that the *Sherbert* Test applies only to unemployment insurance, and therefore "is inapplicable to an across-the-board criminal prohibition on a particular form of conduct," because "[t]he *Sherbert* test […] was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct [and] a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment."[105] This logic does not hold up to scrutiny, however, as many accommodationists claim that many facially neutral laws are not, in fact, neutral as applied, unless accommodations are granted to those disproportionately affected by the statute. Consider Justice Brennan's statement from *Sherbert*: "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[106] Accommodationists could, and did, argue that the federal government's drug restrictions were not as neutral as Scalia claims they are; indeed, accommodationism in general requires individualized judgements on a particular claimant's religious beliefs. There is also the awkward fact that *Smith* did concern a petition to an unemployment claim, the one area where Justice Scalia admits *Sherbert* does hold sway. Here, Justice Scalia explains the distinction convincingly: in *Smith*, Smith and Black were fired for criminal activity, while in *Sherbert*, there was no criminal prohibition on Sherbert's refusal to work Saturdays.

[105] *Smith*, at 873, 884.
[106] *Sherbert*, at 409.

As much as Justice Scalia struggled to explain away *Sherbert, Yoder* provided an even bigger obstacle. The claim that the Court had "never invalidated any governmental action on the basis of the *Sherbert* Test except the denial of unemployment compensation" finds support in the Burger Court's reluctance to grant accommodations even when applying the *Sherbert* Test, but *Yoder* clearly proves it false.[107] *Smith*'s explanation of Yoder is bizarre, and central to probably the most frequently criticized portion of the opinion: the "hybrid case" claim. Justice Scalia claims 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, such as freedom of speech and of the press."[108] He cites five cases to support this claim: *Pierce*, *Cantwell*, *Murdock*, *Follett*, and *Yoder*. These are accurate interpretations of *Cantwell*, *Murdock,* and *Follett*, each of which mentions freedom of speech and the First Amendment in more general terms. *Pierce*, however, provides no support to Scalia's claim for two reasons: first, the Court did not grant an accommodation in *Pierce*, but rather struck down the Oregon law facially, and second, *Pierce* made no mention of the Free Exercise Clause or even the First Amendment, as it was a straightforward Fourteenth Amendment Due Process Clause case.

The interpretation of *Yoder* as a "hybrid case" is just as tenuous, if not more so. *Yoder* clearly stated that the religious nature of Yoder's claim was prerequisite for his constitutional claim, saying that "[a] way of life, however virtuous and admirable, may

[107] *Smith*, at 883.
[108] Ibid at 881.

not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."[109] Later, Chief Justice Burger states that the Court "giv[es] no weight to such secular considerations."[110] Nowhere does *Yoder* mention freedom of speech, freedom of the press, or any constitutional right other than free exercise. Yoder grants no right to direct a child's education, and in fact dodges the question entirely: "It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce v. Society of Sisters,* 268 U. S. 510 (1925). On this record, we neither reach nor decide those issues."[111] *Yoder* provides no suggestion that it was anything more than a free exercise case—albeit an oddly constructed one. Michael McConnell plausibly speculates that "the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* [from *Smith*]."[112]

Why Justice Scalia goes to such great lengths to gerrymander *Smith*, *Sherbert* and *Yoder* into a mutually permissive framework is an interesting question. Likely, Justice Scalia was simply unwilling to overturn precedents that had become calcified, if only for 27 years. But Justice Scalia's reluctance to overturn *Sherbert,* and similar cases like *Yoder*, is uncharacteristic; he was a self-described originalist who was perfectly willing to overturn precedent.[113] Precedents get overturned: just as *Sherbert* rendered *Reynolds* and

[109] *Yoder*, at 215.
[110] Ibid, at 216.
[111] Ibid, at 232-233.
[112] McConnell, "Free Exercise Revisionism and the Smith Decision." (1990), at 1121.
[113] For example, Justice Scalia explicitly voted to overturn *Roe v. Wade*, 410 U.S. 113 (1973) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966) in *Dickerson v. United States*, 530 U.S. 428 (2000), and to overturn *Lemon v.*

Cantwell dead letter, so too could *Smith* have overturned *Sherbert*. It is the particular irony of *Smith* that Justice Scalia, the famous originalist, was hamstrung by precedents less than half his age; he had 150 years of precedent on his side, but was so preoccupied with the previous 27 that he left his *Smith* opinion open to attack.

And attacked it was. Justice O'Connor wrote a scathing concurrence, opening by claiming that "today's holding dramatically departs from well settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[114] Like McConnell and many others, she was particularly critical of Justice Scalia's historical analysis, saying that "the Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions […] but there is no denying that both cases expressly relied on the Free Exercise Clause […] and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence."[115] Perhaps in reaction to Justice Scalia, who she personally disliked,[116] Justice O'Connor defended the *Sherbert* Test—or as she calls it, the compelling interest test—more staunchly than ever before. Only two years prior, in *Lyng*, she (with Chief Justice Rehnquist and Justices Scalia, Stevens and White, all of whom voted with the

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Kurtzman, 403 U.S. 602 (1971) repeatedly, see *Lamb's Chapel v. Center Moriches Union School District*, 508 U.S. 384 (1993).

[114] *Smith* 891

[115] Ibid, at 896. While Justice O'Connor is right to criticize the interpretation of Yoder as a hybrid case, she is wrong about *Cantwell*, which did have a hybridized reasoning for its conclusion: "defendant's conviction of the common law offense of breach of the peace was violative of constitutional guarantees of religious liberty *and freedom of speech*." (*Cantwell* at 299, emphasis mine): see pages 15-16.

[116] "Scalia's extreme views would repel Sandra Day O'Connor, the Court's swing vote, who had a toxic relationship with him during their early days as colleagues." Toobin, Jeffrey. "Looking Back." *The New Yorker*, February 29, 2016.

majority in *Smith*) had refused to apply the *Sherbert* Test, while Justices Blackmun, Brennan and Marshall—the *Smith* minority—elected to apply the *Sherbert* Test.[117] But now in *Smith*, Justice O'Connor defended the *Sherbert* Test by stating that even "laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[118] Coercion is the operative word here; in both her Free Exercise Clause and her Establishment Clause jurisprudence, Justice O'Connor used a vague coercion test that prevented the government from coercing any person into action contrary to his beliefs or giving the impression that it was endorsing any particular religion.[119] But of course, any exemptions claim can be framed as a remedy to government-induced coercion or "intru[sion] upon [one's] religious duties." In *Lyng*, the Court found that "[e]ven assuming that the Government's actions here will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondents' legal claims." [120] Surely, virtual destruction of a class of people's ability to practice their religion must "intrude upon […] religious duties"—and yet, Justice O'Connor still did not elect to apply the *Sherbert* Test in *Lyng*. Perhaps this is too critical of Justice O'Connor, as it would be difficult for any moderate justice to construct a

[117] Justice Kennedy, the fifth Justice in the *Smith* majority, had not yet taken Justice Lewis Powell's vacated seat by *Lyng*'s argument.
[118] *Smith*, at 901.
[119] For example, in *Lyng*, Justice O'Connor writes "[*Sherbert*] does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions *but which have no tendency to coerce individuals into acting contrary to their religious beliefs*, require government to bring forward a compelling justification for its otherwise lawful actions." (*Lyng*, at 450, emphasis mine).
[120] *Lyng*, at 440.

consistent framework out of the hodgepodge of decisions that comprised the Burger Court's Free Exercise Clause jurisprudence.

While she was harshly critical of the majority's reasoning in *Smith*, Justice O'Connor did agree with the Court in upholding Oregon's policies. Justice O'Connor found that outlawing peyote was an integral part of Oregon's statutory scheme to prevent illicit drug use. She also accepted this intended goal—preventing illicit drug use—as a compelling interest, and accepted Oregon's policies as the least burdensome and most narrowly tailored policies possible that could still achieve the State's goal, as "selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens."[121] Therefore, Oregon's law passed the *Sherbert* Test, and did not violate the Free Exercise Clause.

The third and final opinion in Smith was Justice Blackmun's. It was joined in full by Justices Brennan and Marshall—the outright dissenters in Lyng, and three quarters of the Court's liberal wing. Like Justice O'Connor, Justice Blackmun believed that "a state statute that burdens the free exercise of religion […] may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."[122] Also like Justice O'Connor, Justice Blackmun expresses surprise at the Court's decision, saying that "Until today, I thought [the *Sherbert* Test] was a settled and inviolate principle of this Court's First Amendment jurisprudence."[123] Justice Blackmun does not attack Justice

[121] *Smith*, at 906.
[122] Ibid, at 907.
[123] Ibid, at 908.

Scalia's refusal to apply the *Sherbert* Test in depth, however, instead simply endorsing Justice O'Connor's arguments from the first and second sections of her opinion.

Justice Blackmun disagrees with Justice O'Connor's analysis of the *Sherbert* Test: to him, asking whether exemptions in general could prevent furtherance of Oregon's compelling interest is the wrong question. Rather, the Court should consider the narrow point of granting exemptions only in cases exactly like those of Smith and Black: "[i]t is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."[124] Justice Blackmun notes that the State has no evidence of religious peyote causing severe harm, and cites this as proof that granted exemptions would not hinder furtherance of its legitimate inference. Therefore, a statutory policy that denies Smith and Black an exemption is not the least burdensome policy possible, and fails the *Sherbert* Test.

Justice Blackmun's dissent echoes *Yoder* in one final, important way: he seems preoccupied with proving that members of the Native American Church are assets to society. He himself notes the similarity to *Yoder*, one of the first cases he heard as a Justice: "just as in *Yoder*, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws."[125] Justice Blackmun also takes the unavoidable next step, stating that these 'values and interests' might give Native Americans a privileged status over

[124] Ibid, at 910.
[125] Ibid, at 914.

other groups claiming exemptions: "[a]llowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups."[126]

Smith proved to be a pyrrhic victory for jurisdictionalism. Criticism of Scalia's opinion was rampant, and even jurisdictionalists who agreed with Scalia's conclusions found fault with his logic; jurisdictionalist scholar William P. Marshall said the *Smith* opinion "exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction."[127] Within weeks of the *Smith* decision's release on April 17, 1990, a handful of religious institutions opposed to *Smith* formed The Coalition for the Free Exercise of Religion: a group solely dedicated to passing legislation that would reinstate the *Sherbert* Test on a statutory level. Chapter Four describes the process of passing that legislation, which would eventually become the Religious Freedom Restoration Act.

[126] Ibid, at 917-918.
[127] Marshall, "In Defense of Smith and Free Exercise Revisionism" (1991), at 309.

CHAPTER FOUR: THE RELIGIOUS FREEDOM RESTORATION ACT, 1990-1993

By September 1990, within only five months of *Smith*, the Coalition for the Free Exercise of Religion comprised 29 organizations. The bulk of these members were the Coalition's 10 Protestant groups (including the Baptist Joint Committee on Public Affairs, the Presbyterian Church (USA), and the United Methodist Church) and seven Jewish groups (including the American Jewish Committee, the American Jewish Congress, the Central Conference of American Rabbis, and the Anti-Defamation League).[128] Also joining the Coalition were two groups representing other religious minorities (Christian Science Committee on Publication and the Friends Committee on National Legislation) and one group, Americans for Religious Liberty, which was devoted to promoting religious tolerance in general. Six groups in the Coalition dealt mainly with non-religious issues, most notably the prominent liberal organizations the American Civil Liberties Union and People for the American Way. Interestingly, the remaining two groups in the Coalition could be described as anti-religion: the American Humanist Association and Americans United for Separation of Church and State. Both organizations are avowedly atheistic (the American Humanist Organization's current official motto is "Good Without a God.")[129]

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[128] U.S. Congress. House. Committee on the Judiciary. *The Religious Freedom Restoration Act of 1990: Hearing before the Subcommittee on Civil and Constitutional Rights*. 101th Cong., 2nd sess., September 27, 1990, at 61-62.

[129] American Humanist Association. "American Humanist Association: Good Without A God." https://americanhumanist.org/;
Americans United for Separation of Church and State. "Our Issues." https://www.au.org/issues/. Americans United's issues statement says that "[t]he so-called "faith-based" initiative is a euphemism for taxpayer-supported religion."

On July 26, 1990, Congressman Stephen J. Solarz (D-NY-13) introduced the first congressional response to *Smith*: H.R. 5377, the Religious Freedom Restoration Act.[130] Section Two of H.R. 5377 was the relevant portion of the bill; it decreed that:

> "A governmental authority may restrict any person's free exercise of religion only if— (1) the restriction—
>
> > (A) is in the form of a rule of general applicability; and
> >
> > (B) does not intentionally discriminate against religion, or among religions; and
>
> (2) the governmental authority demonstrates that application of the restriction to the person—
>
> > A) is essential to further a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest."

This was essentially a codification of strict scrutiny's most common form, so that courts would be obligated to apply the *Sherbert* Test to free exercise exemptions claims. H.R. 5377 received broad bipartisan support. It had 62 Democratic and 37 Republican cosponsors, including future Speakers of the House Newt Gingrich (R-GA 6th) and Nancy Pelosi (D-CA 5th). But it was introduced late in the session, in the summer between the primaries and the general elections for the 102nd Congress. The House Judiciary Committee referred H.R. 5377 to its Subcommittee on Civil and Constitutional

[130] H.R. 5377, 101st Cong. (1990).

Rights (where, tellingly, it was filed under "Civil Rights and Liberties, Minority Issues). Its hearing, held on September 27, 1990, was cursory and noncontroversial, and no committee votes were taken on the bill. There was also a practically identical Senate companion to H.R. 5377, S. 3254, which Senator Joe Biden (D-DE) introduced to the Senate floor on October 26, 1990. [131] Because of time constraints, the Senate's version of the RFRA of 1990 did not even make it to committee, despite similar bipartisan support.[132] No votes were ever taken on the two RFRAs of 1990.

Despite H.R. 5377's and S. 3254's failure, religious liberty became a prominent national issue in the years following *Smith*. The confirmation hearings of President George H.W. Bush's two Supreme Court nominees, David H. Souter and Clarence Thomas, contained ample concern over *Smith* and its implications. During then-Judge Souter's confirmation hearings of September 13-19, 1990, Senator Arlen Spector (R-PA) asked him outright if he "agree[d] with Justice O'Connor that when you impede on the exercise of religion that there ought to be those two factors, a compelling State interest and means narrowly tailored to achieve that interest?"[133] Judge Souter's response indicated a preference for the *Sherbert* Test over the jurisdictional view:

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[131] S. 3254, 101st Cong. (1990).

[132] S. 3254 was cosponsored by 5 Democrats, and 2 Republicans—Orrin Hatch (R-UT) and Arlen Specter (R-PA).

[133] U.S. Congress. Senate. Committee on the Judiciary. *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary*. 101th Cong., 2nd sess., September 13, 14, 17-19, 1990, at 154.

I think it worth noting here that Justice O'Connor's concurring opinion in *Smith* is, by now, seemingly universally seen as the antithesis to Justice Scalia's majority opinion. Justice Blackmun's opinion, which also applied the *Sherbert* Test, has seemingly been all but forgotten—even though three of the four justices who applied the *Sherbert* Test in Smith agreed with Blackmun's conclusion, and only Justice O'Connor herself agreed with hers. Perhaps Justice O'Connor's opinion was seen as a more palatable option not

> "I have not had personal reason to want to reexamine the strict scrutiny test which has been applied in a lot of cases since *Shurbert* [sic]. I recognize the reasoning of the majority opinion. I mean I can follow it; I understand what the Court was saying in the *Smith* case. But I also recognize I think the fact that that case could also have been examined under the *Shurbert* [sic] standard. And as you mentioned or indicated a moment ago, that, of course, is exactly what Justice O'Connor did in her concurring opinion in that case."[134]

Judge Souter refused to provide any more specific opinions on Smith, as he believed that "without any question, I think the development of that issue is something that if I were confirmed would come before me." Nevertheless, his above statements were enough to give Senator Specter the impression that Souter had a "predisposition to side with Justice O'Connor" on the application of the *Sherbert* Test in future cases.[135] And the next year, during the Clarence Thomas confirmation hearings, Senator Joe Biden (D-DE) went as far as to say that "Just [sic] Souter, sitting not as a Federal judge, sitting as a State court judge, said 'I agree with O'Connor,' no ifs, ands, buts about it, just click, bang, 'I agree with O'Connor'"—a tenuous claim at best, given Souter's actual statements.[136]

Judge Thomas's own confirmation hearings—held from September 10 to October 13, 1991—were significantly longer and more contentious than Judge Souter's, as he

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because of its reasoning, but because of its conclusion. (See Senator Biden's statement on page 52, see Justice Souter's concurrence in *Lukumi*, at 559, 562.)

