

3-1-1993

The Religious Freedom Restoration Act: Legislative Choice and Judicial Review

Rex E. Lee

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. Rev. 73 (1993).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1993/iss1/14>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Religious Freedom Restoration Act: Legislative Choice and Judicial Review

Rex E. Lee*

I. INTRODUCTION

The Supreme Court's 1989 decision in *Employment Division v. Smith*¹ has generated a significant volume of scholarly criticism.² This is not surprising considering the fundamental change it worked on our understanding of the Free Exercise Clause. Prior to *Smith* the prevailing view was that the Free Exercise Clause required the government to show a compelling state interest to justify an intrusion on religious freedom.³ But in *Smith*, the Court held that so long as the law is generally applicable—in other words, not aimed specifically at religion—government may regulate religious activity so long as the governmental interest is legitimate.⁴

In response to *Smith*, members of Congress proposed the Religious Freedom Restoration Act.⁵ Now in its third attempt,

* President, Brigham Young University; George Sutherland Professor of Law, J. Reuben Clark Law School, Brigham Young University; Former Solicitor General of the United States (1981-85); Former Assistant United States Attorney General, Civil Division (1975-77). This article was adapted from a speech originally given at a Bill of Rights symposium jointly sponsored by the Brigham Young University Law School Alumni Association and the J. Reuben Clark Law Society.

1. 494 U.S. 872 (1990).

2. For a listing of some of the scholarly criticisms of *Smith*, see James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 60 (1992) (statement of Oliver S. Thomas, app. IV).

3. *Smith*, 494 U.S. at 894-97 (O'Connor, J., concurring in the judgment); see *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963).

4. *Smith*, 494 U.S. at 878.

5. H.R. 5377 & S. 3254, 101st Cong., 2d Sess. (1990). Neither version of the original bill passed the 101st Congress. The bill was subsequently reintroduced as H.R. 2797, 102d Cong., 1st Sess. (1991); S. 2969, 102d Cong., 2d Sess. (1992), and met a similar fate. The bill has again been reintroduced in both the House and the Senate. H.R. 1308 & S. 578, 103d Cong., 1st Sess. (1993). The bill passed the House on May 11, 1993, 139 CONG. REC. H2356-63 (daily ed. May 11, 1993), and

the Act stands an excellent chance of passing, given its growing bipartisan support.⁶ The potential interaction between the language of the Act and the Supreme Court's decision in *Smith*, however, represents one of the most interesting and important dynamics currently at work in American constitutional law. The Religious Freedom Restoration Act would require states to provide religious exemptions from generally applicable laws unless doing so would defeat a compelling state interest. Quite simply, the Act proposes to mandate religious accommodation that the Supreme Court has determined to be not constitutionally required.

The Religious Freedom Restoration Act should be adopted. It would certainly represent an improvement over the present state of the law, but it raises questions concerning the scope of the legislative power. This article explores the interaction between the Supreme Court's power of judicial review and the Congress's law-making authority in the context of the post-incorporation Free Exercise Clause.

II. THE INTERACTION BETWEEN JUDICIAL REVIEW AND LEGISLATIVE POLICY MAKING

Those who wrote the Constitution clearly intended the judiciary to be the final interpreter of all laws, including the Constitution. The best historical insight into those views is contained in *The Federalist No. 78*, in which Alexander Hamilton wrote:

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and

it was approved by the Senate Judiciary Committee on May 6, 1993 by a vote of 15 to 1, 139 CONG. REC. D472 (daily ed. May 6, 1993); Adam Clymer, *Congress Moves to Ease Curb on Religious Acts*, N.Y. TIMES, May 10, 1993, at A9.

6. See 139 CONG. REC. S2822 (daily ed. Mar. 11, 1993) (statement of Sen. Kennedy); *id.* at S2823 (letter from Pres. Clinton); *id.* at S2824 (statement of Sen. Hatch).

must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.⁷

No historical argument of equal dignity looks the other way. Even the Anti-Federalists, though opposed to the concept of judicial review, recognized that the Constitution provided for its exercise by the courts.⁸

As a policy matter, it makes eminently good sense that the judiciary should be the ultimate guardian of constitutional rights and declarant of their meaning. Constitutional rights are, by their nature, minority rights.⁹ The principal role of the Constitution, in this sense, is to protect these rights by limiting the acts of the two political branches, which by definition represent the majority. Precisely because these branches are political, and thus responsive to the majority, it is appropriate that the constitutional review of laws and other rules governing our society that emanate from the political branches should come from the judiciary—the only branch of government not directly answerable to the majority.

The great risk inherent in this arrangement is, of course, that under the guise of interpretation, the judiciary will engage in a great deal of policy making. The potential for such mischief is exacerbated by the reality that the most important provisions of the United States Constitution, as well as the majority of the statutes reviewed by the Court, are broadly phrased and ambiguous. Nevertheless, the exercise of the very proper judicial prerogative to interpret the law, and particularly to determine its constitutionality, necessarily involves a substantial amount of law making—especially since law making is, in the final analysis, a choice among policy alternatives. I will explain why this is true.

7. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton's statement is supported by several statements made during the constitutional convention explicitly or implicitly recognizing the power of judicial review. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 61, 305, 351, 518, 539 (Norton ed. 1987) (1840).

8. The Anti-Federalist position was not that Hamilton was wrong about the judiciary's role under the new Constitution, but that judicial review was not a good idea. See, e.g., *Essays of Brutus XI-XV*, reprinted in 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 417-42 (Murray Dry ed. 1981).

9. The term "minority rights" in this context refers not specifically to ethnic or racial minorities, but to any political minority.