[134] Ibid, at 156.

[135] Ibid, at 156.

[136] Ibid, at 399. Senator Biden would eventually be proven correct, however; see analysis of Justice Souter's *Lukumi* opinion on pages 76-77.

faced sexual harassment allegations and significant opposition from civil rights groups.[137] Nevertheless, Thomas was asked about *Smith* repeatedly. During the hearings of September 10, Senator Strom Thurmond (R-SC) asked Judge Thomas to "briefly discuss the impact [*Smith*] has on the compelling State interest test established in *Sherbert*."[138] Judge Thomas responded with a relatively innocuous judgement: "I think it is an important departure from prior approaches and it is one that anyone who approaches these cases should be concerned about or at least be watchful for." Three days later, Senate Judiciary Committee Chairman Biden asked Judge Thomas a more probing question on *Smith*: "Do you agree with Scalia's approach, or do you agree with O'Connor's approach?"[139] Judge Thomas's response hinted at subtle criticism of Smith: "Senator, I think as I indicated in prior testimony here, when the *Sherbet* [sic] test was abandoned or moved away from in the *Smith* case […] I think that there was an appropriate reason for concern, and I did note then that Justice O'Connor, in applying the traditional test, reached the same result." Later, Judge Thomas stated that "I cannot express as [sic] preference" between the Scalia approach and the O'Connor approach, because "I have not thought through those particular approaches, but I myself would be concerned that we did move away from an approach that has been used for the past I guess several decades."[140] Upon even further probing from Chairman Biden, Thomas volunteered that "my concern about the approach taken by Justice Scalia is that it may

[137] U.S. Congress. Senate. Committee on the Judiciary. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary*. 102nd Cong., 1st sess., September 10-13, 16, 1991.
[138] Ibid, at 136.
[139] Ibid, at 398.
[140] Ibid, at 398.

have the potential and could have the potential of lessening protection, and I think the approach that we should take certainly is one that maximizes those protections."[141]

Interestingly, both Souter and Thomas, who would eventually take opposite positions on the Court's ideological spectrum (and on *Smith* itself) espoused nearly identical opinions on *Smith* as it related to the Court's religious liberty jurisprudence. Judge Thomas was "concerned that we did move away from an approach that has been used for the past […] several decades," while Judge Souter likewise noted that "Once it is determined that, in fact, their position is a genuinely religious position and that there is, as a matter of fact, a burden placed upon it by a generally applicable State law, the Court has traditionally, since the time of the *Shurbert* [sic] case, applied a standard, as you say, of very strict scrutiny." [142] Both prospective justices ignored, or at least failed to mention, the jurisdictional free exercise standard that the Court had used prior to 1963. It had been fewer than 30 years since *Sherbert*, but by the early 1990's the jurisdictional era of the 19th and early and mid-20th century was seen as almost literally prehistoric.

Meanwhile, the Coalition for Free Exercise of Religion continued to build momentum. From 29 member organizations in September 1990, the Coalition reached 54 members by September 1992,[143] and 66 by the Religious Freedom Restoration Act's eventual passage on November 16, 1993.[144] These new additions came from similar

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[141] Ibid, at 399.
[142] Ibid at 398; Souter confirmation hearings at 155.
[143] U.S. Congress. Senate. Committee on the Judiciary. *The Religious Freedom Restoration Act: Hearing before the Committee on the Judiciary*. 102nd Cong., 2nd sess., September 18, 1992, at 136.
[144] *The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom*. Baptist Joint Committee for Religious Liberty, 2014. http://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf. at 6.

backgrounds as the original Coalition: 10 new Protestant groups (for a total of 20), 10 new Jewish groups (for a total of 17), three new groups dedicated to religious liberty in general (for a total of four) and ten new groups representing other religious minorities, including the American Muslim Council, the Church of Jesus Christ of Latter-Day Saints, the Church of Scientology International, the Mennonite Central Committee, the Native American Church of North America, and the National Sikh Center (for a total of 12). Four new interest groups dealing primarily with non-religious issues joined the coalition (for a total of 10), including the conservative organizations Coalitions for America and the Rutherford Institute. In addition, 55 constitutional law scholars signed on to the Coalition's statement of intent. Oddly, the Coalition contained only one Catholic group at the time of RFRA's passage—the Jesuit Social Ministries National Office—despite Catholicism being the largest religious domination in the United States.[145] This reluctance was explained during the hearings over the 102nd Congress' versions of RFRA.

The year after H.R. 5377, on June 26th, 1991, Congressman Solarz introduced a new RFRA: H.R. 2797, titled The Religious Freedom Restoration Act of 1991.[146] H.R. 2797 was an only slightly reworded version of Solarz's bill from the previous year; it had no substantial changes. The bill attracted a whopping 195 cosponsors; its support was bipartisan but skewed Democratic, with 156 Democrats, 38 Republicans and one

[145] U.S. Census Bureau, "Section 1. Population; Report Number: Statistical Abstract of the United States 2012," 75 - Self-Described Religious Identification of Adult Population, https://www.census.gov/library/publications/2011/compendia/statab/131ed/population.html. This is true only if measuring different Protestant sects separately. The 1990 census registered 151.225 million adult Christians, 46.004 million of whom were Catholic. The next largest denomination was Baptists, of whom there were 33.964 million adults.

[146] H.R. 5377, 102nd Cong. (1991).

Independent signed on as cosponsors. As with the RFRA of 1990, there was a companion Senate version of RFRA for the 102nd Congress, this time S. 2969.[147] Senator Ted Kennedy (D-MA) introduced the bill to the floor on July 2, 1992 with 26 coauthors: 18 Democrats and 8 Republicans. S. 2969 was referred to committee and received a hearing there on September 18, 1992, but as in the previous session, most of the emphasis was on the House version of RFRA.

On November 26th, 1991, five months after the house RFRA of 1991 was introduced, Congressman Chris Smith (R-NJ-4) introduced a competing bill, H.R. 4040.[148] Titled the Religious Freedom Act of 1991, H.R. 4040 was essentially a Republican version of RFRA. It had 26 Republican and five Democratic cosponsors, but each of the Democrats was southern and pro-life.[149] The bulk of the Religious Freedom Act was indistinguishable from Solarz's RFRAs of 1990 and 1991, but it had three major differences, found in Section 3-C-2:

> "(2) Nothing in this Act shall be construed to authorize a cause of action by any person to challenge--
>
> (A) the tax status of any other person;
>
> (B) the use or disposition of Government funds or property derived from or obtained with tax revenues; or
>
> (C) any limitation or restriction on abortion, on access to abortion

[147] S. 2969, 102nd Cong. (1992).
[148] H.R. 4040, 102nd Cong. (1991).
[149] The Democrats were Marilyn Lloyd (D-TN-3), Alan Mollohan (D-WV-1), Richard Ray (D-GA-3), Billy Tauzin (D-LA-3) and Harold Volkmer (D-MO-9). Lloyd changed heart and became pro-choice in 1992, and Tauzin became a Republican in 1995.

services or on abortion funding."

All three of these provisions addressed real concerns held within the right wing of the RFRA coalition, it was the abortion concern that proved the biggest obstacle to RFRA's passage. This was largely because only a few months prior, on April 7th, 1991, the ACLU had filed a federal challenge to a series of abortion restrictions passed by the Utah State Legislature in 1990 and 1991.[150] The ACLU, later joined by Planned Parenthood and other groups, claimed the Utah abortion restrictions facially violated a plethora of constitutional provisions including the right to privacy, due process liberty, equal protection, freedom of speech, Thirteenth Amendment involuntary servitude, Establishment Clause separation of church and state, and, most alarming for social conservatives, a free exercise right to religious liberty.

This claim of abortion restrictions as violative of the Free Exercise Clause had been successfully argued once before at the Federal District Court level, in *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980).[151] In that case, Judge John Dooling of the Eastern District of New York extensively outlined the situations in which Conservative and Reform Jewish teaching, the American Baptist Church, and the United Methodist Church allow abortion, before concluding that "[t]hese teachings, in the mainstream of the country's religious beliefs, and conduct conforming to them, exact the legislative tolerance that the First Amendment assures [and t]he liberty protected by the Fifth

[150] "Suit by A.C.L.U. Challenges New Utah Anti-abortion Law." *The New York Times*, April 7, 1991.
[151] *McRae v. Califano*, 491 F.Supp. 630, 690-728 (E.D.N.Y. 1980).

Amendment extends certainly to the individual decisions of religiously formed conscience to terminate pregnancy for medical reasons."[152]

When the Supreme Court heard the case's appeal in *Harris v. McRae* (*1980*), however, it did not even judge the free exercise claims on the merits, as it found that "the appellees […] lack standing to challenge the Hyde Amendment on free exercise grounds because none alleged, much less proved, that she sought an abortion under compulsion of religious belief."[153] Justice Brennan's dissent mentioned "fundamental rights" extensively, but he only explicitly claimed the "due process liberty right recognized in *Roe v. Wade"* applied to the case at hand, not any free exercise claim.[154] After *Harris v. McRae*, there were no prominent free exercise challenges to abortion restrictions—until the Utah case, which would eventually come to be called *Jane L. v. Bangerter*.[155]

That the ACLU was leading the fight for religious liberty, while simultaneously arguing that religious liberty could provide a right to procure an abortion, alarmed many on the right wing of the RFRA coalition. The Religious Freedom Act was perhaps an inevitable response, but with Democratic majorities in both houses, and the vast majority

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[152] *Califano*, at 741-742, 742.

[153] *Harris v. McRae*, 448 U.S. 297, 320 (1980).

[154] *Harris*, at 329. Interestingly, Justice Brennan (joined by Justices Marshall and Blackmun) does cite *Sherbert* extensively in his dissent, at 334-336, to support his claims on "the illegitimacy of a state policy that interferes with the exercise of fundamental rights through the selective bestowal of governmental favors." (*Harris*, at 334). The majority opinion, delivered by Justice Potter Stewart, refutes Justice Brennan's *Sherbert* argument by stating that "a refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." (*Harris*, at Footnote 19). This refutation of *Sherbert* is made all the more interesting by the fact that it came not in a free exercise case—a further wrinkle to the Burger Court's confusion over the *Sherbert* Test.

[155] The case was originally titled *Jane Liberty v. Bangerter*, but the lead plaintiff's pseudonym was changed to Jane L. after Utah's attorneys objected to "Liberty" as an overly charged name. Margolick, David. "At the Bar; Don't be surprised if the next landmark ruling is 'Day v. Knight' or 'Dog v. Katz.'." *The New York Times*, May 10, 1991.

of momentum for an anti-*Smith* bill already behind the RFRA-style bills, it never stood much of a chance. Instead, the most strenuous debate over RFRA's relation to religiously motivated abortions came out in the hearings over H.R. 2979 (the House's Religious Freedom Restoration Act of 1991).[156] The House Subcommittee on Civil and Constitutional Rights held the hearings on May 13th and 14th 1992, some 11 months after the bill was introduced to the floor. The hearings were lengthy and contentious, and from the outset, Henry Hyde (R-IL 6th)—he of the Hyde Amendment challenged in *McRae v. Califano/Harris v. McRae*—championed the right-wing opposition to RFRA. His opposition was fairly straightforward, and he seemed particularly concerned by the *Jane L. v. Bangerter* case:

> "H.R. 2797 seeks to overturn the Smith decision. While I agree that legislation is necessary, in light of the propensity of important proabortion groups such as the ACLU and the Religious Coalition for Abortion Rights to assert a first amendment right to abortion under the free exercise clause, I cannot support H.R. 2797 in its current form. My primary objection is based on the bill's predictable impact on abortion law."[157]

Congressman Hyde's opposition was later echoed by the Catholic representative on the first panel of experts: Mark E. Chopko, representing the United States Catholic Conference.[158] Chopko briefly discussed the Church's qualms about tax-exempt status

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[156] U.S. Congress. Senate. Committee on the Judiciary. *The Religious Freedom Restoration Act: Hearing before the Subcommittee on Civil and Constitutional Rights*. 102nd Cong., 2nd sess., May 13-14, 1992.
[157] Ibid, at 7.
[158] The Catholic Church was the only religious group to testify against H.R. 2979, although the Lutheran Church, Missouri Synod also opposed the bill for similar reasons. (Ibid, at 49).

and government funds used on religion, but his main concern with RFRA was the avenue it provided for abortion claims. Chopko claimed that "[t]here is no question that abortion is within the scope of activities which the people who drafted this legislation intend will be offered into the courts, and it is certainly, if you believe the public statements of those drafters, a certain number of them are expected to succeed."[159]

The other two experts on the first panel—Robert Dugan, Jr., representing the National Association of Evangelicals and Elder Dallin H. Oaks, representing The Church of Jesus Christ of Latter-Day Saints—were unconcerned by the abortion argument because, as Dugan stated in his opening statement, "five Justices presently sitting on the Supreme Court other than Justices Souter and Thomas have unequivocally said that the State does have a compelling interest in protecting unborn human life throughout the pregnancy."[160] Why the National Association of Evangelicals and the Church of Jesus Christ of Latter-Day Saints, which, like the Catholic Church, were and are staunchly pro-life, would be far less concerned than the Catholic Church was about the prospective abortion claims is a matter of speculation. Perhaps the gap came from vestigial distrust from the early 20th century, when religious jurisprudence conflicts were usually Catholic v. Protestant rather than Secular v. Religious. More likely, Catholics were simply more opposed to abortion than Protestants were in the early 1990's; as recently as the early

[159] Ibid, at 34.
[160] Ibid at 11-12. See Dugan's testimony at ibid, at 10-22; see Oaks's testimony at ibid, at 23-32; see Chopko's testimony at ibid, at 33-47.

1970's, most Protestant churches had supported liberalizing abortion laws, unlike the Catholic Church.[161]

For Congressman Hyde, the Catholic Church and other right-wing RFRA skeptics, the inconsistent application of the *Sherbert* Test in the pre-*Smith* years fueled their fear over the prospective claims to a free exercise right to abortion; Chopko notes that "the Court has not applied a compelling interest analysis with any uniformity across the board to all claims and all times and all circumstances. That has led us to be a little bit skeptical about especially the area of abortion and the cooperation with public programs."[162] They also feared that RFRA would be an expansion, rather than a restoration, of religious freedom. Hyde correctly pointed out that, even during the most accommodationist period of the Court's history, the *Sherbert* Test was applied inconsistently, and therefore concluded that "if by Federal statute Congress requires courts to utilize the strict scrutiny standard, the most rigorous constitutional inquiry as applied in *Sherbert* and *Yoder*, the admitted highwater mark of free exercise jurisprudence, it is far more likely that plaintiffs asserting a free exercise claim will prevail on their claims than they did prior to Smith."[163] This was largely because:

> "H.R. 2797 does not restore the law because it would apply the strict scrutiny standard to free exercise claims involving prison and military regulations and

[161] In the early 1970s, most Protestant denominations did not share the Catholic Church's view of abortion. "As we have seen, mainline Protestant groups approved of liberalizing access to abortion; some approved repeal, while others endorsed variants of the "reform" position." Greenhouse, Linda, and Reva B. Siegel. "Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling." (2012), at 258.
[162] H.R. 2797 hearing, at 51-52.
[163] Ibid, at 7-8.

> government management of its own internal affairs. Prior to *Smith,* the Supreme Court has held on numerous occasions that the strict scrutiny analysis was not applicable in these situations. H.R. 2797 contains no exceptions, and would thus apply the strict scrutiny analysis to all government action, burdening religious exercise. While the policy behind this application may or may not be sound, it is undoubtedly a significant expansion of the law which existed prior to Smith and not a restoration."[164]

The inconsistent application of the *Sherbert* Test during the Burger Court years, which had once puzzled justices, now caused confusion and trepidation in lawmakers.

Even among the pro-RFRA wtinesses in the H.R. 2979 hearings, the fault lines that would eventually lead to the fracturing between the right and left wings of the RFRA coalition were obvious. The right wing of the coalition referred to free exercise as a "fundamental right," uniform and akin to those rights "to life, liberty, and property, to free speech, a free press, freedom of […] assembly, and other fundamental rights."[165] The left wing of the coalition, however, saw free exercise rights as discrete and insular minority protections, as the court opinions of Justice Brennan in *Sherbert*, Chief Justice Burger in *Yoder* and others had suggested. Nadine Strossen, representing the ACLU, expressed concern that:

> "Essentially, the Court has told us that all that is left of religious liberty is this: You only have a claim under the Constitution if you can show, *as a member of a*

[164] Ibid, at 8.
[165] Ibid, at 17 (Prepared statement of Robert Dugan for the National Association of Evangelicals).

> *minority religious group*, that the Government that passed a measure that infringes your religious liberty did so intentionally and deliberately—maliciously, willfully, and wantonly singling you out on the basis of your religion."[166] (emphasis mine).

Later under questioning, Strossen claimed that "the whole purpose of the Bill of Rights, including the freedom of religion clause, is precisely to protect minority groups from the tyranny of the majority"—an apt summary of the left wing of RFRA's view of free exercise protections, and one not shared by the right wing of the coalition, which held the uniform fundamental right view.[167] Many of the northern and western legislators involved in RFRA's passage echoed these left-wing accommodationist views. Senator Daniel Inouye's (D-HI) statement in support in RFRA dealt entirely with RFRA's relation to the American Indian Religious Freedom Act of 1978.[168] Congressman Ben Cardin (D-MD-3) gave four examples of religious practices which had been compromised by the *Smith* standard: all four dealt with beliefs of religious minorities.[169] Congressman Bob Franks (R-NJ-7) wrote that "implications are especially burdensome for those whose beliefs lie within the religious minority[…] It is my understanding that the Founding Fathers authored the first amendment *to protect religious minorities* from exactly the kind of Government discrimination which has resulted from the *Smith* decision."[170]

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[166] Ibid, at 64. Emphasis mine.
[167] Ibid, at 104.
[168] Senator Inouye, speaking on S. 2021, 103rd Cong., 1st sess., Congressional Record 139 (May 25, 1993): S 6456.
[169] Congressman Cardin, speaking on H.R. 1308, 103rd Cong., 1st sess., Congressional Record 139 (May 12, 1993): E 1234.
[170] Congressman Franks, speaking on H.R. 1308, 103rd Cong., 1st sess., Congressional Record 139 (May 12, 1993): E 1243.

Despite the differences between the right-wing and the left-wing camps, the accommodationist position completely dominated the RFRA discussions. Even the harshest of RFRA critics, such as Henry Hyde and Mark Chopko, stopped short of espousing a jurisdictionalist view, instead objecting to specific provisions of the Democratic bills while still asserting their support of a RFRA-like bill that would address their three specific concerns.[171] Professor Ira Lupu, an expert witness during the H.R. 2797 hearings, would later lament that "[t]he debate and deliberation one might have expected to surround such a sweeping and unprecedented enactment never occurred."[172] Out of the dozens of expert witnesses who testified on H.R. 2797, only one, Dean Herbert W. Titus of Regent University School of Law, recommended Congress take a jurisdictional approach to free exercise.[173] Titus argued that a jurisdictional system like the one used by the Court before *Sherbert* actually provided more protection to religious liberty, because "[t]he spheres of civil and ecclesiastical authority were constitutionally separate. The State could not intrude upon the church's domain, no matter what the State's interest and no matter how compelling."[174]

Titus also gave the Subcommittee the prescient warning that RFRA "would probably be found unconstitutional as an exercise of congressional power according to footnote 10 of Justice William Brennan's opinion in *Katzenbach* and *Morgan*."[175] Titus's

[171] Chopko confirms that the Catholic Church would a support a RFRA-like bill that contained "a disclaimer on abortion" and "on operation of public programs." (H.R. 2797 hearings, at 57).
[172] Lupu, Ira C. "The Failure of RFRA." *University of Arkansas at Little Rock Law Review* 20, no. 3 (1998), at 576.
[173] H.R. 2797 hearing, at 87-95.
[174] Ibid, at 88.
[175] Ibid, at 89.

opinion was not unique: Mark Chopko said that he "needed to satisfy myself at least that I was not asking my clients, the bishops, to explore a legislative remedy that would be doomed to an unconstitutional result" and Ira Lupu correctly predicted that "the act as drafted, as it is designed to rest on Congress' power to enforce the 14th amendment, is unconstitutional as applied to the States" because Congress lacks "constitutional authority to tell State governments and State administration that they must go in a direction that is opposite to what the Supreme Court has held."[176]

Congress' stated authority for passing RFRA was Section 5 of the Fourteenth Amendment, which states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[177] The pertinent "provisions of the article" for RFRA were the Due Process Clause and the Equal Protection Clause, both contained in Section 1 of the Fourteenth Amendment, which together state that "No state shall make or enforce any law which shall […] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[178] The Due Process Clause contains all fundamental rights, and would therefore be more suggestive of a right-wing accommodationist perspective, while the Equal Protection Clause is the main rationale for protection of discrete and insular minorities, and is therefore more suggestive of a left-wing accommodationist perspective. Unfortunately, Congress had little debate over which clause(s) of the Fourteenth Amendment it was enforcing and why; indeed, there was nearly total silence on the

[176] Ibid, at 51; Ibid, at 372.
[177] U.S. Const. amend. XIV. Sec. 5.
[178] U.S. Const. amend. XIV. Sec. 1.

authority for Congress to impose RFRA on the states, suggesting a false security as to RFRA's constitutionality which would eventually be debunked in *City of Boerne v. Flores* (1997).

Ultimately, the skepticism of Hyde, the Catholic Church and other like-minded opponents proved sufficient to stop H.R. 2797, and neither it nor its companion Senate version, S. 2969, received a committee or floor vote. The fortunes of RFRA changed, however, on December 17, 1992, when the United States District Court for the District of Utah released its decision on the ACLU's challenge in *Jane L. v. Bangerter*.[179] Judge J. Thomas Greene upheld the majority of Utah's abortion restrictions, and rejected the plaintiffs' Free Exercise and Establishment Clause claims outright.[180] The two sections of Utah code that were overturned were struck down based on the Due Process right to privacy found in *Roe*, and "the legal theories of involuntary servitude, equal protection, separation of church and state, free exercise of religion, freedom of speech, and the corresponding state constitutional claims [we]re not interrelated with the theories behind the successfully prosecuted claims."[181] After the *Jane L.* case, the religiously mandated abortion argument became something of a non-issue to the right wing of the RFRA coalition. *Jane L.* was eventually appealed up to the 10th Circuit Court of Appeals, but the Circuit Court's August 2, 1995 opinion did not even address the plaintiffs' free exercise

[179] *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992).
[180] Judge Greene's adjudication on the legal fees of the case stated that: "It is doubtful that plaintiffs ever had standing to assert violations of the Free Exercise Clause because the Utah Act does not impose criminal sanctions on clergy or counselors who counsel those in their care to have an abortion. The court assumed, however, that plaintiffs' had standing without deciding the issue, and proceeded to dismiss the Free Exercise claims on the merits." (Ibid, at Footnote 23).
[181] Ibid, at 1553.

claims on the merits, and no high-profile case since has seriously argued the free exercise claim.[182]

Congressman Solarz lost reelection in 1992, but his fellow New Yorker Charles Schumer (D-NY-9) took up the torch and introduced the 103rd Congress' version of RFRA: H.R. 1308, the Religious Freedom Restoration Act of 1993. Congressman Schumer introduced H.R. 1308 to the House floor on March 11, 1993 with an astonishing 170 cosponsors—122 Democrats, 47 Republicans, and 1 Independent. This time, the Catholic Church, the Lutheran Church, Missouri Synod and the right-wing accommodationists who were previously skeptical of RFRA dropped their opposition. Partly, this was because of the resolution of the *Jane L*. case and the apparent conclusion to the free exercise claims to procure an abortion, but it was also due in part to H.R. 1308's new section, not present in the RFRAs of the previous session. Section 7 of H.R. 1308 is included in its entirety below:

> SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.
>
> (a) In General.--Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause of the First Amendment, shall not constitute a violation of this Act.
>
> (b) Definition.--As used in this section, the term ``granting

[182] *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1995)

> government funding, benefits, or exemptions" does not include a denial of government funding, benefits, or exemptions."

In a sense, Section 7 was purely tautological; obviously Congress did not intend H.R. 1308 to violate any part of the Constitution. But the new Section was significant for two reasons: first, it was an olive branch to the Catholic Church and other RFRA skeptics who feared that RFRA could challenge tax-exempt status and government funding of certain religiously affiliated organizations, and second, it showed that Congress had at least some trepidation that the courts might see some merit in the Establishment Clause claim against RFRA.

H.R. 1308 went through the legislative process nearly seamlessly. It passed the Judiciary committee without a hearing and then passed the House on May 11 via a unanimous, 435-0 voice vote with no abstentions—not even Henry Hyde. In the Senate, H.R. 1308 faced a minor obstacle as some Senators objected to the bill's protection of prison inmates. Senator Harry Reid (D-NV), with 3 Democratic and 3 Republican cosponsors, proposed Amendment 1083 "[t]o prohibit the application of this Act, or any amendment made by this Act, to an individual who is incarcerated in a Federal, State, or local correctional, detention, or penal facility."[183] The Senate's primary concern over H.R. 1308 was that, by applying the *Sherbert* Test to prisoners, RFRA would create an unacceptably high standard of rights for convicted criminals. As Congressman James Traficant (D-OH-17th) summarized the general sentiment of those in support of

[183] S. Amdt. 1083 to S. 578, 103rd Cong. (1993).

Amendment 1083: "we here in America have bent over backward on prisoners and criminals rights, I think what we have done is forgotten the victims."[184] On October 27, 1993 Senator Reid's Amendment failed, 41-58, with one abstention. The vote did not split on party lines; 18 Democrats and 23 Republicans supported the amendment, while 37 Democrats and 21 Republican opposed. That same day, the Senate passed a minor, semantic, amendment to H.R. 1308 by unanimous voice vote, replacing "burden" with "substantially burden." The Senate then passed H.R. 1308 in its final form by a 97-3 margin. The three holdouts—Robert Byrd (D-WV), Jesse Helms (R-NC), and Harlan Mathews (D-TN)—voted against RFRA because of concerns over expanding free exercise rights of prisoners. All three of the Senators had voted for the Reid amendment, and Helms and Mathews had consponsored it. Senator Helms had the added concern that "the Religious Freedom Restoration Act has less to do with our legal and historical notions of religious liberties than it does with the creation of new rights and employment opportunities for the nation's lawyers" because of the new litigation claims that RFRA would authorize.[185]

On November 3, the House accepted the Senate's amendment without objection. Two days later, H.R. 1308 was presented to President Bill Clinton. On November 16, 1993, President Clinton signed the Religious Freedom Restoration Act of 1993, and it became Public Law number 103-141.[186] President Clinton's signing message "especially

[184] Congressman Traficant, speaking on H.R. 1308, 103rd Cong., 1st sess., Congressional Record 139 (August 6, 1993): H 6298.
[185] Curliss, J. Andrew. "Helms, others cautious of religious freedom act's 'new rights'." *The News & Observer*, April 26, 2015.
[186] Pub. L. No. 103-141, 107 Stat. 1488 (1993).

thank[ed] the Coalition for the Free Exercise of Religion for the central role they played in drafting this legislation and working so hard for its passage," and the President humorously remarked that RFRA's extremely broad support "shows, I suppose, that the power of God is such that even in the legislative process miracles can happen."[187] Here was the high-water mark of consensus on the Free Exercise Clause; Democrats and Republicans, left-wing accommodationists and right-wing accommodationists alike celebrating these new protections for religious liberty.

[187] Clinton, William J.: "Remarks on Signing the Religious Freedom Restoration Act of 1993," November 16, 1993.

CHAPTER FIVE: FROM RFRA TO *BOERNE*, 1993-1997

It is still controversial how much impact the Smith standard had on free exercise exemptions claims in the three and a half years between the *Smith* decision in April 1990 and RFRA's passage in November 1993. While there is some qualitative evidence that suggests religious minorities, in particular, were less likely to turn to the courts between *Smith* and RFRA, they were still much more likely to sue under RFRA than members of mainstream religions; only 4% of RFRA claims were brought by mainstream Protestants, who comprised 21% of the American population at the time.[188] Furthermore, a 2004 quantitative compiling of all federal court free exercise cases between 1980-2004 found that *Smith* and RFRA did each have significant impact on court decisions, as the percentage of favorable decisions for free exercise claims went from 39% before *Smith*, to 29% between *Smith* and RFRA, to 45% after RFRA.[189] This data may be misleading, however, as it groups all free exercise claims together instead of looking only at exemptions cases. Looking solely at RFRA exemptions cases paints a different picture: of the 144 federal court decisions involving RFRA exemptions claims between RFRA's passage and *Boerne* in June 1997, the courts denied relief in 126 cases and granted it in only 18.[190] The 24 state court decisions adjudicating on RFRA claims had a similar breakdown: 17 judgments against the free exercise claims, and 7 in favor. This ratio was little different from that of the porous strict scrutiny applied before *Smith*: James Ryan's 1992 study compiled all the Federal circuit court and Supreme Court free exercise

[188] Adamczyk, Amy, John Wybraniec, and Roger Finke. "Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA." *Journal of Church and State* 46, no. 2 (2004), at 245-246.
[189] Ibid, at 248-249.
[190] Lupu, at 591.

exemptions cases between 1980 and 1990 and found that, in 85 of the 97 cases, the court ruled that the statute in question passed strict scrutiny, and denied the exemption.[191]

The biggest difference between post-RFRA accommodationism and pre-*Smith* accommodationism was the relative success of minority and mainstream religions. Courts before *Smith* had applied a version of the *Sherbert* Test that was at least flavored by a discrete and insular minority view of strict scrutiny. Every Supreme Court free exercise exemptions case from *Sherbert* in 1963 until *Smith* in 1990 concerned a claim from a religious minority: Seventh-Day Adventists in *Sherbert* and *Hobbie*, Amish in *Yoder* and *Lee*, a Jehovah's Witness in *Thomas*, a Muslim in *Shabazz*, an Orthodox Jew in *Goldman*, and Native Americans in *Roy, Lyng* and *Smith*. Therefore, the latent divide between the left-wing, minority protections view of free exercise accommodationism and the right-wing, fundamental rights view of accommodationism never had reason to appear. But RFRA's universal *Sherbert* Test was now applied to all cases from mainstream Christians, without judicial choice of when to apply strict scrutiny. This change had dramatic effect. In many respects, RFRA's accommodationism benefitted members of well-represented religions more than it benefitted religious minorities: for example, 65% of religious claims initiated by mainline Protestants during the first ten years of RFRA were successful, compared to only 37% for non-Christian minority groups.[192]

In total the RFRA-mandated strict scrutiny standard applied in federal courts after RFRA is less stringent than many other forms of strict scrutiny. Adam Winkler's 2006

[191] Ryan, James E. "Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment." *Virginia Law Review* 78 (1992), at 1417.
[192] Adamczyk, Wybraniec, and Finke, at 246-248.

empirical analysis of strict scrutiny cases across federal courts found that, while application of strict scrutiny truly is "fatal" to the law's chance of survival in most subject areas, "[t]here is one area of law in which strict scrutiny has been widely recognized to be less than fatal in practice: free exercise cases."[193] Finally, at the level of administrative policy, Ira Lupu found that "there is absolutely no evidence that RFRA did anything to protect religion in decision making by the agencies of the United States."[194] Altogether, there is little evidence that any of the late *Sherbert*-to-*Smith* era, the brief *Smith* era, the pre-*Boerne* RFRA era and the post-*Boerne* RFRA era were significantly better than the others at protecting religious liberty.

And yet, there was a remarkable tendency for anti-*Smith* scholars and legislators to exaggerate the decision's effects to the apocalyptic. In 1997, Craig Anthony Arnold wrote that "Ultimately, *Smith* will come to be viewed as the *Plessy* of the 20th century."[195] Anecdotally but tellingly, during the Thomas confirmation hearings, the example that Senator Joe Biden gave for how *Smith* had affected religious liberty was a New Mexico law which banned minors from drinking alcohol under any circumstances—which, therefore, would prevent children from taking Catholic communion. Biden gave the law as an example to show that "clearly, under the test applied by Scalia, such a law could be

[193] Winkler, Adam. "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts." *Vanderbilt Law Review* 59 (2006), at 809.
[194] Lupu, at 589.
[194] H.R. 2797 hearing, at 87-95.
[195] Arnold, Craig Anthony. "Religious Freedom as a Civil Rights Struggle," Nexus Journal of Opinion 2 (1997), at 162. *Plessy v. Ferguson*, 163 U.S. 537 (1896) was the Supreme Court decision that upheld racial segregation.

passed and it would be held constitutional"—the irony of which is that the law was struck down immediately by a New Mexico court, and never reached the Supreme Court.[196]

There was only one major free exercise case between *Smith* and RFRA: *Church of the Lukumi Babalu Aye v. Hialeah*, argued in November 1992 and decided in June 1993.[197] In *Lukumi*, the Court heard a challenge to a 1987 city ordinance from Hialeah, Florida that prohibited animal slaughter. The Court unanimously agreed with the appellants that the ordinance was targeted at the Church of the Lukumi Babalu Aye, a Santeria church which includes animal sacrifice as part of its religious doctrine and practice. *Lukumi* was not an exemptions case: the Court struck down the law facially and totally.