Challenges to governmental acts are usually brought by individuals who contend that a particular statute or regulation violates their constitutional rights. Accordingly, judicial review is customarily thought to be a process of balancing two competing sets of interests: those of the government and those of the individual. The judicial task, it follows, is to determine whether the individual interest is constitutionally protected, thus requiring the governmental interest to yield.

This view is deficient because it overlooks one important feature of the overall governmental process. In the overwhelming majority of cases, the governmental interest that conflicts with the individual interest involves nothing more nor less than a legislative preference of one private, individual interest over another. Consider, for example, *Williamson v. Lee Optical*,¹⁰ in which a group of opticians challenged an Oklahoma statute that restricted the rendering of certain eye-care services to licensed ophthalmologists and optometrists. Under the traditional view, *Williamson* would be characterized as a case involving a conflict between the state's interest in ensuring high quality eye care and the individual interest of opticians in being allowed to perform the restricted eye-care services. But this is not an accurate characterization. The public policy reflected in the Oklahoma statute represented no more than a legislative decision that the public interest is better served by preferring the interests of one private group, the more highly trained ophthalmologists and optometrists, over those of another, the opticians. The imprimatur of state interest was not attached until after the legislature, as required by our system of government, weighed the competing private interests and made a decision. It was only then that one of the competing private interests became governmental. As the Court explained, "The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."¹¹ Line drawing—deciding which of two competing interests better serves the public interest—is the essence of law making. It is what legislatures do best; it is what they are institutionally and structurally capable of doing better than any other branch of government.

10. 348 U.S. 483 (1955).

11. *Id.* at 487.

In *Williamson*, the Court left the legislative judgment intact. In *Zablocki v. Redhail*¹² it did not. Instead, the Supreme Court struck down a Wisconsin statute that required persons with existing child support obligations to demonstrate their ability to meet those obligations before they could marry.¹³ Under the traditional view, judicial review of this statute would be described as a balance of two competing sets of interests: the government's interest in assuring that children are cared for, and the private interest of those who want to marry.

Once again the traditional view is wrong. And it is wrong in ways that affect our thinking about the respective roles of legislatures and courts. In our system, government has no internal self-interest; it exists to serve the needs of the people.¹⁴ The traditional view is wrong because it considers the competing sets of interests only at the stage where they come into court, after the government, in the form of the legislature, has already considered those interests and made a choice between them. But at the very first stage, in *Zablocki* as in *Williamson* and most cases, the choice made by the legislature is a choice between two sets of competing private interests. The reason that the competing interests can be neatly classified as governmental or individual at the judicial stage is that the legislature has already addressed the issues, made its choice, and placed the imprimatur of public interest on one side of the controversy.

In *Zablocki*, one of the private interests was the interest in marrying—in pursuing one's life as a member of a traditional family unit. The group of individuals who share that interest are adults—parents and prospective marriage partners. The competing interests are those of children in assuring that their basic needs for survival and sustenance will not be disregarded by those who brought them into the world. It is simply wrong, therefore, to say that the competing interests in *Zablocki* were those of the State of Wisconsin on the one hand and those of

12. 434 U.S. 374 (1978).

13. *Id.* at 375, 388-91.

14. The preamble to the United States Constitution provides that the purpose of government is to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty." U.S. CONST. pmbl. The purpose of state governments is basically the same. See, e.g., UTAH CONST. art. I, §§ 1-2; VA. CONST. art. I, § 3; WASH. CONST. art. I, § 1.

individuals like Mr. Redhail on the other. At the legislative stage both interests were individual interests. When the legislature made its choice, the individual nature of the preferred interest did not disappear.

The only accurate way to describe the task facing the judiciary, therefore, is that it involves an accommodation between two groups of individuals, one of whom the legislature has already decided has the best side of the argument. Obviously, this does not mean that legislative policy choices should never be disturbed by the courts. Judicial review is just as much a cornerstone of our separation of powers, and indeed our total constitutional structure, as is the legislative policy-making prerogative. The solution lies in reaching an accommodation between the two branches and the inherent overlap between their two core functions: policy making by the legislature, and constitutional law making by the judiciary, which inevitably involves overturning at least some of the legislature's policy judgments.

III. STANDARDS FOR JUDICIAL REVIEW

The proper approach to judicial review must begin with an attitude of deference toward the legislature and a consequent reluctance to rule against constitutionality. This general view is motivated in part by basic feelings about democracy, and in part by theoretical and practical considerations of what the relationship should be between coordinate branches of government, including whether the residual power to make law ought to reside in the legislature or in the courts.¹⁵

This deferential standard of review, which is followed in

15. The legislature is, after all, a coordinate branch of government with independent authority to interpret the Constitution within its own sphere of responsibility. The fact that "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), does not mean that Congress must take a subservient position to the Court. As Professor Wechsler has reminded us:

Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what *Marbury v. Madison* was all about.

Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) (footnote omitted).

the majority of cases, is usually called rational basis review. Like other standards employed by the Court, it has two principal, and related focal points. The first concerns the importance of the governmental interest that must be shown, and the second, the degree of likelihood that the statute at issue will in fact achieve that governmental objective. In its traditional applications, the rational basis approach favors the government on both of these inquiries: the governmental interest is acceptable so long as it falls within the legitimate scope of government's power to act, and the "fit" between means and end will be found acceptable so long as there is a reasonable possibility that what government has done will in fact achieve its legitimate objective.¹⁶ Not surprisingly, in the great majority of cases in which the rational basis test is applied, the government emerges victorious.

Over the course of our history, considerable attention has focused on the question of which categories of cases ought to qualify for an exception to the rational basis approach. The Constitution says nothing explicitly about categories of "preferred" rights entitled to higher levels of scrutiny, and over the years the courts have struggled with the question of whether there should be such preferred, heightened scrutiny categories, and if so, what they should be.

In my view, the strongest candidates for preferred, fundamental right status are those rights that quite clearly, either from the constitutional text or its history, were the central concern underlying the adoption of a particular provision. Obvious examples include (1) the First Amendment's freedom from prior restraints, (2) the Fourteenth Amendment's prohibition of state-sponsored racial discrimination, and (3) the Commerce Clause's guarantee that a state may not prefer its own economic interests over those of another state. In fact, however, preferred status has been extended far beyond these concerns or even those rights explicitly mentioned in the Constitution's text, to the point that it is impossible to draw a rational dividing line between rights that are afforded a preferred status and rights that are not. Indeed, many rights declared fundamental by the Supreme Court are not even mentioned in the Constitution.

16. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949). See generally GERALD GUNTHER, *CONSTITUTIONAL LAW* 608-12 (12th ed. 1991) (discussing rational basis scrutiny).

Starting about a hundred years ago, with *Lochner v. New York*,¹⁷ and continuing for the next four decades, the cases on which the constitutional searchlight consistently shone most brightly were those in which the government deprived individuals and corporations of life, liberty or property without due process of law. The Court's concern was not with procedural defects in the regulations, but rather with their substance.¹⁸ In most cases, these were economic regulation cases, but in at least two famous instances, *Meyer v. Nebraska*¹⁹ and *Pierce v. Society of Sisters*,²⁰ non-economic rights were involved. This so-called *Lochner* era of substantive due process came to an end with *Nebbia v. New York*²¹ and *West Coast Hotel v. Parrish*,²² not because the Supreme Court declared that the Due Process Clause had no substantive component, but simply because the Court changed the standard of review from heightened scrutiny to a highly deferential application of rational basis scrutiny.²³

Over the decades since that time, beginning as early as 1942 with *Skinner v. Oklahoma ex rel. Williamson*,²⁴ and reaching full flower within the last three decades, the Court has now rather firmly established that it will afford heightened or strict scrutiny where the law under review either contains a suspect classification or impacts a fundamental right.²⁵

The standard for reviewing these cases provides an interesting comparison to the rational basis test. Both tests inquire into the strength of the governmental interest and the

17. 198 U.S. 45 (1905).

18. *E.g.*, *Coppage v. Kansas*, 236 U.S. 1, 12-16 (1915); *Adair v. United States*, 208 U.S. 161, 172-73 (1908).

19. 262 U.S. 390 (1923) (invalidating state law prohibiting the teaching of foreign languages in the schools).

20. 268 U.S. 510 (1925) (invalidating state law requiring students to attend public schools).

21. 291 U.S. 502 (1934).

22. 300 U.S. 379 (1937).

23. *Nebbia*, 291 U.S. at 525 (holding that legislation need only bear a substantial relationship to its underlying purpose); *West Coast*, 300 U.S. at 391 (holding that a regulation is constitutional if it is reasonably related to a community interest). Later cases were even more deferential. *See Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963) (rational basis); *Williamson v. Lee Optical*, 348 U.S. 483, 487-91 (1955) (same).

24. 316 U.S. 535 (1942).

25. *See Hunter v. Erickson*, 393 U.S. 385, 391-93 (1969) (suspect class); *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (same); *Roe v. Wade*, 410 U.S. 113, 152-56 (1973) (fundamental rights); *Reynolds v. Sims*, 377 U.S. 533, 561-68 (1964) (same).

tightness of the fit between means and end. But where a suspect classification or a fundamental right is involved, the requirements for both components of the test are considerably more stringent. The governmental interest must be compelling, not merely legitimate and reasonable, and the statute must be narrowly tailored or necessary to achieve the relevant compelling state interest.²⁶ The mere possibility, or even probability, that the law will in fact achieve its objective is not sufficient. This second requirement, dealing with the means-end relationship applicable to fundamental rights cases, is sometimes expressed another way—that government must employ the least burdensome alternative.²⁷ This is not identical to the “narrowly tailored” requirement; it is even more restrictive, because in essence what it says is that the chosen governmental means is unconstitutional so long as there is some other less burdensome way that government could have achieved the same result.²⁸

To be sure, this brief summary is somewhat oversimplified. On the rational basis end, the courts have sometimes found ways to apply what some have referred to as rational basis “with bite”²⁹ either by requiring a tighter fit between means and end,³⁰ or by ascribing an improper motive to the legislature.³¹ And at the other end, the Court has sometimes shown a proclivity to find some governmental objectives to be compelling.³² But whatever give there may be at either end on either of these two tests, there is little doubt that in theory, and almost always in practice, they are poles apart.

The critical questions then are (1) Which rights are

26. *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984). See generally GUNTHER, *supra* note 16, at 642 n.2 (discussing the various verbal formulations of strict scrutiny).

27. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960).

28. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

29. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-37 (1972); see also GUNTHER, *supra* note 16, at 449 & n.9.

30. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 446-53 (1972); *Reed v. Reed*, 404 U.S. 71, 75-77 (1971).

31. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 342-45 (1960).

32. See, e.g., *United States v. Lee*, 455 U.S. 252, 258-59 (1982) (social security); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (military conscription); *Korematsu v. United States*, 323 U.S. 214, 216-19 (1944) (prevention of espionage and sabotage).

included within the class of rights determined to be fundamental? and (2) Which bases for classification are considered to be suspect? These questions are important because not only do the answers determine the intensity of the constitutional review, but in most cases they determine the substantive outcome as well. Unfortunately, the Court's answers have been far from satisfactory.