The petitioners, for whom Douglas Laycock advocated, did not challenge *Smith*, but rather claimed that the Hialeah ordinances were not neutral.[198] Consistent with *Smith*, Justice Kennedy held that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context."[199] But to Justice Kennedy and the Court, "[f]acial neutrality is not determinative" of neutrality, as "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial

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[196] Thomas confirmation hearing, at 399.

[197] *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).

[198] Laycock himself stated that "I made a deliberate decision not to breathe a hint that we wanted Smith overruled or that this was a stepping-stone to get it overruled. One reason was that I don't think they would have granted certiorari to consider that." Laycock, Douglas. "Free Exercise and the Religious Freedom Restoration Act." Fordham Law Review 62 (1994), at 897-898. Additionally, there were five *amici* briefs for the petitioners in *Lukumi* that did challenge *Smith*.

[199] *Lukumi*, at 533.

neutrality."[200]Justice Kennedy used records of the Hialeah City Council hearings to establish legislative intent, which he found supported the conclusion that "[t]he ordinances had as their object the suppression of religion."[201] Justice Kennedy ruled that "the ordinances by their own terms target this religious exercise," and "suppress[ed] much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense."[202] The ordinances were not neutral and not narrowly tailored, and therefore violated the Free Exercise Clause.

Ironically, the *Lukumi* opinion was harsh toward free exercise in a way that many had falsely accused *Smith* of being. At the beginning of Section 3—a section joined by seven justices, all but Blackmun and O'Connor—Justice Kennedy casually inserted the novel statement that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[203] This sounds innocuous enough, but it is actually a departure from traditional jurisdictional view that a non-neutral law is inherently unconstitutional.[204] Justice Scalia wrote in *Smith* that non-neutral laws were not merely subject to heightened scrutiny, but were unconstitutional *ipso facto*:

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[200] Ibid, at 534.
[201] Ibid, at 542.
[202] Ibid, at 542.
[203] Ibid, at 546.
[204] Justice Kennedy's dictum that non-neutral laws were subject to strict scrutiny rather than inherently unconstitutional may have originated from the District Court of Southern Florida, which first heard *Lukumi*: "Although acknowledging that the foregoing ordinances are not religiously neutral, the District Court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest." *Lukumi*, at 520.

> "a state would be 'prohibiting the free exercise (of religion)' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf."[205]

Doubtless unconstitutionality is a far cry from strict scrutiny, especially strict scrutiny as the Court had applied it to free exercise claims during the Burger Court years.

Justice Kennedy's divergence from precedent was not lost on Justice Blackmun, the lone outright dissenter in *Smith* left on the Court after Justices Brennan and Marshall's retirements. The bulk of Justice Blackmun's opinion argued in favor of applying the *Sherbert* Test rather than *Smith*'s laxer neutrality test (unsurprisingly, Justice O'Connor joined Justice Blackmun's opinion in full).[206] But Justice Blackmun took particular offense to Justice Kennedy's statement that laws not neutral to religion could potentially be constitutional:

> "When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert* v. *Verner* […] because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest."[207]

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[205] *Smith*, at 877-878.
[206] *Lukumi*, at 578.
[207] Ibid, at 579.

Justice Blackmun's argument here is compelling from an accommodationist perspective, as a law which is not neutral to religion. But the jurisdictional argument against non-neutral laws is just as strong: that a non-neutral law is targeting a religion as such is proof that its reach goes beyond the purely secular, and therefore beyond the government's legitimate jurisdiction.[208]

There were two other concurring opinions in *Lukumi*. Justice Scalia, joined by Chief Justice Rehnquist, wrote to express disagreement with Justice Kennedy's reliance on legislative intent as a valid source to prove the law's lack of neutrality, "because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*."[209] Refusal to consider legislative intent as part of his decisions was a favored hobby horse of Justice Scalia's, as he found it "virtually impossible to determine the singular 'motive' of a collective legislative body."[210]

Lastly, Justice Souter wrote an opinion almost exclusively dedicated to attacking *Smith.* Justice Souter echoed the common criticism that "[t]hough *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, […] I am not persuaded" because "[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule."[211] But not only does Justice

[208] For example, if there were a hypothetical religion which tended to instigate militant armed rebellions against the Federal Government, a true jurisdictionalist would still hold that the state could make no law which banned any of the hypothetical religion's beliefs, or any of its practices for any motives other than their purely secular impact.
[209] *Lukumi*, at 558.
[210] Ibid, at 558.
[211] Ibid, at 566, 567.

Souter question the wisdom of *Smith*, he also questions its legitimacy, saying that "[t]he *Smith* rule, in my view, may be reexamined consistently with principles of *stare decisis* [as] the *Smith* rule was not subject to 'full-dress argument' prior to its announcement."[212] Justice Souter then went even farther, speculating that:

> "The *Smith* rule's vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case […] I think a rule of law unnecessary to the outcome of a case, especially one not put into play by the parties, approaches without more the sort of *'dicta* ... which may be followed if sufficiently persuasive but which are not controlling.'"[213]

Throughout his opinion, Justice Souter argued that "the Court should reexamine the rule *Smith* declared," revealing that his testimony during his confirmation was an accurate, if understated, depiction of his thoughts on *Smith*.[214] Justice Thomas, however, joined the majority opinion but not those of Justices Blackman or Souter, suggesting that he approved of the *Smith* ruling, or would at least let it stand. The Court's pro-*Smith* majority was now up to 6-3.

Shortly after *Lukumi*, the Court's composition changed further. First, in June 1993, Justice Byron White retired, to be replaced soon thereafter by Ruth Bader Ginsburg. Then, on August 3, 1994, Justice Harry Blackmun retired and was immediately replaced by Stephen Breyer, who had already been confirmed. Justices Ginsburg and Breyer faced relatively easy confirmation battles, and were confirmed by wide margins of

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[212] Ibid, at 571.
[213] Ibid, at 572-573 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935)).
[214] Ibid, at 559.

96-3 and 87-9, respectively. *Smith*, RFRA, and free exercise exemptions generally were not nearly as pressing concerns after RFRA's passage, and Ginsburg and Breyer received only minimal questioning on those topics, particularly when compared to what Justices Souter and Thomas received.[215] Judge Ginsburg only received one at her confirmation hearing, on July 22, 1993. Senator Arlen Specter (R-PA) noted that Judge Ginsburg had "urged the strict scrutiny standard for equal protection" for cases involving "rights for women," and then asked Judge Ginsburg: "Do you think that strict scrutiny is any less applicable to the free exercise clause of the first amendment, free exercise of religious freedom under the first amendment?"[216] Judge Ginsburg dodged the question entirely, saying that she would only "address questions that come to me in the context of a specific case, on the basis of the facts of that specific case, on the record that is presented in that case, on the arguments the lawyers make, and on the applicable law and precedent, but [...] not address an abstract issue." Judge Breyer's questioning, on July 12, 1994 was similarly scant. He only revealed his philosophy only once; when pressured by Senator Orrin Hatch (R-UT) to explain his views on RFRA, Judge Breyer said nothing more than that "[t]he principle is absolutely right."[217]

[215] Ginsburg's confirmation hearings were held in late July, three months before President Clinton signed RFRA, but by that point H.R. 1308 had passed the House unanimously and it was clear that it would pass into law easily.

[216] U.S. Congress. Senate. Committee on the Judiciary. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary*. 103rd Cong., 1st sess., July 20-23, 1993, at 360.

[217] U.S. Congress. Senate. Committee on the Judiciary. *Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary*. 103rd Cong., 2nd sess., July 12-15, 1994, at 122.

RFRA did impose changes from the *Sherbert* and *Smith* eras beyond the relative success of religious minorities' claims: most notably in prisons. The concerns of Jesse Helms and the other supporters of Harry Reid's proposed amendment were vindicated, as claims from prison inmates initiated 94 of the 144 federal court decisions involving RFRA between RFRA's passage and *Boerne* (June 25, 1997).[218] During the National Governors' Association Meeting of July 30-August 1, 1995, the Association adopted a policy statement resolution that "the Governors believe Congress should enact legislation without delay that would […e]xclude prison and jail inmates or any person held or incarcerated as a pretrial detainee from provisions of the Religious Freedom Restoration Act."[219] Only two days before, on July 28, 1995, Senator Harry Reid had again tried to limit RFRA's application to prisons. He proposed a bill, S. 1093, which would amend RFRA by adding a section which stated:

> "Notwithstanding any other provision of this Act, nothing in this Act or any amendment made by this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment regarding laws prohibiting the free exercise of religion, with respect to any individual who is incarcerated in a Federal, State, or local correctional, detention, or penal facility (including any correctional, detention, or penal facility that is operated by a private entity under a contract with a government)."[220]

[218] Lupu, at 591. The courts denied relief in 85 of these cases, and granted relief in only 9.
[219] Senator Bryan, speaking on S. 1093, 104th Cong., 1st sess., Congressional Record 141 (August 3, 1995): S 11340-11341.
[220] S. 1093, 104th Cong. (1995).

S.1093 had only four cosponsors: Reid's fellow Nevadan Senator Richard Bryan (D-NV) and three Republican Senators. In a speech on the Senate floor, Senator Bryan cited and endorsed the statement from the National Governors' Association that RFRA "threatens the ability of prison officials to effectively manage state and local correctional institutions," and promotes "extensive litigation and an explosion of frivolous petitions by prisoners demanding accommodations for specific religious activities [that has] a detrimental impact on the costs of operating correctional institutions."[221] S.1093 was referred to the Senate Committee on the Judiciary, but never received a hearing or a vote, even in newly Republican-dominated Congress.[222] Senator Reid returned with an identical bill, S. 206, for the 105th Congress, and introduced it on January 28, 1997, this time with only two cosponsors: Senators John Breaux (D-LA) and Thad Cochran (R-MS).[223] Again, the bill died quietly in committee.

Meanwhile, in 1993, the Catholic Archbishop of San Antonio, Patrick Flores, applied for a building permit to expand the church in nearby Boerne, Texas. The Boerne church was considered a contributing property to a historic district, however, so the local zoning commission denied Archbishop Flores's request. Flores filed suit under RFRA, saying the commission's denial of expansion burdened the free exercise of the local Catholic congregation. In March 1995, the United States District Court for the Western District of Texas heard Flores's case, and struck down RFRA as an overbroad reach of

[221] Senator Bryan, speaking on S. 1093, 104th Cong., 1st sess., Congressional Record 141 (August 3, 1993): S 11341.
[222] The 104th Congress of 1995-1997 was the first in 8 years to have a Republican-controlled Senate, and the first in 40 years (and only the third in 64 years) to have a Republican-controlled House.
[223] S. 206, 105th Cong. (1997).

Congress' Section 5 authority to enforce the Equal Protection Clause of the Fourteenth Amendment.[224] On January 23, 1996, the United States Court of Appeals for the Fifth Circuit reversed the District Court's decision, ruling for Flores and upholding RFRA as fully constitutional.[225] The Supreme Court then granted certiorari, and heard oral argument for *City of Boerne v. Flores* on February 19, 1997.[226] On June 25, 1997, the Court released its decision, which reversed the circuit court's decision and struck down RFRA as applied to the states.

Justice Anthony Kennedy wrote the opinion of the Court, the judgment of which was joined by a 6-3 majority. Justice Kennedy's opinion first described the facts of the case, and then affirmed the Court's adherence to the *Smith* precedent. The crux of his argument, however, had nothing to do with free exercise or religious liberty, but instead refuted Congress' claim that RFRA was an acceptable use of Congress' Fourteenth Amendment authority over the states. *Boerne* was one of the strongest affirmations of judicial supremacy yet handed down by the Court. Justice Kennedy wrote that, while "Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion," its power "extends only to 'enforc(ing)' the provisions of the Fourteenth Amendment," and no more.[227] Congress has a "remedial" power, but not an interpretive power:

[224] *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995)
[225] *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996).
[226] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[227] Ibid, at 519.

> "The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[228]

Furthermore, RFRA could not be seen as remedial or preventative measure, the two acceptable forms of constitutional authority that would give Congress Section 5 power over the states, because "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."[229] Given that *Smith* was still precedent, Congress could only enforce a jurisdictional interpretation of free exercise on the states. RFRA was too far.

There were six opinions in Boerne: every Justice save Chief Justice Rehnquist, Justice Thomas and Justice Ginsburg wrote separately. Four of the six opinions—all but Justice Stevens's and Justice Kennedy's opinion of the Court—are almost exclusively concerned with the specter of *Smith* and its precedent. Justice O'Connor was now the only dissenter left from *Smith*, and the seven intervening years had tempered none of her ire towards Justice Scalia's opinion. Her *Boerne* opinion only briefly endorses the

[228] Ibid, at 519.
[229] Ibid, at 532.

Court's reasoning as to the federalism question involved, saying that "if I agreed with the Court's standard in *Smith,* I would join the [majority] opinion," before launching into an attack on the *Smith* ruling.[230] While her opinion in *Smith* was primarily concerned with Court precedent, her opinion in *Boerne* attacked Justice Scalia on his own originalist terms by citing James Madison, Thomas Jefferson, George Washington, state laws from the pre-Revolution period, and 18th century state constitutions.[231] Throughout this analysis, she reaffirmed that the "[Free Exercise] Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."[232] Justice O'Connor also made clear that she "would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument" to "simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of […] Congress."[233]

These beliefs were echoed by Justice Breyer and Justice Souter. Justice Breyer wrote a brief opinion, clarifying that he joined the O'Connor dissent in full, save for the brief paragraph where she endorsed the Court's federalism argument. Justice Breyer agreed that *Smith* should be reargued, but did not find it necessary to address whether Congress was authorized to pass RFRA until then.[234] Justice Souter cited his own opinion

[230] Ibid, at 545.
[231] Ibid, at 549-564.
[232] Ibid, at 546.
[233] Ibid, at 545.
[234] Ibid, at 566

from *Lukumi* and reiterated his "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."[235] But despite his harsh criticism of *Smith*, Justice Souter was unwilling to refute *Smith* entirely, as he said that "I am not now prepared to join Justice O'Connor in rejecting it or the majority in assuming it to be correct."[236]

Justice Scalia joined the majority opinion in full, but he wrote yet another opinion, solely to refute Justice O'Connor. Justice Scalia claimed that "[t]he material that the [O'Connor] dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause," and then proceeds to rebut her arguments one by one.[237] Only one unlikely ally joined on to Justice Scalia's opinion: frequent adversary Justice John Paul Stevens.

Justice Stevens, too, wrote an opinion: the second-shortest (to Justice Breyer's) of the six *Boerne* opinions, but by far the widest-reaching; he would have struck down RFRA facially, as applied to the States and to the Federal Government, without any need to consider the federalism and separation of powers issues upon which Justice Kennedy's majority opinion focused on. Justice Stevens's view of the religion clauses was unique among Supreme Court justices. Like other members of the Court's liberal wing, Justice Stevens had broad conception of the Establishment Clause, and rejected any government preference of religion over irreligion. However, other justices with broad conceptions of

[235] Ibid, at 565
[236] Ibid, at 565
[237] Ibid, at 537.

the Establishment Clause, such as Justice William Brennan and Justice Thurgood Marshall, tended to be the likeliest to require religious accommodations to neutral laws.[238] In contrast, Justice Stevens's conception of Establishment Clause neutrality was so stringent that he saw free exercise accommodations offered to the religious but not the irreligious as an impermissible preference of religion. Therefore, Justice Stevens was the only member of the court's liberal wing to rule against the *Sherbert* Test in *Smith*, and, in *Boerne*, was the only justice to join on to Justice Scalia's concurring opinion which defended the rationale behind the *Smith* decision.[239] Justice Steven's philosophy caused him to see RFRA as an unconstitutional preference of religion over irreligion. At only 145 words, Justice Stevens's *Boerne* opinion is worth replicating in full here:

> "In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally

[238] Justice Brennan, concurring in part in *County of Allegheny v. American Civil Liberties Union* (at 644) (1989), said that the Court has "interpreted [the Establishment] Clause to require neutrality, not just among religions, but between religion and nonreligion." This opinion was joined by Justice Marshall. Justice Souter, another strict separationist, wrote in his *Lee v. Weisman* 505 U.S. 577, 616 (1992) concurring opinion that "history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some," only a year before criticizing *Smith* in *Lukumi*.

[239] Neither Chief Justice Rehnquist nor Justice Kennedy, both of whom had joined Justice Scalia's opinion of the court in *Smith*, joined Justice Scalia's concurrence in *Boerne*.

> applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. *Wallace v. Jaffree*, 472 U. S. 38, 52–55 (1985)."[240]

Justice Stevens was not the first to raise the potential Establishment Clause complications of a statutory scheme or jurisprudence which privileges religiously motivated claims over other claims of conscience. Indeed, Justice Potter Stewart addressed the potential conflicts between accommodationism and the Establishment Clause in *Sherbert* itself, saying that "[t]o require South Carolina to so administer its laws as to pay public money to the appellant under the circumstances of this case is thus clearly to require the State to violate the Establishment Clause as construed by this Court," because the State denied unemployment insurance to those who refused work on irreligious grounds, for example "a mother unavailable for work on Saturdays because she was unable to get a babysitter."[241] Justice Stewart, however, raised these concerns only to demonstrate his opposition to the Court's stringent Establishment Clause jurisprudence; he himself did not subscribe to the position, because had a more lenient Establishment Clause jurisprudence. Justice O'Connor made a similar exemptions-based criticism of a strict Establishment Clause in *Wallace v. Jaffree* (1985):

[240] *Boerne*, at 537.
[241] *Sherbert*, at 415-416.

> "[i]t is difficult to square any notion of 'complete neutrality,' [citing Stevens's majority opinion in Wallace] with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion.[242]

Finally, during his 1990 confirmation hearings, then-Judge Souter recognized "what ha[d] explicitly been recognized as the potential conflict between the [*Sherbert* and *Lemon*] tests," as *Sherbert* requires government official to make judgements on religion in a way that the *Lemon* Test usually forbade.[243]

This tension between accommodationism and the Establishment Clause is less pressing now that it was when Justices Stewart, O'Connor, or even Souter made their remarks, however, because of the Court's shifting Establishment Clause jurisprudence. Up until the Rehnquist Court (1986-2005), the Court generally held a jurisprudence of strict neutrality, meaning that "neither a state nor the Federal Government […] can pass laws which aid one religion, aid all religions, or prefer one religion over another."[244] As recently as 1961, two years before *Sherbert*, the Court ruled unanimously that no state or

[242] *Wallace v. Jaffree*, 472 U.S. 38, 82-83 (1985)

[243] *Souter* hearing, at 156. The *Lemon* Test, from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was a three-pronged test concerning Establishment Clause challenges to government statues accused of establishing religion. For the government statute in question to stand, it must have a secular legislative purpose, its primary effect must neither advance nor inhibit religion, and it must not result in excessive government entanglement with religion. Plausible arguments could me made against RFRA on all three prongs of the *Lemon* Test.

[244] *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 15 (1947). This case was the first to apply the Establishment Clause to the States through Fourteenth Amendment Due Process incorporation.

federal government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers."[245]

Mandated neutrality between religion and irreligion began to decline during the Burger Court; Justice Rehnquist's dissent in *Wallace*, joined by Chief Justice Burger and Justice White, claimed that "[a]s its history abundantly shows […] nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion."[246] Chief Justice Burger himself appeared conflicted on accommodationism's relationship to the Establishment Clause: in *Wisconsin v. Yoder* (1972), he wrote that "[t]he Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause," but he then wrote in *Thomas v. Review Board of Indiana* (1981) that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[247]

During the Rehnquist Court, the tenet that religion could not be preferred over irreligion became contested ground, and the strict separationist position found itself in dissent more often than not. Justice Scalia, with whom Justice Stevens so closely agreed on free exercise exemptions, believed that "there is nothing unconstitutional in a State's favoring religion generally."[248] New Establishment Clause philosophies began to emerge: Justices O'Connor, Kennedy, and Breyer held views of the Establishment Clause

[245] *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).
[246] *Wallace*, at 113.
[247] *Yoder*, at 220-221; *Thomas*, at 713.
[248] *Van Orden v. Perry*, 545 U.S. 677, 692 (2005).

somewhere in between the Scalia/Rehnquist and Stevens positions, but none of the three saw religious exemptions without analogous exemptions of conscience for non-believers as violating the Establishment Clause.[249] In sum, "sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not."[250]

Given that the Court has shied away from demanding government neutrality to religion as opposed to irreligion in recent years, it is unlikely that RFRA could be struck down at the federal level. Some scholars have supported Justice Stevens's view, such as Marci Hamilton, who argued the case for the petitioner in *Boerne v. Flores*. Hamilton wrote that RFRA violates the Establishment Clause both because it promotes religion over irreligion and because its "resulting relationship between the government and religious authority is one of excessive entanglement," which violates the third prong of the *Lemon* Test.[251] But this position remains a fringe one, and unless the Court's Establishment Clause jurisprudence shifts dramatically, RFRA as currently written is likely safe from the Court for the foreseeable future.

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[249] Justice O'Connor and Justice Breyer use an "endorsement" test for the Establishment Clause. For O'Connor, see *Wallace*, at 67; *McCreary County v. America Civil Liberties Union of Kentucky*, 845 U.S. 844, 882 (2005). For Breyer, see *Van Orden*, at 698. Justice Kennedy uses a "coercion" test: see his opinions of the Court in *Lee v. Weisman*, 505 U.S. 577 (1992) and *Town of Greece v. Galloway*, 572 U.S. ___ (2014).

[250] *McCreary*, at 891. (J. Scalia, dissenting).

[251] Hamilton, Marci A. "The Religious Freedom Restoration Act is Unconstitutional, Period." *University of Pennsylvania Law Journal* 1, no. 1 (1998), at 9. Hamilton also says separation of powers principles make RFRA unconstitutional at the federal level, because RFRA "does not amend the text of any federal law. Rather, it changes the way in which the courts scrutinize federal law. The self-limitation defense of RFRA is a post hoc pretext for Congress' bold aggrandizement of its powers." Ibid, at 3.

Boerne was released on June 25, 1997, but it took until 2000 for Congress to officially remove references to state and local governments and define "government" as applying only to the US government and its territories in the federal code.[252] Many states, however, reacted quickly to *Boerne*. Before *Boerne*, only two states had enacted states RFRAs which codified *Sherbert* Test accommodationism for free exercise claims under state law: Rhode Island and Connecticut, both shortly before RFRA in 1993.[253] In the three years following *Boerne*, however, nine states implemented state RFRAs with similar language to the federal RFRA. Illinois led the pack in 1997, followed by Alabama and Florida in 1998.[254] Arizona, South Carolina and Texas passed state RFRAs in 1999.[255] Idaho, New Mexico and Oklahoma passed state RFRAs in 2000.[256] A general trend emerges from the states enacting these RFRAs; the first three (Connecticut, Rhode Island and Illinois) were staunchly liberal, but starting in 1998 state RFRAs became more desirable in conservative areas which had traditionally balked at accommodationism. Seven of the eight states (including Florida) that passed RFRAs from 1998 to 2000 gave their electoral votes to George W. Bush in 2000, and all eight voted for President Bush in 2004. These state level trends were matched at the federal level, as liberal interest groups and congressmen began to fear the effects of accommodationism shortly after *Boerne*. This ideological switch would only accelerate from 1998 onwards, as explained in Chapter Six.

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[252] Pub. L. No. 106-274, 114 Stat. 803, 806 (2000).
[253] Conn. Gen. Stat. §52-571b; R.I. Gen. Laws §42-80.1-1, et seq.
[254] Ala. Const. Art. I, §3.01; Fla. Stat. §761.01, et seq.
[255] Ariz. Rev. Stat. §41-1493.01; S.C. Code §1-32-10, et seq.; Tex. Civ. Prac. & Remedies Code §110.001, et seq.
[256] Idaho Code §73-402; N.M. Stat. §28-22-1, et seq.; Okla. Stat. tit. 51, §251, et seq.

CHAPTER SIX: THE RFRA COALITION FRACTURES, 1997-2012

Boerne was the beginning of the end for the RFRA coalition. During *Boerne*, The ACLU filed an a*micus curiae* brief in support of Flores and RFRA. The brief argued that Congress was within its Section 5 powers to pass RFRA largely because of established cases dealing with voting rights, where the Court had consistently "upheld Congress' power to prohibit electoral changes having the effect of causing a retrogression in minority political power" and other minority protections.[257] The ACLU's argument that RFRA was preventative cited the H.R. 2797 committee hearing from May 1992, where [t]he Senate Committee likewise found that governmental bodies will rarely reveal their intent to deliberately disadvantage religious minorities."[258] Again, the ACLU championed the left-wing accommodationist position: that free exercise rights protect "discrete and insular minorities" and not a blanket, equally applied fundamental right. The ACLU brief makes no mention of fundamental rights, and it only mentions the Due Process Clause once, awkwardly noting that Section 5 "is used equally to enforce the Due Process Clause, the Equal Protection Clause, and other incorporated rights" to avoid what was increasingly becoming an obvious tension between the left-wing accommodationists and the right-wing accommodationists.

On July 14, 1997, less than a month after the *Boerne* decision was released, the House Judiciary Committee's Subcommittee on the Constitution held an emergency

[257] Brief for the American Civil Liberties Union as Amicus Curiae, *City of Boerne v. Flores*, 521 U.S. 507 (1997). https://www.aclu.org/legal-document/aclu-amicus-brief-city-boerne-v-flores-archbishop-san-antonio-et-al.
[258] Ibid.

hearing titled "Protecting Religious Freedom after *Boerne v. Flores*."[259] Like bill hearings, the post-*Boerne* hearing hosted expert witnesses, including representatives from the National Council of Churches, the American Jewish Congress, the Prison Fellowship Ministries, and the U.S. Catholic Conference, as well as Douglas Laycock, who argued for RFRA before the Court in *Boerne*.

The consensus of the hearing was that *Boerne* was wrongly decided; Oliver Thomas of the National Council of Churches went so far as to say that "[a]s the *Dred Scott* decision of a century ago was for African–Americans, so *City of Boerne* v. *Flores* is for religious Americans today."[260] The expert witnesses agreed that a constitutional amendment was not a wise path forward, and instead advocated more state RFRAs and new federal legislation justified under the Spending Clause or Commerce Clause.[261] The Committee generally agreed: Congressman Bobby Scott (D-VA-3) said that "reconfiguring the statute based on an Interstate Commerce clause or on the Spending Clause are the credible options we have before us."[262] The hearing did not get into the specifics of prospective legislation, however.

Despite this lack of specificity, there were hints in the witness' testimony of further tensions to come. Charles Colson of the Prison Fellowship Ministries lamented that, after *Boerne*, "if we were to discharge someone or a church excommunicates someone because of behavior which we believe was prohibited by scripture, but there

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[259] U.S. Congress. Senate. Committee on the Judiciary. *Protecting Religious Freedom after Boerne v. Flores: Hearing before the Subcommittee on the Constitution*. 105th Cong., 1st sess., July 14, 1997.
[260] Ibid, at 25.
[261] Ibid, at 48-49.
[262] Ibid, at 3.

were laws providing recourse to those aggrieved employees, we could find ourselves in a position in which we could not exercise our own faith in our own organizations."[263] It later became clear what Colson meant by the class of people "believe[d to be] prohibited by scripture" when he said "[i]f you look at the language of *Romer* v. *Evans* in which those motivated by religious feelings were accused of being bigoted in bringing their religious convictions into public policy […] the religious community might be forgiven for thinking that this Court has decided to create another class of people in those who are people of faith."[264] *Romer v. Evans* (1996) had concerned a challenge to Colorado's Amendment 2, a 1992 ballot initiative which amended the state constitution to

> "prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination."[265]

Justice Kennedy's 6-3 majority opinion in *Romer* ruled that Amendment 2 violated the Equal Protection Clause, as "the amendment [wa]s at once too narrow and too broad, identifying persons by a single trait and then denying them the possibility of protection across the board."[266] Furthermore, the amendment was not designed to solve any real policy problem, and therefore lacked a "rational relation to some independent and legitimate legislative end."[267]

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[263] Ibid, at 6.
[264] Ibid, at 9.
[265] *Romer v. Evans*, 517 U.S. 620 (1996).
[266] Ibid, at 621.
[267] Ibid, at 621.

Romer was the first major victory for gay rights at the Supreme Court level, and marked the beginning of a tension between religious liberty and gay rights which still lasts today.[268] Among those organizations supporting the case against Amendment 2's constitutionality was the ACLU—a group which was conspicuously absent from the House's post-*Boerne* hearing.[269] Indeed, there were no left-wing accommodationist groups or scholars present at the hearing. The conversation was instead dominated by right-wing accommodationists, including one group previously skeptical of RFRA: the U.S. Catholic Conference. Mark Chopko still represented the Conference, and in contrast to the hearings of five years prior, he was now one of the strongest proponents of finding alternative means of codifying the *Sherbert* Test, saying "I think we need to study avenues to pass uniform legislation. Many have been suggested in this testimony already. I would remind you of them, and, again, emphasize the Spending Clause, the Commerce Clause, privileges and immunities."[270]

It did not take long for a bill derived from these proposals to be introduced in Congress. On June 6, 1998, identical versions of the Religious Liberty Protection Act were introduced to Congress: S. 2148 in the Senate and H.R. 4019 in the House. Like the RFRAs of earlier in the decade, S.2148 and H.R. 4019 received bipartisan support. But while the RFRAs' base of support skewed left, the Religious Liberty Protection Act was championed mostly by Republicans. Orrin Hatch (R-UT) sponsored S.2148, which had 4

[268] For a contemporary view on *Romer*, see: Duncan, Richard F. "Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans," *Notre Dame Law Review* 72 (1997).
[269] ACLU. "The Rights of Lesbian, Gay, Bisexual and Transgendered People." https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgendered-people.
[270] Protecting Religious Freedom after Boerne v. Flores hearing, at 48.

Republican and 2 Democratic co-sponsors, while Charles Canady (R-FL-12) sponsored H.R. 4019 with 22 Democratic and 29 Republican cosponsors.[271]

The Religious Liberty Protection Act would have used the so-called "federal funding hook" to apply the *Sherbert* Test to the many programs in state or local government that received federal funding or could be connected to interstate commerce.[272][273]

SEC. 2. PROTECTION OF RELIGIOUS EXERCISE.

(a) General Rule.--Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise--

(1) in a program or activity, operated by a government, that receives Federal financial assistance; or

(2) in or affecting commerce with foreign nations, among the several States, or with the Indian tribes; even if the burden results from a rule of general applicability.

[271] H.R. 4019, 105th Cong. (1998); S. 2148, 105th Cong. (1998).
[272] An Act Making Appropriations for the Departments of State and Justice and for the Judiciary and or the Departments of Commerce and Labor, for the Fiscal Year Ending June 30, 1926, and for Other Purposes, Public Law 502, U.S. Statutes at Large 43 (1925): 1023-1024.
[273] Congress had used the same tactic to effectively overrule *United States v. Lopez* 514 U.S. 549 (1995). *Lopez* had struck down a portion of the Gun-Free Schools Act of 1990, which outlawed carrying a firearm in a school zone. In the Omnibus Appropriations Act of 1997, Congress used the slightly altered language that "It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." (emphasis mine). Pub. L. No. 104-208, 110 Stat. 3009, 369-371 (1996).

The exception to Section 2(a)'s provisions comes verbatim from RFRA; the burdening law can stand if the government "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." RLPA also contained land use regulations, stating in Section 3(b) that:

> "No government shall impose a land use regulation that—
>
> > (A) substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety;
> >
> > (B) denies religious assemblies a reasonable location in the jurisdiction;
> >
> > (C) excludes religious assemblies from areas in which nonreligious assemblies are permitted."

Again, Congress' rationale was that the proliferation of federal funding in land use would give it authority to pass such regulations on the states.

S. 2148 was never referred to committee, but H.R. 4019 went farther, receiving subcommittee hearings on June 16th and July 14th, 1998. The June hearings' expert witnesses were primarily unaffiliated scholars: a mix of jurisdictionalists like Marci Hamilton and accommodationists like Douglas Laycock.[274] The July hearings were more revealing, as they involved representatives of interest groups. Continuing a trend, these groups, such the Prison Fellowship Ministries, the Southern Baptist Convention, the

[274] U.S. Congress. House. Committee on the Judiciary. *Religious Liberty Protection Act of 1998: Hearings before the Subcommittee on the Constitution*. 105th Cong., 2nd sess., June 16 and July 14, 1998.