With regard to the first question, in at least one case, *San Antonio Independent School District v. Rodriguez*,³³ the Supreme Court has said that fundamental rights are those explicitly or implicitly guaranteed by the Constitution. The problem with this statement is that it does not, in fact, describe what the Supreme Court has done.³⁴ As the dissent in *Rodriguez* points out so persuasively, several rights traditionally held to be fundamental—the right to vote in state elections,³⁵ the right to marry and procreate,³⁶ and the right to appeal a criminal conviction³⁷—are neither explicitly nor implicitly guaranteed by the Constitution.³⁸ Additional examples of so-called implied fundamental rights include the right to travel³⁹ and the right of privacy.⁴⁰

The second question, concerning which classifications qualify as suspect, has not been addressed in a consistent fashion.⁴¹ The Court has consistently held that classifications

33. 411 U.S. 1, 33-34 (1973).

34. In at least one scholar's view, the *Rodriguez* dichotomy between textual and nontextual rights is no longer followed by the Court. Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 192 (Subsequent cases "demonstrate that *Rodriguez* is now a constitutional relic."). But see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 900 (2d ed. 1991) ("Since 1973 the Court has generally adhered to the *Rodriguez* reformulation."). Interestingly, both Hutchinson and Stone are members of the same law faculty.

35. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

36. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); see also *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978).

37. *Griffin v. Illinois*, 351 U.S. 12, 17-19 (1956).

38. *Rodriguez*, 411 U.S. at 100 (Marshall, J., dissenting).

39. *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969).

40. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973). After the Court's recent decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), it is unclear whether the right of privacy, at least in the context of abortion, has retained its fundamental status. *Id.* at 2804-08; *id.* at 2860 (Rehnquist, C.J., dissenting).

41. The Court's decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), though ostensibly a decision cutting back on the number of cases qualifying for heightened scrutiny, left a loophole that has become the basis of much of the modern suspect classification debate. In his famous footnote four,

based on race are inherently suspect and thus must be strictly scrutinized.⁴² Beyond race, however, only three classifications have attracted any degree of heightened scrutiny—gender,⁴³ alienage or national origin,⁴⁴ and illegitimacy.⁴⁵ However, none of these classifications currently evoke strict scrutiny across the board,⁴⁶ and attempts to attract heightened scrutiny to classifications based on age,⁴⁷ mental deficiency,⁴⁸ and poverty⁴⁹ have failed. Thus, the only clear answer to this question is that government may not draw distinctions based on race unless it can demonstrate that the distinction is narrowly tailored to serve a compelling interest. Not surprisingly, this is a very difficult, if not impossible, task.

Justice Stone stated,

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: *whether prejudice against discrete and 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.*

Id. at 152 n.4 (emphasis added) (citations omitted). The Court has been grappling with the answer to this question ever since.

42. *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *see also* *Strauder v. West Virginia*, 100 U.S. 303 (1880).

43. *Rostker v. Goldberg*, 453 U.S. 57, 69-72 (1981); *Michael M. v. Superior Court*, 450 U.S. 464, 468-69 (1981); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (plurality opinion).

44. *Compare* *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) ("[C]lassifications based on alienage are 'subject to close judicial scrutiny.'") and *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (same) *with* *Ambach v. Norwick*, 441 U.S. 68, 72-75 (1979) ("[E]xclusion of aliens from [certain] governmental positions would not invite as demanding scrutiny.") and *Foley v. Connelie*, 435 U.S. 291, 294-97 (1978) (same).

45. Illegitimacy has never formally been labeled a suspect classification, GUNTHER, *supra* note 16, at 688, however classifications based on illegitimacy have attracted varying degrees of heightened scrutiny. *E.g.*, *Pickett v. Brown*, 462 U.S. 1, 7-11 (1983); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977); *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968).

46. *See supra* notes 43-45; GUNTHER, *supra* note 16, at 636-93.

47. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976).

48. *Schweiker v. Wilson*, 450 U.S. 221, 230-31 (1981).

49. *James v. Valtierra*, 402 U.S. 137, 141-42 (1971).

IV. FREE EXERCISE AND *Employment Division v. Smith*

The individual guarantees contained in the First Amendment, including the free exercise of religion, were among the first to be afforded fundamental right status.⁵⁰

This is as it should be if heightened scrutiny is to be extended to any guarantees beyond those that were, as discussed above,⁵¹ quite clearly the central concern underlying the adoption of a particular constitutional provision. As a textual guarantee, the free exercise of religion has a strong claim on heightened scrutiny. Accordingly, it had been the law, at least since *Sherbert v. Verner*,⁵² that the only constitutionally acceptable laws that inhibit the free exercise of religion are those that are narrowly tailored to achieve a compelling state interest.

The most striking example of the potency of this rule in the Free Exercise Clause context is found in *Wisconsin v. Yoder*,⁵³ a case in which the Court held unconstitutional as applied to members of the Amish faith a Wisconsin statute requiring all children to attend school up to the age of sixteen. The legitimacy of the State's interest in assuring a minimally educated citizenry was obvious and conceded, as was the rationality of the relationship between the law at issue and the achievement of that objective. Clearly, the law would pass rational basis scrutiny with flying colors. But regardless of the strength of the governmental interest, and even assuming *arguendo* that it was compelling (which the Court did not), the State of Wisconsin had access to other, less burdensome means to achieve its objective. Accordingly, the statute failed the second half of the compelling state interest test. The fit between means and end was not sufficiently tight.

Despite the apparently established fundamental status of the free exercise right, the compelling interest test was

50. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."); *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) ("[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." (footnote omitted)).

51. See *supra* p. 79.

52. 374 U.S. 398, 406-07 (1963).

53. 406 U.S. 205, 234 (1972).

abandoned in *Employment Division v. Smith*,⁵⁴ which may be the most important free exercise case to be decided since *Reynolds v. United States*.⁵⁵ Alfred Smith and his companion Galen Black were fired from their jobs as drug counselors because they ingested peyote for sacramental purposes pursuant to their beliefs as members of the Native American Church.⁵⁶ The Supreme Court ruled that the denial of their claims for unemployment compensation did not offend the Free Exercise Clause. But that fact is not what put the opinion into the case books and the law reviews. As Justice O'Connor states in her concurrence, the Court could have easily affirmed the Oregon Supreme Court under the traditional compelling state interest standard, given the strength of the state's interest in controlling the use of drugs.⁵⁷ Instead, the majority stunned nearly every student of constitutional law by announcing a quite different approach to the adjudication of free exercise cases: So long as the state's laws are generally applicable, so that religious practices are not singled out, they are not rendered unconstitutional because they infringe on religious belief or practice.⁵⁸

54. 494 U.S. 872 (1990).

55. 98 U.S. 145 (1878) (holding that general prohibition of polygamy did not violate the Free Exercise Clause).

56. Just offhand, one would say that this is something drug counselors should not do.

57. *Smith*, 494 U.S. at 903-07 (O'Connor, J., concurring). If, however, the state's interest is defined more narrowly as the interest in refusing to make an exception for the religious use of peyote, this argument becomes problematic because Oregon was not enforcing its drug laws with respect to the religious use of peyote at the time. *Id.* at 909-11 (Blackmun, J., dissenting).

58. *Id.* at 878. According to Justice Scalia,

It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business.

Id. This analogy is reminiscent of a rather cramped Hamiltonian view of the Bill of Rights. Hamilton, who opposed the Bill of Rights, contended that it could add no protections beyond those provided by the limited nature of the proposed federal government. *THE FEDERALIST* NO. 84, at 512-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961). His thesis, that the limited government had no authority to act beyond its enumerated powers, led him to ask rhetorically, "[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" *Id.* at 513-14. Hamilton's argument is based on a conception of a First Amendment that would protect individual

In all fairness, the *Smith* decision was not completely without precedent. As Justice Scalia pointed out, the Court has not always been completely consistent, even before *Smith*, in requiring that the laws be narrowly tailored to serve a compelling state interest in religion cases.⁵⁹ The case which irrefutably proves his point is *Goldman v. Weinberger*,⁶⁰ which rejected the claim of an Orthodox Jewish Air Force officer that the Free Exercise Clause gave him a constitutional right to wear a yarmulke as part of his military attire, notwithstanding military regulations to the contrary.

The Court, per Justice Rehnquist, determined *ipse dixit* that "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."⁶¹ In other words, the compelling interest test did not apply. Exactly why such deference to the military was required in that case is unclear. About the strongest argument that can be made in support of the regulation is that it promotes the military's interest in uniformity of appearance. Although acceptable reasons exist for the military to want to have all of its officers look alike, it can certainly carry out its task of defending our shores while still permitting yarmulkes in the cockpit. To say that there is no less burdensome alternative would be nothing less than laughable.

If the *Smith* approach survives, it will work some very large changes in existing free exercise jurisprudence. The

liberties only against purposeful infringement, not against generally applicable legislation. Although Hamilton's conception of the Bill of Rights may have been acceptable in 1786, when the federal powers were construed narrowly, it is almost unthinkable in a modern society in which nearly every facet of life is subject to governmental regulation. It is also worth remembering that Hamilton's argument concerning the Bill of Rights was not persuasive even in his day.

59. *Smith*, 494 U.S. at 882-90. The scorecard does not suggest that free exercise plaintiffs have done very well, even under the compelling state interest test. See Ryan, *supra* note 2, at 1416-17, 1458-59 (In the Supreme Court, free exercise claims have lost in 13 out of 17 cases and in the circuit courts they have lost in 85 out of 97 cases.). Even so, the danger of *Smith* is that legislatures will no longer feel a need to provide religious exemptions that, though no longer required, are permissible. See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-40 (1987).

60. 475 U.S. 503 (1986). Other cases where the Court failed to apply the compelling state interest test include *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Bowen v. Roy*, 476 U.S. 693 (1986).

61. *Goldman*, 475 U.S. at 507.

reason, quite simply, is that few laws that in fact inhibit the free exercise of religion are specifically aimed at religious practices. Certainly the South Carolina unemployment compensation laws involved in *Sherbert* or Wisconsin's compulsory education requirement in *Yoder* were not aimed at religious groups or religious practices. Both were quintessential general laws, generally applied. But as then Chief Justice Burger stated in *Yoder*, there are

areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*

. . . 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.⁶²

It is quite clear, therefore, that the *Smith* test applied to the facts of either *Sherbert* or *Yoder* would have required a different result than that obtained in either of those cases.

In an attempt to distinguish *Yoder* and other similar cases in which the compelling interest test had been applied, Justice Scalia noted that each case involved a hybrid of constitutional rights, a free exercise right combined with another constitutionally protected right which subjected the claim to heightened scrutiny. This so-called hamburger-helper theory of constitutional law⁶³ is not an accurate description of those cases. Although each distinguished case did implicate another right afforded protection by the Court, a reading of *Yoder* and the other cases demonstrates that the free exercise right did not play second chair to the other right. In *Yoder* for example, the plus factor was the right of parents to direct the education of their children. Although the Court noted that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment,"⁶⁴ the opinion also

62. *Yoder*, 406 U.S. at 220, *quoted in Smith*, 494 U.S. at 896 (O'Connor, J., concurring) (emphasis added).