Center for Law and Religious Freedom, and Pat Robertson's American Center for Law and Justice, were all from the right wing of the RFRA coalition. These organizations generally supported the Religious Liberty Protection Act, but the sentiment was not unanimous. Some, most vociferously Michael Farris, President of the Home School Legal Defense Association, expressed concern that, by making commercial impact prerequisite for relief, RLPA would reduce religious liberty to the same status as "big business."[275] Most, however, recognized that while H.R. 4019 was not as ideal an accommodations scheme as RFRA had been, it was still an improvement on RFRA only applying to the federal government.[276] Farris, like chief H.R. 4019 sponsor and subcommittee chairman Charles Canady, believed that "the constitutional amendment [wa]s the best alternative" to the Religious Liberty Protection Act, and stated that he had "never heard an explanation of why it is not politically possible, except that most of the groups on the left don't want it."[277]

But not only did these "groups from the left" oppose a constitutional amendment, they also opposed the Religious Liberty Protection Act. Following the H.R. 4019 hearings, and apparently motivated by concerns that "[s]everal witnesses during hearings […] specifically stated their belief that RLPA could and should be used as a

[275] Ibid, at 303.
[276] See the Christian Legal Society's Steven McFarland's prepared statement (Ibid, at 314-324) for a rebuttal to Farris' argument from within the right-wing accommodationist camp.
[277] Ibid, at 352. There was a proposed Constitutional Amendment, H.J. Res. 78 (1997), which was making its way through the legislature, but its material was fundamentally different from RFRA's or RLPA's. H.J. Res. 78's crux was its stipulation that "the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed." The resolution failed to pass because of a dearth of Democratic support; it received 197 Republican but only 27 Democratic votes in support. H.R. Res. 78's sponsor, Ernest Istook (R-OK-5), had also sponsored a similar constitutional amendment the previous session.

defense to civil rights claims based on gender, religion, sexual orientation, and marital status," meaning that "without any further amendments, RLPA could potentially jeopardize certain civil rights claims," the ACLU released a statement opposing RLPA.[278] Several expert witnesses in the H.R. 4019 hearing, notably Douglas Laycock and the American Jewish Congress' Marc Stern, recommended against including civil rights exemptions in RLPA such as those that had been advocated by the ACLU and some liberal House Democrats. Stern had summarized the right-wing accommodationist view on a civil rights carve-out when he said that "discrimination laws embody a particular view of hotly contested moral issues [and…t]o say in RLPA that some moral views are outside the use of polite discourse […] is in effect to use RLPA to say that religious views ought not to be even heard."[279]

The ACLU denouncement of RLPA gave seven examples of free exercise claims challenges raised since RFRA that challenged civil rights. Six of the seven were challenges to anti-discrimination housing laws, the main civil rights concerns raised by left-wing accommodationist Congressmen Bobby Scott (D-VA-3) and Jerrold Nadler (D-NY-8) during the H.R. 4019 hearings.[280] But the article went even further, noting that

[278] ACLU. "Effect of the Religious Liberty Protection Act on State and Local Civil Rights Laws." https://www.aclu.org/other/effect-religious-liberty-protection-act-state-and-local-civil-rights-laws.
[279] Religious Liberty Protection Act of 1998 hearing, at 56-57. See also Laycock's comments at 236-237
[280] The cases listed were: *Thomas v. Municipality of Anchorage*, 1999 U.S. App. Lexis 440 (9th Cir. Jan. 14, 1999); *McCready v. Hoffius*, 1998 Mich. Lexis 3234 (Mich. Dec. 22, 1998); *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska), cert. denied, 115 S. Ct. 460 (1994); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); and *Jasniowski v. Rushing*, 678 N.E.2d 743 (Ill. App. 1997). In most of these cases, landlords had expressed religious opposition to unmarried couples living together as tenants on their property. Unmarried couples living together appeared to be highly suggestive of gay couples, particularly given the nature of the religious opposition.

"[d]efendants in civil rights cases have also raised religious liberty defenses in cases involving such characteristics as race or sexual orientation and in contexts ranging from educational institutions to employment." Here, again, they cited five cases, including one Supreme Court case, *Bob Jones University v. United States (1983).* Remarkably, the five cases that the ACLU gave as examples of challenges to racial or sexual orientation civil rights were all from the 1980's—in other words, before the passage of RFRA.[281]

The fascinating part of the ACLU's opposition to the Religious Liberty Protection Act is that RLPA went no farther than RFRA in any way, shape, or form; any claim which would succeed under RLPA would also have succeeded under RFRA, as RLPA's version of the *Sherbert* Test came verbatim from RFRA and had no broader applications. The difference between the two bills was not in policy, but rather that it took the ACLU until the mid-1990's to realize the full implications of accommodationism. Not only was RFRA's accommodationism, with universalized strict scrutiny for all free exercise claims, benefitting members of well-represented religions far more than it was benefitting religious minorities, but free exercise claims were now being made that harmed other discrete and insular minority groups. Left-wing accommodationist groups like the ACLU could not have anticipated these effects under their own religious liberty framework, because their framework gave accommodations only to the religious practices of minority religious groups, who could not wield enough power to enforce their will through the

[281] The cases listed were: *Bob Jones University v. United States*, 461 U.S. 574 (1983); *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982); *Walker v. First Orthodox Presbyterian Church*, 22 FEP Cases (BNA) 762 (Cal. Sup. Ct. 1980); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985); *Gay Rights Coalition v. Georgetown University*, 536 A.2d 1 (D.C. App. 1987).

political process. But free exercise accommodationism always had the potential to encroach on other rights; there had always been religious liberty claims which had the potential to harm others. For example, the Supreme Court had seen religious liberty challenges to drug restrictions,[282] minimum wage laws,[283] business permit laws,[284] traffic laws,[285] laws regulating polygamy,[286] and child labor laws.[287] These free exercise claims failed under a jurisdictional court or statutory scheme; but under RFRA, RLPA or any other accommodationist system, rights would inevitably collide.

H.R. 4019 died in committee, but Congressman Canady came back with a new RLPA, H.R. 1691 (or the Religious Liberty Protection Act of 1999) and introduced it to the floor on May 5, 1999. The partisan divide in accommodationism had shifted even further in the past year: while H.R. 4019 had 22 Democratic and 29 Republican co-sponsors, H.R. 1691 had 30 Republican and only 9 Democratic cosponsors.[288] The very same day H.R. 1691 was introduced, the ACLU released a letter stating that it opposed the new RLPA unless it was amended to "make clear that RLPA has no effect on state or local civil rights laws, thus leaving in place both the rights of civil rights plaintiffs and the existing constitutional exception from civil rights laws for the ministerial functions of religious organizations and the numerous statutory exceptions for religious organizations

[282] *Smith.*
[283] *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985).
[284] *Murdock.*
[285] *Cox v. New Hampshire*, 312 U.S. 569 (1941).
[286] *Reynolds v. United States*, 98 U.S. 145 (1879).
[287] *Prince v. Massachusetts*, 321 U.S. 528 (1944).
[288] H.R. 1691, 106th Cong. (1999).

and small landlords."[289] At the House committee hearing on H.R. 1691, ACLU counsel Christopher Anders acknowledged "the ACLU's historical position favoring stronger protection of religious exercise even against neutral, generally applicable governmental restrictions," but expressed concern "that some courts may turn RLPA's shield for religious exercise into a sword against civil rights," particularly in the arena of housing discrimination.[290] On July 1, H.R. 1691 passed the House Judiciary Committee.

A fortnight later, on July 15, 1999, Jerrold Nadler (D-NY-8) proposed a civil rights carve-out to H.R. 1691, as recommended by the ACLU. House Amendment 284 would have prevented all persons, save small landlords, religious institutions and small business owners, from filing free exercise claims for cases dealing with housing and employment discrimination.[291] House Democrats supported the amendment 174-30, but the majority-party Republicans opposed the amendment 15-204. The Amendment failed 190-234, with ten members abstaining. Less than an hour later, H.R. 1691 passed the House 306-118. Democrats narrowly supported the bill, 107-97, while Republicans overwhelmingly supported it 199-20. H.R. 1691 was not referred to the Senate Judiciary Committee until November 19, 1999, where it died quietly in committee. Senator Hatch introduced yet another RLPA in February 2000, but it received only one cosponsor and did not even make it to committee.[292]

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[289] ACLU. "Letter to the House on the Religious Liberty Protection Act and the Impact on Civil Rights Laws." https://www.aclu.org/letter/letter-house-religious-liberty-protection-act-and-impact-civil-rights-laws.

[290] U.S. Congress. House. Committee on the Judiciary. *Religious Liberty Protection Act of 1999: Hearing before the Subcommittee on the Constitution*. 106th Cong., 1st sess., May 12, 1999, at 153.

[291] H. Amdt. 384 to H.R. 1691, 106th Cong. (1999).

[292] S. 2081, 106th Cong. (2000).

Instead, the efforts of religious liberty proponents channeled toward a new bill: the Religious Land Use and Institutionalized Persons Act of 2000. RLUIPA was something of a compromise, as it combined protections for one favorite subject of right-wing accommodationists (land use protections) with one favorite subject of left-wing accommodationists (protections for prisoners), thereby avoiding broader protections which would have drawn out the tension between the two camps. Senator Hatch and Congressman Canady introduced matching versions of RLUIPA on July 13, 2000: S. 2869 and H.R. 4862.[293] Senator Hatch's opening statement on S. 2869 emphasized that its "narrowly focused" nature was the result of a "consensus approach" necessitated by "concerns […] regarding the scope of S. 2081 [RLPA]."[294] In other words, just seven years after RFRA, free exercise accommodationism had been revealed as a partisan issue.

RLUIPA was narrowly focused, and like RFRA, simply and succinctly constructed. Section 2 contained the land use language, mandating that "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" unless the regulation passes the same version of the *Sherbert* Test used in RFRA and RLPA; that being that the challenged regulation must be both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." Section 3 included the protections for institutionalized persons; that "No government shall impose a substantial burden on the

[293] S. 2869, 106th Cong. (2000); H.R. 4862, 106th Cong. (2000).
[294] Senator Hatch, speaking on S. 2869, 106th Cong., 2nd sess., Congressional Record 146 (July 13, 2000): S 66687-6688.

religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability" unless the burden passes the same version of the *Sherbert* Test.

Both the land use accommodations in Section 2 and the institutionalized persons accommodations found in Section 3 used the federal funding hook and the Commerce Clause to avoid any Fourteenth Amendment challenges. Both sections apply in cases where "the substantial burden is imposed in a program or activity that receives Federal financial assistance" and where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." The land use section also applies in one additional set of cases; those in which "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."

Because of its compromising nature, RLUIPA sailed through the legislative process quickly and easily. S. 2869 passed the Senate on unanimous consent the morning of July 27, and then, remarkably, passed the House on unanimous consent later that same day. On September 22, 1999, President Clinton signed S. 2869 into law, and it became Public Law No: 106-274.[295] RLUIPA is, as of this date, the last major bipartisan free exercise accommodations bill passed through Congress.

[295] Pub. L. No. 106-274, 114 Stat. 803 (2000).

RLUIPA was challenged in *Cutter v. Wilkinson* (2005), but the Court held that RLUIPA was both within Congress' spending and Commerce Clause powers and not violative of the Establishment Clause.[296] All nine justices joined Justice Ginsburg's unanimous opinion of the Court. Soon after *Cutter*, President George W. Bush filled two Supreme Court vacancies, appointing Judges John Roberts and Samuel Alito to replace the seats of Chief Justice Rehnquist and Justice Sandra Day O'Connor.

Judge Roberts's confirmation hearings were from September 12-15, 2005.[297] The hearings were thorough, but free exercise accommodationism was apparently not a concern of the Democratic Senators on the committee. All of the religious jurisprudence questions levelled at Roberts related to the Establishment Clause: he was asked if "the separation of church and state is absolute," about the *Lemon* Test, and about the recent challenge to "under God" in the Pledge of Allegiance in *Elk Grove v. Newdow* (2004), but never was he asked about his views on accommodationism.[298] Judge Roberts only mentioned accommodationism once, and unprompted, when answering a question about the tension between the Free Exercise Clause and the Establishment Clause. Roberts said:

> "There is a tension of sorts between the Establishment Clause, on the one hand, and the Free Exercise Clause on the other, and the Court's cases in recent years have tried to consider when is an accommodation for religious belief—when does

[296] *Cutter v. Wilkinson*, 544 U.S. 709 (2005).
[297] U.S. Congress. Senate. Committee on the Judiciary. *Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary*. 109th Cong., 1st sess., September 12-15, 2005.
[298] Ibid, at 227, 277, 358, 367. *Elk Grove United School District v. Newdow*, 542 U.S. 1 (2004).

that go too far and become an establishment of religion? The Court has a case on its docket coming up."[299]

This case, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), did come before the Court for its November 2005 term, two months into the new Roberts Court and two months before Alito's confirmation.[300] In one of Chief Justice Roberts's first majority opinions, he wrote for a unanimous Court that RFRA was constitutional as applied to the federal government. Even Justice Stevens joined the majority opinion, as his Establishment Clause concerns had apparently been placated by RFRA's newly limited post-*Boerne* form.

Judge Samuel Alito's hearing, held January 9-13, 2006, had even fewer religious questions than the new Chief Justice's had; again, he was not asked about his views on free exercise accommodations even once.[301] As in the Roberts hearing, the sparse questioning on religion that Alito did get concerned the Establishment Clause, particularly religion in the public square and prayer at public school graduation.[302] The hearings of the two George W. Bush appointees provided a sharp contrast from those of his fathers' appointees only fifteen years prior, but such was the shifting politicization of free exercise accommodations.

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[299] Ibid at 277.
[300] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). The decision was released February 21, 2006, but Justice Alito did not participate because he had not heard argument.
[301] U.S. Congress. Senate. Committee on the Judiciary. *Nomination of Samuel A. Alito to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary*. 109th Cong., 2nd sess., January 9-13, 2006.
[302] Ibid, at 467, 567.

Following RLUIPA, there were no major religious liberty bills proposed by Congress for over a decade. Several bills were proposed, but they were "red meat" for the base, designed to send a point but with little hope of passage into law. After the Court of Appeals for the Ninth Circuit's 2002-2003 rulings in *Elk Grove v. Newdow* that found the Pledge of Allegiance's affirmation of one nation "under God" to violate the Establishment Clause, conservative Republicans introduced three 2003 bills to counter the decision: Congressman Ron Paul's (R-TX-14) H.R. 1547, the Religious Freedom Restoration Act of 2003, Congressman Chip Pickering's (R-MS-3) H.R. 3190, the Safeguarding Our Religious Liberties Act (2003), and Senator Wayne Allards's (R-CO) S.B. 1558, the Religious Liberties Restoration Act.[303] In response to *Newdow*, the bills expressly opposed the "separation of church and state" ideal, particularly regarding the Pledge of Allegiance, the National Motto ("In God We Trust"), and public displays of the Ten Commandments. All three bills sought to restrict federal court jurisdiction; H.R. 1547 denied federal district courts jurisdiction over any religious freedom claim originating in a State or Federal statute, while H.R. 3190 and S.B. 1558 removed cases concerning the display of the Ten Commandments and the use of the word 'God' in the Pledge of Allegiance and the National Motto from the jurisdiction of all Federal courts but the Supreme Court. None of the three bills received a committee hearing.[304] There were also a series of Constitution Restoration Acts in 2004, 2005, and 2006.[305] These bills would have removed jurisdiction over any challenge "against an element of Federal,

[303] H.R. 1547, 108th Cong. (2003); H.R. 3190, 108th Cong. (2003).
[304] Congressman Pickering came back with another SORLA in 2005; H.R. 4576, 109th Cong. (2005).
[305] H.R. 3799, 108th Cong. (2004); S. 2082, 108th Cong. (2004); S. 2323, 108th Cong. (2004); H.R. 1070, 109th Cong. (2005); S. 520, 109th Cong. (2005). The Constitution Restoration Act was drafted by Herbert Titus, the jurisdictionalist witness from the RFRA hearings. (see pages 63-64).

State, or local government, or against an officer of Federal, State, or local government (whether or not acting in official personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government" from any federal court, including the Supreme Court. Of the five Constitution Restoration Acts, all introduced by Senator Richard Shelby (R-AL) or Congressman Robert Aderholt (R-AL-4), only 2004's H.R. 3799 reached the committee hearing stage, and even H.R. 3799 did not receive a committee vote. These 2003-2006 bills shared much of the language of accommodationism, but were far narrower in nature, and received almost no Democratic support.

By 2010, the old RFRA coalition no longer existed. Increasing party polarization meant that the Republican Party was now closely aligned with right-wing accommodationism, and the Democratic Party was now closely aligned with left-wing accommodationism. The vast majority of the conservative Southern Democrats who had, for example, supported Harry Reid's amendment to keep prisoners outside of RFRA's protections had since retired, been defeated by Republican challengers or switched parties. On the flipside, the Republican Party had drifted rightwards. Arlen Specter, a pro-choice moderate and one of the staunchest Republican proponents of passing RFRA, crossed over to join the Democratic Party in April 2009.[306] Not only was free exercise now more politicized than ever, it was now also more partisan than ever. These divides had stayed under the surface during the first decade of the new millennium, but circumstances would soon bring the religious liberty divide to the political forefront.