63. James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 98 n.49 (1991).

64. *Yoder*, 406 U.S. at 233.

concluded that the Free Exercise Clause (by itself) often requires exemptions to generally applicable law.⁶⁵

Many of the concerns implicated in Free Exercise Clause cases may also be addressed by other constitutional guarantees, such as equal protection or free speech, but it does not follow that this overlap somehow relegates the Free Exercise Clause to a secondary status. Especially puzzling is the implication that the free exercise of religion, a textual right, needed to be combined with the right of parents to direct the education of their children, a nontextual, substantive due process right,⁶⁶ in order to attract strict scrutiny.⁶⁷ The first freedom of the First Amendment is the free exercise of religion, and nothing in the text, history, or previous judicial interpretation of the Free Exercise Clause suggests that this freedom must depend upon some other constitutional guarantee for protection.

The attempted distinction of *Sherbert* is similarly unsatisfactory. Justice Scalia pointed out that recently the compelling state interest test had been applied only in unemployment compensation cases such as *Sherbert*. That does not provide ground for distinction because *Smith*, like *Sherbert*, was an unemployment compensation case.

On June 11, 1993, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁶⁸ the Supreme Court reaffirmed by dictum the basic rules of law laid down by the *Smith* case, though it held, on quite narrow grounds, that the church and its individual practitioners involved in that particular case were entitled to free exercise protection. At issue was the constitutionality of ordinances enacted by the city of Hialeah prohibiting ritual animal sacrifice.⁶⁹

The ordinances on their face did not single out any particular sect or group. The Court held, however, that despite their facial neutrality, the record in the case revealed the

65. See *supra* text accompanying note 61.

66. See *Yoder*, 406 U.S. at 213-14; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

67. At least one lower court has interpreted the hybrid-right theory to mean that the combination of two constitutional rights should trigger no greater scrutiny than would each right standing on its own. *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 200 (3d Cir. 1990). In other words, the combination of free exercise and freedom of association would protect association for religious purposes only against purposeful discrimination. *Id.*

68. 113 S. Ct. 2217 (1993).

69. See *Hialeah, Fla.*, Ordinance 87-72 (Sept. 22, 1987).

ordinances to have been directly aimed at the practices of a particular sect known as Santería,⁷⁰ whose membership consists principally of Caribbean immigrants to the United States and whose religious ceremonies include the ritual sacrifice of small animals, such as chickens, squirrels and cats. "Facial neutrality is not determinative," the Court said,⁷¹ and "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality'"⁷² And though the city put forth legitimate governmental objectives on which the ordinances could be based, there were other means by which these objectives could have been achieved.⁷³

Because the *Lukumi* case was decided on religious neutrality grounds,⁷⁴ statements in the various opinions concerning the continuing validity of *Smith* are necessarily dicta. Nevertheless, it is fairly apparent that the 5-4 majority, which in 1990 rejected the compelling state interest test in free exercise cases involving statutes of general applicability, is now a 6-3 majority. Two of the four original dissenters, Justices Brennan and Marshall, have retired. Of their two replacements, one agrees with *Smith* and one does not. Justice Souter, concurring in the judgment in *Lukumi*, is of the view that "the distinction *Smith* draws strikes me as ultimately untenable."⁷⁵ And Justice Thomas joined the majority opinion, which asserts that, "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."⁷⁶ Justices Blackmun and O'Connor, concurring in the judgment, adhere to the position "that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no

70. See Petitioners' Brief *passim*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (No. 91-948).

71. *Id.* at 2227.

72. *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

73. *Id.* at 2229-30.

74. The Court also found the ordinances overbroad and underinclusive. *Id.* at 2232-34.

75. *Id.* at 2244 (Souter, J., concurring in the judgment).

76. *Id.* at 2226 (citing *Smith*).

more than an antidiscrimination principle."⁷⁷

Thus, though all the statements are dicta, those statements leave little doubt that the *Smith* test now enjoys better health than it did three years ago, and the need for prompt passage of the Religious Freedom Restoration Act is correspondingly "compelling."

V. THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act, which was introduced in response to *Smith*, leaves little doubt about what it attempts to do. Section three provides:

- (a) Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
- (b) Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
 - (1) is in furtherance of a compelling governmental interest; and
 - (2) is the least restrictive means of furthering that compelling governmental interest.⁷⁸

This is about as clear a statement of the compelling state interest test as can be found anywhere, and it creates a very interesting tension. On the one hand, the Supreme Court of the United States has interpreted the First Amendment to require only a fairly deferential standard of review whenever the law at issue is religiously neutral because it is generally applicable in both religious and non-religious contexts. Then, rather patently, Congress proposes a very different standard of review, and therefore a very different rule of constitutional law. Can the Congress of the United States simply lay down a completely different rule of constitutional law, and if so, has the core function of a coordinate branch of government been completely eviscerated?

The source of authority for the Religious Freedom Restoration Act is Section Five of the Fourteenth Amendment, which gives Congress the power "to enforce, by appropriate legislation, the provisions of this article."⁷⁹ The exact

77. *Id.* at 2250 (Blackmun, J., concurring in the judgment).

78. S. 578, 103d Cong., 1st Sess. (1993).

79. U.S. CONST. amend. XIV, § 5. Each of the other Reconstruction

parameters of Congress's Fourteenth Amendment Section Five powers constitute one of the most complex and vexing areas of constitutional law, and one that quite clearly is yet to be resolved. The endpoints of that doctrine are fairly well fixed. On the one hand, Section Five does not create in Congress the blanket authority to overrule any constitutional decision by the Supreme Court, thereby effectively overruling *Marbury v. Madison*. But on the other hand, neither is it devoid of any meaning. At a minimum, it authorizes Congress to enact what the Court has sometimes referred to as "remedial" legislation, which effectively builds upon and strengthens already existing constitutional rights.⁸⁰ About the only matter on which one can be confident in this regard is that if the bill becomes law, there will be a challenge to its constitutionality.

The scope of the Section Five power was articulated over 100 years ago in *Ex parte Virginia*:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.⁸¹

This language substantially mirrors Chief Justice Marshall's description of the Necessary and Proper Clause⁸² in *McCulloch v. Maryland*.⁸³ "Let the end be legitimate, let it be within the scope of the constitution, and all means which

Amendments, Thirteen and Fifteen, has an identical enforcement clause. See *id.* amend. XIII, § 2; *id.* amend. XV, § 2.

Other possible sources of authority include the Commerce Clause, *id.* art. I, § 8, cl. 3, and, if redrafted, the General Welfare Clause, *id.* cl. 1, but Congress has not chosen to use these powers. If it had been utilized, the Commerce Clause would have been a possibility because many generally applicable laws infringing on the free exercise of religion affect interstate commerce. See, e.g., *Smith*, 494 U.S. at 874 (employment compensation). Congress might also make the receipt of certain federal funds contingent upon the granting of religious exemptions from generally applicable law. Cf. The Equal Access Act, 20 U.S.C. § 4071 (1988) (requiring high schools receiving federal funds to allow religiously oriented student groups equal access to school facilities).

80. Compare *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), with *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

81. 100 U.S. 339, 345-46 (1880).

82. U.S. CONST. art. I, § 8, cl. 18.

83. 17 U.S. (4 Wheat.) 316, 421 (1819).

are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Chief Justice Marshall's language was used by the Court in *South Carolina v. Katzenbach*⁸⁴ as the test for determining the limit of Congress's enforcement power under Section Two of the Fifteenth Amendment.⁸⁵ In that case the Court, under the Voting Rights Act of 1965,⁸⁶ upheld a suspension of literacy testing in areas with less than fifty percent voter registration, even though the Court had previously held, in *Lassiter v. Northampton County Board of Elections*,⁸⁷ that literacy testing did not violate the Fifteenth Amendment.⁸⁸ Another example of the breadth of the enforcement power is found in *City of Rome v. United States*,⁸⁹ in which the Court, applying *McCulloch*'s appropriateness test, held that Congress could legislate to prohibit voting schemes with discriminatory effects even though, according to *City of Mobile v. Bolden*,⁹⁰ decided the same day, those schemes did not per se violate the Fifteenth Amendment.⁹¹

Both *South Carolina v. Katzenbach* and *City of Rome* suggest, at least by implication, that the enforcement powers of each of the reconstruction amendments are coextensive.⁹² Since the language of each of the enforcement provisions is identical, no reason exists to believe that this implication is not, in fact, explicit.⁹³

In *Katzenbach v. Morgan*,⁹⁴ the Court decided a Voting Rights Act case under the Equal Protection Clause of the

84. 383 U.S. 301 (1966).

85. *Id.* at 326. This is entirely proper given that the Clause, by its text, applies to "all other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

86. 42 U.S.C. § 1973 (1988).

87. 360 U.S. 45 (1959).

88. See Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1059-60 (1993).

89. 446 U.S. 156 (1980).

90. 446 U.S. 55, 65-74 (1980).

91. *City of Rome*, 446 U.S. at 177; see Pawa *supra* note 88, at 1059-62.

92. See *City of Rome*, 446 U.S. at 176-77, 179-80; *Katzenbach*, 383 U.S. at 326-27; Pawa, *supra* note 88, at 1059-62.

93. *City of Rome*, 446 U.S. at 207 n.1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive.").

94. 384 U.S. 641 (1966).

Fourteenth Amendment. The State of New York required persons who had completed the sixth grade in a Puerto Rican school to pass a literacy test in order to vote. The enforcement of the testing requirement was prohibited by section 4(e) of the Voting Rights Act. The Court found this to be a proper exercise of the Section Five enforcement powers even though in *Lassiter* it was determined that literacy tests are not necessarily prohibited by the Fourteenth or Fifteenth Amendments. The Court held that Section Five of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁹⁵

Justice Brennan, writing for the Court, gave two alternative rationales for section 4(e). The first, that Congress may have intended to increase the political power of Puerto Ricans,⁹⁶ does not seem outlandish. However, the second rationale, that Congress may have determined on its own accord that the New York literacy tests violated the Fourteenth Amendment's Equal Protection Clause,⁹⁷ is truly remarkable, in that, if carried to its extreme, it shakes the foundations of the popular understanding of *Marbury v. Madison*.⁹⁸

This second rationale, qualified by the notion that Section Five "does not grant Congress power to exercise discretion . . . 'to dilute equal protection and due process decisions of this Court,'"⁹⁹ has become known popularly as the "ratchet theory."¹⁰⁰ According to this theory, Congress may statutorily require more, but not less, protection of a constitutional right than the Constitution, as interpreted by the Court, would itself require. If that is in fact a correct statement of the law—a proposition which is not settled—then the Religious Freedom Restoration Act would fit within congressional authority. The test for determining whether it is appropriate legislation to enforce the Free Exercise Clause would be, in the language of *McCulloch v. Maryland*, whether the legislation is "plainly adapted to that end" and whether the Act is "not prohibited,

95. *Id.* at 651.

96. *Id.* at 652-53.

97. *Id.* at 652-54.

98. *But see supra* note 15.