[306] Hulse, Carl, and Adam Nagourney. "Specter Switches Parties; More Heft for Democrats." *The New York Times*, April 28, 2009.

CHAPTER SEVEN: THE *HOBBY LOBBY* ERA, 2012-PRESENT

Accommodationism as such laid fallow as a hotbed political issue from RFRA's passage in until March 2010, when President Barack Obama signed H.R. 3590, the Patient Protection and Affordable Care Act (the ACA).[307] The act was highly controversial in its own right, but it also instigated free exercise claims under RFRA resulting from the ACA's individual health insurance mandate. Most of the ACA's beneficiaries are covered through employer-provided healthcare insurance plans, which subsidize the costs of treatments selected by the Department of Health and Human Services' Health Resource and Service Administration.

The HRSA's list of drugs to be covered by the ACA contained 20 female contraceptives, some of which were considered abortifacient by members of certain religious denominations. David Green, the founder and CEO of Hobby Lobby Stores, Inc., was one such person; his evangelical Christian beliefs led him to see four of these contraceptives, specifically emergency contraceptives and intrauterine devices, as abortifacients. Hobby Lobby was a closely held, for-profit corporation with an expressly Christian mission statement. [308] All churches and institutions organizations were exempted from the ACA's requirements, as were all other non-profit organizations, and all employers with fewer than 50 employees, but for-profit corporations like Hobby Lobby were forced to subsidize any and all of the treatments authorized by the HRSA or

[307] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[308] According to Hobby Lobby's website, the company is committed to "Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." Accordingly, all Hobby Lobby stores are closed on Sundays. Hobby Lobby. "Our Story." http://www.hobbylobby.com/about-us/our-story.

else be penalized by paying either a daily fine or higher wages and tax as compensation to the workers. Therefore, Green claimed that Hobby Lobby's compliance with a healthcare insurance plan that subsidized drugs with effects violated the corporation's core religious beliefs, was substantial burden on Hobby Lobby's free exercise rights, and was therefore a violation of RFRA. In 2012, Green filed suit in the United States District Court for the Western District of Oklahoma on Hobby Lobby's behalf.

Hobby Lobby's claim was completely anathema to left-wing accommodationism. Not only were Hobby Lobby's claimed beliefs not those of a religious minority, as its stated belief system was mainstream Christian, but no for-profit corporation could claim protections as a discrete and insular minority group. *Pierce*, the case cited by *Carolene*'s Footnote Four as an example of when strict scrutiny should be applied to religious minorities, stated that "corporations cannot claim for themselves the liberty guaranteed by the Fourteenth Amendment, and, in general, no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power by the State."[309] A for-profit coalition can also never be discrete and insular in the way that a religious nonprofit can: a religious institution can, and often does, hire employees only from its own denomination, while for-profit corporations are prevented by the Civil Rights Act of 1964 from hiring based on religion. Additionally, a corporation is not human, which raises the more philosophical question of whether it can really have religious beliefs as such. For right-wing wing accommodationists, however, Hobby Lobby's argument was colorable. If free exercise is an assertive fundamental right to

[309] *Pierce*, at 510.

action, irrespective of the democratic process, then for-profit corporations could quite plausibly exercise religion. Consider, for example, freedom of speech or freedom of the press, which are nearly universally considered to be universal, monolithic fundamental rights much in the way that right-wing accommodationists consider free exercise to be.[310] For-profit corporations receive the same free speech and freedom of press restrictions that individuals do, with their restrictions dictated by time, place and manner restrictions rather than personhood status. Free speech and freedom of the press protections are often applied to for-profit corporations: see, for example, the landmark cases *New York Times Company v. Sullivan* (1964) and *New York Times Company v. United States* (1971).[311]

Hobby Lobby's claim, however, would depend on personhood status, as RFRA states that "Government shall not substantially burden a *person's* exercise of religion even if the burden results from a rule of general applicability" unless the government's restriction passes the *Sherbert* Test.[312] RFRA's Definitions section, Section 5, was no help; it defines "government," "state," "demonstrates," and "exercise of religion" but not "person." Likewise, RLPA did not define "person," and RLUIPA defined "claimant" as "a person raising a claim or defense under this chapter," but did not define "person."[313]

It is highly likely that most of RFRA's proponents did not expect the bill to apply to for-profit corporations. The issue was never explicitly discussed in any of the

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[310] "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the *fundamental personal rights and liberties* which are protected by the Fourteenth Amendment from invasion by state action." (Emphasis mine). *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

[311] *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); *New York Times Company v. United States*, 403 U.S. 713 (1971).

[312] 42 U.S.C. § 2000bb-1(a). Emphasis mine.

[313] 42 USC 2000cc–5.

RFRA, RLPA or RLUIPA hearings—itself a sign that the issue was not considered—but even the statements of right-wing accommodationists suggested that for-profit corporations were ineligible for free exercise accommodations. It was generally accepted, especially by right-wing accommodationists, that RFRA applied to religious institutions. Douglas Laycock wrote in 1994 that "RFRA protects the rights of any 'person,' and under the terms of the Dictionary Act, this term includes organizations."[314] He then wrote that:

> "a religious institution, such as a church, synagogue, school, or social service agency, should not have to prove that every detail of its operation has an independent religious motivation. Rather, it should be enough to prove that the institution as a whole has a *primary religious motivation* and that the government is burdening or interfering with an integral part of the institution's operation."[315] (emphasis mine).

Laycock's examples of religious institutions, as well as his requirement of primary religious motivation, would seem to preclude for-profit corporations from being religious institutions. This sentiment was echoed in Laycock's prepared statement from the July 1998 RLPA, which said that "land use regulation has a disproportionate impact on religious organizations, because they are not-for-profit organizations, often operating on limited operational budgets and with little or no capital"—implying that religious

[314] Laycock, Douglas, and Oliver S. Thomas. "Interpreting the Religious Freedom Restoration Act." *Texas Law Review* 73, no. 2 (1994), at 234. (emphasis mine).
[315] Ibid, at 234.

organizations are always not-for-profit.[316] In the same H.R. 4019 hearing, Marc Stern stated that "*RLPA* would in theory apply to all forms of discrimination by religious institutions and religious individuals," mentioning no other classes of "person."[317]

Hobby Lobby's case became a news sensation almost immediately, and conservative Republicans championed its cause. On January 30, 2012, before the District Court's opinion was released, Senator Marco Rubio (R-FL) introduced S. 2043, the Religious Freedom Restoration act of 2012.[318] Four days later, Congressman Steve Chavet (R-OH-1) introduced an identical House version.[319] These RFRAs of 2012 broke new ground, as they were the first effort to grant exemptions based on religious objections to specific policies, rather than a general test for exemptions. In the RFRA of 2012's case, this policy was contraception coverage. Section 3(d) of the bill stated that the ACA shall not "require any individual or entity to offer, provide, or purchase coverage for a contraceptive or sterilization service, or related education or counseling, to which that individual or entity is opposed on the basis of religious belief." The RFRA of 2012's purpose was mainly symbolic; even in the Republican House it did not receive a committee hearing or vote. But it the RFRA of 2012 did suggest the increasing extent to which free exercise was seen as a political issue, which could affect concrete policies on a major scale, rather than a series of random, uncoordinated exemptions.

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[316] Religious Liberty Protection Act of 1998 hearings, at 424. After the *Hobby Lobby* claim, Laycock expressed that he thought for-profit corporations are protected by RFRA: see Laycock, Douglas. "The Religious Freedom Act Worked the Way It Should." *The New York Times*, July 1, 2014.
[317] Religious Liberty Protection Act of 1998 hearings, at 144.
[318] S. 2043, 112th Cong. (2012).
[319] H.R. 3897, 112th Cong. (2012).

Regardless, it now fell to the courts to decide how broad the original RFRA's sweep was. On November 19, 2012, District Court Chief Judge Joe Heaton released his opinion, which rejected Hobby Lobby's claim.[320] While the Dictionary Act does state that "In determining the meaning of any Act of Congress, unless the context indicates otherwise […] the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," Judge Heaton found that the context of RFRA clearly precluded for-profit corporations from claiming free exercise rights.[321] He said that:

> "business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those 'purely personal' matters referenced in *Bellotti* which is not the province of a general business corporation."[322]

Additionally, Chief Judge Heaton ruled that there was no substantial burden on Green through his role as owners of Hobby Lobby.[323] Green and Hobby Lobby appealed this decision to the Tenth Circuit Court of Appeals, which reversed the District Court's opinion on June 27, 2013.[324] Judge Timothy Tymkovich wrote the en banc decision for

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[320] *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).
[321] 1 U.S.C. § 1.
[322] *Hobby Lobby* (W.D. Okla. 2012), at 1291.
[323] Ibid, at 1293-1296.
[324] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114 – Court of Appeals, 10th Circuit (2013).

the Circuit Court, which found that "the supposedly preexisting distinction between non-profit, religious corporations and for-profit, secular corporations" did not apply to RFRA because "Congress did not exclude for-profit corporations from RFRA's protections."[325] The court's opinion stated that, because Congress often excludes certain types of "person" as defined by the Dictionary Act but did not do so in RFRA, Congress intended RFRA's protections to apply to all classes of "person" as defined by the Dictionary Act. This directly rejected the government's argument that RFRA's context clearly implied that the act applied only to individuals or nonprofit religious institutions: a context based on definitions from a general statutory scheme including the Americans with Disabilities Act, the National Labor Relations Act and the ACA itself, which exempted "religious employers" from the individual mandate and stipulated that an institution must be nonprofit to qualify as a religious employer.[326] In applying the *Sherbert* Test, the Circuit Court found that while there was a compelling government interest for the individual mandate, the contraceptive mandate as currently constructed was not sufficiently "narrowly tailored" because "Congress is quite capable of narrowing the scope of a statutory entitlement or affording a type of statutory exemption when it wants to," as it had done for nonprofit religious institutions.[327] The government appealed the Tenth Circuit's opinion to the Supreme Court, and the Court granted certiorari. Hobby Lobby's case was consolidated with a similar case from Conestoga Wood Specialties, whose

[325] Ibid, at 1128-1129; ibid, at 1129.
[326] Ibid, at 1129-1131.
[327] Ibid, at 1130.

claim had been denied at the District and Circuit Court levels. The Court heard oral argument for *Burwell v. Hobby Lobby Stores, Inc.* on March 25, 2014.[328]

There were a whopping 84 amicus curiae briefs submitted for *Hobby Lobby*. Fifty-nine of the briefs supported Hobby Lobby's claim, 23 opposed the claim, and two were neutral. The composition of the groups supporting and opposing Hobby Lobby's claim was almost purely partisan, revealing the complete fracture between the left-wing accommodationists and right-wing accommodationists that the corporate free exercise question had wrought. A coalition of 16 Senators and 72 members of Congress submitted a brief in favor of Hobby Lobby; all 16 Senators and 70 of the 72 representatives were Republican.[329] Interestingly, these congressmen's amicus brief did not claim that Congress had specifically intended to include for-profit corporations under RFRA's protections, but rather argued that "Congress expressed its intent to protect against any burden on religious exercise—no matter the individual or entity burdened—that might arise in future, unforeseen circumstances."[330] In contrast, 19 Democratic Senators and 91 Democratic Congressmen, but not a single Republican in the House or Senate, submitted briefs against Hobby Lobby, claiming that "Congress could not have anticipated, and did not intend, such a broad and unprecedented expansion of RFRA."[331] Twenty states

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[328] *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ___ (2014).

[329] Brief of *Amici Curiae* Members of Congress in support of Respondents, *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ___ (2014). http://www.becketfund.org/wp-content/uploads/2014/01/13-354-bsac-Members-of-Congress.pdf.

[330] Ibid, at 6-7.

[331] Brief for United States Senators Murray, Baucus, Boxer, Brown, Cantwell, Cardin, Durbin, Feinstein, Harkin, Johnson, Leahy, Levin, Markey, Menendez, Mikulski, Reid, Sanders, Schumer and Wyden as *Amici Curiae* in support of *Hobby Lobby* Petitioners and *Conestoga* Respondents, *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ___ (2014). http://www.becketfund.org/wp-content/uploads/2014/01/13-354-bsac-Members-of-Congress.pdf.

submitted a joint amicus brief in favor of Hobby Lobby; only five of which (Colorado, Florida, Michigan, Ohio, and Wisconsin) voted for President Obama in 2008 or 2012, and only one of which, Colorado, voted for Hillary Clinton in 2016.[332] Sixteen states submitted an amicus brief against Hobby Lobby; all 16 voted for President Obama in 2008 and 2012, and only one, Iowa, voted for President Trump in 2016.[333] The left-wing accommodationist interest groups including the ACLU, overwhelmingly opposed Hobby Lobby's claim, fearing that a victory for Hobby Lobby would give precedent for religiously justified discrimination.[334]

On June 30, 2014, the Court released its decision for *Burwell v. Hobby Lobby Stores, Inc.*, which affirmed the Tenth Circuit's ruling and granted Hobby Lobby's claim by a 5-4 margin. Justice Alito wrote the opinion of the Court, which was joined by his four fellow Republican appointees: Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas. Unlike the Circuit Court opinion, Justice Alito suggested that the owners of Hobby Lobby, rather than Hobby Lobby itself, might be the aggrieved party; he wrote that "owners of the companies [did not] forfei[t] all RFRA protection

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[332] Brief of *Amici Curiae* States of Michigan, Ohio, and 18 Other States for Conestoga, Hobby Lobby, Mardel, *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ___ (2014). http://www.becketfund.org/wp-content/uploads/2014/01/Nos.-13-354-13-356-bsac-State-of-Michigan.pdf, at 36-38.

[333] Brief of California, Massachusetts, Connecticut, Delaware, Diostrict of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Rhode Island, Oregon, Vermont, and Washington as *Amici Curiae* Supporting Federal Petitioners and Respondents Kathleen Sebelius, et al., *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ___ (2014). http://www.becketfund.org/wp-content/uploads/2014/01/13-354-13-356-tsac-California.pdf

[334] Brief Amici Curiae of Julian Bond, The American Civil Liberties Union, The ACLU of Pennsylvania, the ACLU of Oklahoma, The NAACP Legal Defense & Education Funds, Inc., and The National Coalition on Black Civic Participation, In Support of the Government, *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ___ (2014). http://www.becketfund.org/wp-content/uploads/2014/01/No.-13-354-tsac-Julia-Bond.pdf, at 33.

when they decided to organize their businesses as corporations" and that the "terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations."[335]

Regardless, Justice Alito found that RFRA applied to for-profit corporations because there was "nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition."[336] Justice Alito noted that the Court had consistently applied RFRA to nonprofit religious organizations, for example in *Lukumi* and *O Centro*, and that the for-profit status of Hobby Lobby was irrelevant because the Court had previously "entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants," for example in *Braunfeld*.[337] Justice Alito therefore applied the *Sherbert* Test as mandated by RFRA, and, like the Circuit Court, found that the "HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs," because nonprofit religious organizations were exempted from the very mandates that Hobby Lobby claimed as burdensome.[338] The Court therefore upheld Hobby Lobby's (or Green's) claim to an exemption from providing the four ACA-covered contraceptives that it believed objectionable.

Justice Ruth Bader Ginsburg wrote a scathing dissent, joined by her three fellow Democratic appointees: Justice Stephen Breyer, Justice Sonia Sotomayor, and

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[335] *Hobby Lobby*, at Supreme Court Reporter 2759. At the time of this thesis' publication, *Burwell v. Hobby Lobby Stores, Inc.* has not yet been published in the preliminary print of the United States Reports, so specific page numbers are not available. Instead, numbers from the Court Reporter will be provided.
[336] Ibid, at 2768.
[337] Ibid, at 2769.
[338] Ibid, at 2782.

Justice Elena Kagan.[339] Justice Ginsburg's dissent first claimed that the context of RFRA clearly indicated that RFRA was not intended to apply to for-profit corporations, and that the Dictionary Act definition of "person" was therefore inapplicable. She supported this claim first by noting that the Court had never applied free exercise rights to a for-profit corporation, likely because of the self-evident fact that corporations themselves "have no consciences, no beliefs, no feelings, no desires."[340] To Justice Ginsburg, the reasoning behind including religious nonprofit organizations, but not for-profit corporations, under RFRA's protections is "hardly obscure": "religious organizations exist to foster the interests of persons subscribing to the same religious faith," which is "[n]ot so of for-profit corporations."[341] Even if Hobby Lobby had qualified as a person under RFRA, however, Justice Ginsburg would have rejected its claims. She found no substantial burden, as Hobby Lobby was not required to purchase any contraceptives or make decisions on the purchase thereof.[342] Finally, in a rare jurisdictionalist-sounding point, Justice Ginsburg notes the free-rider problem that *Hobby Lobby* causes; the women employed by Hobby Lobby would still receive their contraceptives, but the government, and therefore other taxpayers, would pay.[343] In her concluding sections, Justice Ginsburg asks the soon-to-be-realized question:

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[339] Justice Breyer and Justice Kagan only joined in part; they agreed with Justice Ginsburg that RFRA did not protect for-profit corporations, but unlike Justice Ginsburg, they therefore found it unnecessary to confront Hobby Lobby's claim under RFRA's *Sherbert* Test. Justice Sotomayor joined Justice Ginsburg's dissent in full.