99. *Morgan*, 384 U.S. at 651 n.10 (quoting *id.* at 668 (Harlan, J., dissenting)).

100. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1230 (1978).

but consist[s] with the letter and spirit of the constitution."¹⁰¹

The ratchet theory has never been expressly adopted by the Court. In *Morgan* it was one of two alternative rationales. However, it is fully consistent with the theory of constitutional jurisprudence since *McCulloch*. That is, the Constitution gives Congress broad powers to act within the scope of its broadly interpreted enumerated powers.¹⁰² In addition, numerous cases have reaffirmed Congress's authority to legislate beyond the Court's interpretations to enforce the Fourteenth Amendment.¹⁰³ This power is equally broad when used to enforce the incorporated Bill of Rights.¹⁰⁴

The enforcement power is not unlimited. It is subject to other express provisions of the Constitution,¹⁰⁵ and it may not be used as a pretext to legislate on matters unrelated to the Fourteenth Amendment.¹⁰⁶ However, none of these concerns appears to be implicated by the Religious Freedom Restoration Act.¹⁰⁷ The Constitution leaves no power expressly to the states to regulate religion, and after incorporation the Free Exercise Clause is directly related to the Fourteenth Amendment.¹⁰⁸

101. 17 U.S. (4 Wheat.) 316, 421 (1819).

102. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (Commerce Clause).

103. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563-66 (1990); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-88 (1989); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion). See generally Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221.

104. See *Hutto v. Finney*, 437 U.S. 678, 693-99 (1978). But see *id.* at 717-18 (Rehnquist, J., dissenting) (arguing that Congress's power to enforce the Bill of Rights is not the same as its power to enforce the textual provisions of the Fourteenth Amendment). See generally Pawa, *supra* note 88, at 1062-69.

105. *Oregon v. Mitchell*, 400 U.S. 112, 118, 124-31 (1970).

106. *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (1983) (Burger, C.J., dissenting).

107. Paul Brest suggests another limitation on the Section Five power: "[T]he Fourteenth Amendment does not give Congress any greater power to contradict judicial doctrine than Congress has under any other part of the Constitution." Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 69 (1986). This limitation should pose no difficulty to the Religious Freedom Restoration Act. Properly understood the Act does not attempt to contradict *Smith's* interpretation of the First Amendment, instead it provides a more effective enforcement mechanism for the free exercise of religion than that which the Court was willing to provide. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). Justice Scalia concludes his opinion in *Smith* by suggesting that the Court is not the proper branch of government to draw the lines in this area. *Id.* If the Religious Freedom Restoration Act is seen as a congressional acceptance of the invitation to "be solicitous of [the free exercise] value in its legislation," *id.*, then no objection can be raised.

108. Laycock, *supra* note 103, at 95.

The adoption of the Religious Freedom Restoration Act would represent an improvement in the present state of the law. Of all the rights that might qualify for preferred status, free exercise of religion should head the list. Within the present framework of constitutional law, the "generally applicable" standard simply does not afford sufficient protection for religious exercise, especially for smaller, politically powerless religions. Justice Scalia's description of this fact as an "unavoidable consequence of democratic government"¹⁰⁹ is incredible in the context of the fundamental nature of First Amendment rights. Although many private interests are sacrificed as a price of living in a civilized society, the free exercise of religion cannot be one of them. Free exercise has at least as great a claim to the protection of heightened scrutiny as any other right afforded such protection by the Court.

The ultimate irony of the Court's new approach to the Free Exercise Clause is that, from a practical standpoint, racial minorities, normally afforded protection from discrimination in the suspect classification cases, are the very ones that have been denied the protection of the compelling state interest test in this fundamental rights context. In many of the Court's free exercise cases, even before *Smith*, the losing plaintiffs were members of a racial or ethnic minority.¹¹⁰ Almost all of them are members of a religious minority—a potentially suspect class according to *United States v. Carolene Products Co.*¹¹¹ Because larger religions are powerful enough to protect their concerns through the political process, generally applicable laws will rarely burden anything but the free exercise of minority religions. The reality of the post-*Smith* Free Exercise Clause may be that the compelling state interest test, still applicable in cases of purposeful discrimination, governs except in those cases where there is a suspect classification. From the standpoint of constitutional policy, giving those within a suspect class a lesser, rather than a greater, protection is the ultimate perversion.

109. *Smith*, 494 U.S. at 890.

110. See *Smith*, 494 U.S. at 874 (Native Americans); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (same); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Jews); see also *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991); *supra* notes 59-67 and accompanying text.

111. 304 U.S. 144, 152 n.4 (1938).

VI. CONCLUSION

The present state of free exercise jurisprudence is, to say the least, confused and unsettled. It simply cannot remain in its present state. Several possibilities exist for change. The change could come from Congress, if it has the constitutional authority. Or the Court itself could back away from *Smith*, and reinstitute compelling state interest and narrow tailoring as the governing standard. The *Lukumi* case suggests that this possibility is not imminent. A third possibility is that *Smith*, with its "anything-goes-so-long-as-the-laws-are-generally-applicable" standard, could become the governing law not only in free exercise cases, but all across the First Amendment spectrum.¹¹² A fourth possibility—though unfortunately not a likely one—is that the Court will recognize the wisdom of my own preferred view and establish deference to the political branches as the standard in all contexts except where it can be shown that the protection of a specific individual right was *the* motivating force behind the adoption of a particular provision of the constitution. The final possibility is that the end of the world will come. When that happens, all laws should be generally applicable.

112. See *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2465-67 (1991) (Scalia, J., concurring in the judgment) (applying *Smith*'s "generally applicable law" standard in the context of free expression).