[340] *Hobby Lobby*, at 2294, quoting Justice Stevens in *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 466 (2010).

[341] *Hobby Lobby*, at 2795.

[342] *Hobby Lobby*, at 2798-2799.

[343] *Hobby Lobby*, at 2801-2803.

> "Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, "each one of these cases . . . would have to be evaluated on its own . . . apply(ing) the compelling interest-least restrictive alternative test." Not much help there for the lower courts bound by today's decision."[344]

These claims presented a problem far beyond policy for Justice Ginsburg, who then made a closing argument reminiscent of Chief Justice Morrison Waite in *Reynolds*, Justice Owen Roberts in *Cantwell*, Justice Scalia in *Smith*, and jurisdictionalists throughout the last 150 years of Supreme Court religious liberty jurisprudence:

> "There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," *Lee*, 455 U. S., at 263, n. 2 (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was

[344] *Hobby Lobby*, at 2805.

> designed to preclude." *Ibid*. The Court, I fear, has ventured into a minefield by its immoderate reading of RFRA."

Justice Ginsburg's opinion was shared by nearly all left-wing accommodationists, and nearly all Democrats. *Hobby Lobby* became an instant wedge issue for the 2014 midterm elections, with Democrats and left-wing accommodationists framing the decision as opening up new possibilities for discrimination against women and, potentially, other groups.[345] Jurisdictionalism began to have a minor resurgence in the public discourse, as members of the political left saw its utility for fighting *Hobby Lobby*-like claims. In contrast, right-wing accommodationist groups, now comfortably aligned with the Republican Party, framed *Hobby Lobby* as nothing more than a defense of religious liberty, an unquestionable good in the abstract. Senator Orrin Hatch (R-UT) "applauded" the Hobby Lobby decision, saying that "the Religious Freedom Restoration Act could not have been clearer in saying religious liberty of all Americans must be equally protected and not unnecessarily burdened."[346]

The RFRA coalition was now truly broken. For the first time since the bill's passage, left-wing accommodationists and Democrats did not support it as interpreted by the Court. RFRA always had the potential to apply like a universal, fundamental right; left-wing accommodationists' failure to see that strict scrutiny is not always as it was applied by the pre-*Smith* Court was their ultimate downfall. Two weeks after Hobby

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[345] Peters, Jeremy W., and Michael D. Shear. "A Ruling That Both Sides Can Run With." *The New York Times*, June 30, 2014.

[346] De Vogue, Ariane. "Hobby Lobby Wins Contraceptive Ruling in Supreme Court." *ABC News*, June 30, 2014.

Lobby was released, now-Senator Charles Schumer (D-NY), the original sponsor of RFRA, spoke on the Senate floor:

> "As the author of the bill, I can say again with absolute certainty that the Supreme Court got the Hobby Lobby case dead wrong. When we wrote RFRA back in 1993, we did so to protect that which individuals with strong religious beliefs had always enjoyed—the presumption that they should be able to exercise their religious beliefs without interference from the government. But the Court took that protection and misapplied it to for-profit companies that exist for the purpose of benefiting from the open market."[347]

RFRA is dead; long live RFRA.

[347] Senator Schumer, speaking on S. 2578, 133th Cong., 2nd sess., Congressional Record 160 (July 16, 2014): S 4531.

CHAPTER EIGHT: CONCLUSION

Of course, *Hobby Lobby* was not the end of discussions over RFRA or free exercise accommodationism in general. To the contrary, it brought free exercise accommodations to the national fore in a way they had not been since at least before RFRA's passage, and perhaps ever. Free exercise accommodationism was now, for the first time, a charged, partisan, political issue. In June 2015, the ACLU announced that it now opposed RFRA in its current form, emphasizing its belief that RFRA was initially passed to support "vulnerable religious minorities."[348]

On July 9, 2014, Democrats introduced two matching bills, both entitled the Protect Women's Health From Corporate Interference Act of 2014: S. 2578 in the Senate and H.R. 5051 in the House.[349] These bills would have effectively overturned *Hobby Lobby*'s narrow decision by preventing any employer that provides group health plans for its employees from denying coverage of any approved treatment, notwithstanding any other federal law. S. 2578 was cosponsored by 45 Democrats, 1 Independent, and no Republicans; H.R. 5051 had 162 cosponsors, all Democrats. H.R. 5051 died in committee in a Republican House, while S. 2578 was filibustered, with all Democrats save Majority Leader Harry Reid, but only 3 Republicans, voting for cloture.

Hobby Lobby engendered renewed interest in state RFRAs in conservative states. Only five states had passed RFRAs in the 12 years between RLUIPA and *Hobby*

[348] Melling, Louise. "ACLU: Why we can no longer support the federal 'religious freedom' law." *The Washington Post*, June 25, 2015.
[349] S. 2578, 113th Cong. (2014); H.R. 5051, 113th Cong. (2014).

Lobby.[350] In the two years following *Hobby Lobby*, however, there was a new wave of State RFRAs passed exclusively by conservative states: Kansas and Kentucky in 2013, Mississippi in 2014, and Arkansas and Indiana in 2015.[351] These RFRAs were fundamentally different than the pre-*Hobby Lobby* state RFRAs, as they explicitly allowed closely held for-profit corporations like Hobby Lobby to file suit under their protections. Some pushed even further: Indiana's RFRA stated that even private person and entities, and not only government entities, could burden religion under its statute, so civil suits could contain RFRA claims. The Obama White House explicitly denounced Indiana's RFRA.[352] So different was this new wave of RFRAs that even states that had already passed RFRAs, like Arizona and Missouri, considered passing broader laws: Arizona's made it all the way to the governor's desk in 2014.[353]

The *Hobby Lobby* precedent still stands in full. But the ACA contraceptive mandate was only the first of many areas from which for-profit businesses would claim exemption. The second new wave of accommodationism claims followed *Obergefell v. Hodges* (2015), the case that established a Constitutional right for gay couples to marry.[354] Following *Obergefell*, there were a number of high-profile cases of for-profit

[350] These being Pennsylvania (2002), Missouri (2003), Virginia (2007), Tennessee (2009) and Louisiana (2010).
[351] Kan. Stat. §60-5301, *et seq.*; Ky. Rev. Stat. §446.350; Miss. Code §11-61-1; Arkansas 2015 SB 975, enacted April 2, 2015; Indiana 2015 SB 101, enacted March 26, 2015, and 2015 SB 50, enacted April 2, 2015.
[352] Groppe, Maureen. "White House disputes Pence's description of RFRA." *Indianapolis Star*, March 31, 2015.
[353] Shoichet, Catherine E., and Halimah Abdullah. "Arizona Gov. Jan Brewer vetoes controversial anti-gay bill, SB 1062." *CNN*, February 26, 2014; Botelho, Greg, and Seth Kovar. "Missouri 'religious freedom bill' passes as 39-hour filibuster ends." *CNN*, March 9, 2016.
[354] *Obergefell v. Hodges*, 576 U.S. ___ (2015).

businesses refusing to serve gay couples: most famously a Colorado cake shop that refused to bake cakes for gay weddings, claimed a free exercise burden, and had its claim denied.[355] In addition, a new controversy arose: government officials who, when working in their official capacities, refused to perform certain actions on the basis of their religious beliefs. Kim Davis, the county clerk of Rowan County, Kentucky, became a national celebrity after she refused to issue marriage licenses to gay couples, was ordered to issue the licenses by a federal District Court, continued to refuse issuing the licenses, and was jailed for contempt of court. Democrats denounced Davis, but many prominent Republicans, including presidential candidates Ted Cruz, Mike Huckabee, Rand Paul and Rick Santorum, expressed support for Davis' claim. [356]

Less than a month after *Obergefell*, Republicans introduced two identical versions of a new religious liberty bill, the First Amendment Defense Act.[357] The Senate version of FADA, S. 1598, was cosponsored by 37 of the 54 Republican Senators, and not a single Democrat, while 171 of the 247 House Republicans and only one House Democrat, Dan Lipinski (D-IL-3) cosponsored H.R. 2802. FADA was a direct response to *Obergefell*; it mandated that the federal government shall not discriminate against a person "on the basis that such person believes *or acts in accordance* with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage." The bill's narrowness was striking: like the RFRA of 2012, it granted religious

[355] *Craig v. Masterpiece Cakeshop, Inc*., 370 P. 3d 272 – Colo; Court of Appeals, 1st Div. (2015).
[356] Gabriel, Trip. "Candidates Respond to Kim Davis Case With Varying Intensity." *The New York Times FirstDraft*, September 3, 2015.
[357] S. 1598, 114th Cong. (2015); H.R. 2802, 114th Cong. (2015).

accommodations based on religious objection to one specific issue, rather than on religious objection to any policy. But also striking was its breadth: FADA defined discrimination as altering tax treatment in any way, reducing or terminating any grant, loan, contract, or employment, or "otherwise discriminat[ing]" against. It included federal employees like Kim Davis in its protections, and protected not only their belief but also all of their religiously motivated conduct. FADA used the Dictionary Act definition of "person" from *Hobby Lobby*, therefore including for-profit corporations in its scope.

Neither version of FADA made it far in the legislative process, but FADA was incorporated into the 2016 Republican Party platform, which stated that "We endorse the First Amendment Defense Act, Republican legislation in the House and Senate which will bar government discrimination against individuals and businesses for acting on the belief that marriage is the union of one man and one woman."[358] FADA's message, especially only three years after the RFRA of 2012, was abundantly clear. Free exercise accommodationism would now be used as an organized tool for, or against, specific public policies, and not only as a blanket test for all claimants and against all policies.

The first real post-*Hobby Lobby* policy struggle was gay marriage: not only was there FADA, but within days of *Obergefell*, state legislators in Arkansas, Florida, Michigan, Ohio, Tennessee, Utah and Wisconsin drafted bills that would subvert the

[358] Republican Platform 2016. https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf, at 11. the Democratic platform was left-wing accommodationist, containing a whole section on religious minorities and proclaiming that "We support a progressive vision of religious freedom that respects pluralism and rejects the misuse of religion to discriminate." 2016 Democratic Party Platform. http://www.presidency.ucsb.edu/papers_pdf/117717.pdf, at 47, 19.

Court's ruling on free exercise grounds.[359] The next source of controversy is unknown, but the breadth of religious belief is such that virtually no policy area is safe from challenge on religious grounds.

Such is the state of religious liberty discourse in the United States: fiercely partisan, results-based, and largely devoid of thoughtful discussions on the appropriate ideological frameworks to utilize. Religious liberty has become something of a buzzword, but neither Democrats nor Republicans have put forward a cohesive and coherent philosophy for judging free exercise claims that is independent of context. This is likely because political incentives reward vagueness, particularly for Republicans. Religious liberty, in the abstract, is immensely popular. An AP-NORC poll from December 2015 found that 82% of Americans believe religious liberty protections are necessary for Christians, and for each religion featured in the poll, at least 61% of respondents thought that particular religion needed protections.[360] The same poll found only 55% of Americans think government is doing a good job at protecting religious liberty, a steep drop from the 75% that AP-NORC found when asking the same question in 2011.[361] When asked about actual, specific religious cases, however, Americans are far less supportive of free exercise. A 2014 NBC poll found that 53% of Americans thought that employers like Hobby Lobby should not be exempted from providing healthcare

[359] Ballot News. "State Legislative Responses to Obergefell v. Hodges." http://www.ballotnews.org/state-legislatures/state-legislative-responses-to-obergefell-v-hodges/.
[360] "Americans Evaluate the Balance between Security and Civil Liberties." *The Associated Press-NORC Center for Public Affairs Research*, 2013. http://www.apnorc.org/projects/Pages/HTML%20Reports/americans-evaluate-the-balance-between-security-and-civil-liberties1222-4187.aspx.
[361] Wetzstein, Cheryl. "Americans back religious rights but lose confidence in government protection, survey shows." *The Washington Times*, December 30, 2015.

treatments to which they object, and only 41% thought they should be exempted.[362] Likewise, a 2015 ABC News/Washington Post poll found 63% of Americans thought Kim Davis should be forced to issue marriage licenses to same-sex couples, compared to 33% opposed, with only 6% undecided.[363] Republicans do well to support religious liberty in the abstract, making statements such as claiming that Democrats' "ongoing attempts to compel individuals, businesses, and institutions of faith to transgress their beliefs are part of a misguided effort to undermine religion and drive it from the public square."[364] Democrats, meanwhile, currently stand on the defensive regarding religious liberty. RFRA and state-level accommodationism statutes cover all the accommodations that left-wing accommodationists want, but they go too far; it is too much religious liberty, not too little, that Democrats fear.

This brings up another aspect of accommodationist's development: the Democratic Party is now completely aligned with left-wing accommodationism, while the Republican Party is completely aligned with right-wing accommodationism. This was not always so: Senator Arlen Specter (R-PA), one of the main proponents of RFRA, was a moderate, pro-choice Republican, while the two Senators who joined Jesse Helms in opposing RFRA were conservative, pro-life Democrats who held right-wing accommodationist views: Robert Byrd (D-WV) and Harlan Mathews (D-TN). In an

[362] NBC News/Wall Street Journal. "Study #14133." March 2014. http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A_U.S.%20news/US-news-PDFs/14133%20MARCH%20NBC-WSJ%20Poll%20(3-12%20Release).pdf.
[363] ABC News/Washington Post. "Equal Treatment Prevails in Views on Gay Marriage." September 2015. http://www.langerresearch.com/wp-content/uploads/1171a4ReligionandGayMarriage.pdf.
[364] Republican Platform 2016, at 11.

increasingly polarized Congress, religious liberty laws are likely to stay sharply partisan for the near future, and prospects for consensus are dim.

The Supreme Court, too, deserves some of the blame for today's lack of clear free exercise dialogue; from 1963 to 1990, it was ineffectively, incompletely, and inconsistently rationalized. *Carolene* remains an immensely popular precedent, and strict scrutiny is found across nearly all fields of constitutional law. But even though it has been widely accepted, the reasons for why and when a court should apply strict scrutiny continue to be both crucially important and stubbornly opaque. The difference between protections for discrete and insular minorities and protections of a universal, fundamental right is not merely theoretical, as the left wing of the RFRA coalition painfully discovered in RFRA's second decade.

Ultimately, the only stable solution to the current free exercise turmoil is a return to jurisdictionalism. Accommodationism, whether of the right-wing or left-wing varieties, has two fatal flaws: firstly, it is inherently volatile and difficult to predict, providing much more confusion to lower courts and the future Court. The Court's free exercise jurisprudence of 1963-1990 provides ample proof of this confusion; and while the post-*Hobby Lobby* RFRA claims so far have all been against liberal policies, it is quite likely that, sooner or later, there will be a successful, organized, free exercise exemptions campaign against a conservative policy. Secondly, accommodationism requires, by definition, the courts to determine the legitimacy of a claimant's religious beliefs, in direct contradiction to *Cantwell*'s dictum that a state actor's "determin[ation whether] the cause is not a religious one" violates the Free Exercise Clause. Such determinations are

likely to favor popular and familiar religions: those religions least in need of accommodation. *Hobby Lobby* has the potential to make this judgement regarding the legitimacy of religious beliefs even more difficult. Hobby Lobby now pays significantly less for healthcare than it would without an exemption, and in a corporate world where companies struggle to gain even the tiniest margins of advantage over competitors, it is quite plausible that ambitious companies could claim exemptions to gain economic advantage.

This is, of course, pure speculation. But if there is one thing that the last 25 years of accommodationist debate and then practice should teach us, it is that accommodationism has the potential to develop in unpredictable directions. As the ACLU's Nadine Strossen said in support of RFRA at its 1992 hearings, "precisely the advantage of this kind of neutrally written statute is you can't sort of calculate it in advance who is going to be benefited and whose ox is going to be gored."[365] Current RFRA proponents should take heed of Strossen's statement. She did not foresee her ox getting gored, but nobody ever does.

[365] H.R. 2797 hearing, at 105.

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