THE REGIME CHANGE IN THE FREE EXERCISE OF RELIGION DEBATE

A Senior Honors Thesis

by

LESLIE THERESA SCHEUERMANN

Submitted to the Office of Honors Programs
& Academic Scholarships
Texas A&M University
in partial fulfillment of the requirements of the

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RESEARCH FELLOWS

April 2004

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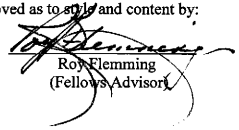

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ABSTRACT

The Regime Change in the

Free Exercise of Religion Debate. (April 2004)

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Religious litigation in the modern era at the Supreme Court level falls into two separate regimes that delineate specific trends emanating from and acting upon religious policy. Each regime contains its own set of ideas, interests, and institutions that characterize the nature and extent of religious freedom under the law. The first regime began with the incorporation of the First Amendment's religion clauses and represents a period of stability and equilibrium among the Court, Congress, and the involved interest groups. However, the Court's ruling in *Employment Division* v. *Smith* (1990) destroyed that equilibrium and marked the beginning of a new regime characterized by uncertainty and complexity. Within that second regime, the Court and Congress are locked in a battle over policy-making authority, while interest groups that were former rivals now have joined together for the promotion of free exercise. Today, the second regime is still in place and the complexity surrounding the free exercise debate continues to grow.

ACKNOWLEDGMENTS

The road to the completion of my thesis has been long and winding, and I would like to thank all of those who have helped me find my way along it. For months, my parents have supported my progress and encouraged me to do my best, while my loyal friends have never failed to remind me that there is always a light at the end of the tunnel.

But most of all, I would like to thank my fellows advisor, Dr. Flemming. He has continually given me more help and guidance on this thesis than I could have ever hoped for from any mentor. Through weekly meetings, daily emails, and long discussions he helped to direct the focus of my project and refine my work into something worthwhile. There is no question that without his vital assistance, I could have never completed this thesis.

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INTRODUCTION

The full-scale entry of religious litigation into the sphere of the federal government is a relatively recent phenomenon. Taken as a whole, however, religious litigation in the modern era at the Supreme Court level falls into two separate regimes that delineate specific trends emanating from and acting upon religious policy. Each regime contains its own set of ideas, interests, and institutions that characterize the nature and extent of religious freedom under the law. By focusing on the decisions of the Supreme Court regarding the Free Exercise Clause of the First Amendment, I will attempt to demonstrate how the ruling in *Employment Division* v. *Smith* (1990) shifted the Court, Congress, and the involved interest groups from a period of stability in the first regime to uncertainty and complexity in the second. As evidence of that shift, I will provide information detailing the drastically increased role of Congress in religious policy-making during the second regime, as well as the profound change in allegiances experienced by many interest groups.

This thesis follows the style and format of the *American Political Science Review*.

FIRST REGIME

The first religious regime has its beginnings in the turmoil of the New Deal. For several decades prior to the New Deal a conservative equilibrium of stability existed on the Court. However, that equilibrium was upset during the 1930s by President Roosevelt's liberal New Deal legislation and by his attempt to "pack" the Court with new justices. In 1938, Justice Harlan Stone attempted to restore a semblance of order to the Court by redirecting its focus away from judicial review of economic legislation, which had led to clashes with the president, in Footnote 4 of *United States* v. *Carolene Products Company* (1938). As a result, the Court achieved a new equilibrium in which an increasing number of cases dealing with personal rights and civil liberties were addressed.

In 1940, the incorporation of the First Amendment's religious clauses into the realm of state law marked the beginning of the religious regime under the Free Exercise Clause. During that regime, the number of Supreme Court cases with free exercise claims grew rapidly in both number and complexity. In the civil rights era of the 1960s, the stability of the regime was further enhanced by a spirit of cooperation between the Court and Congress as they sought to "develop a set of fundamental principles that would permanently order US society" (Tushnet 2004, 520). For example, "sometimes Congress would push the ball forward, and the Court would approve, as in its holding that the Commerce Clause gave Congress the power to enact the Civil Rights Act of 1964." At other times, "Congress would actively seek out the Court's assistance, as

when Congress directed the president to file a lawsuit challenging the constitutionality of the poll tax" (Tushnet 2004, 520).

This equilibrium continued throughout the remainder of the regime while the basic trend emanating from the Court was to generally refrain from restricting any religious sect's observances or practices so long as the public welfare was preserved. At the same time, religious interest groups and lobbyists began to form and filed amicus curiae briefs, sponsored litigation, and argued on behalf of litigants in many of the regime's major cases. These groups for the most part remained committed to their own ideologies and rarely cooperated on cases with rival groups. Most importantly, though, this regime represents the first extended period of stability since the New Deal where the relations between Congress, the Court, and the interested groups rested in a state of equilibrium.

Increasing Litigation

The origins of the first regime reside in Justice Harlan Stone's historic footnote 4 where the Court turned its focus from economic activism and began a "more searching judicial inquiry" into statutes that discriminated against "discrete and insular minorities" (*United States* v. *Carolene Products* 1938). Stone's footnote also implicitly endorsed Justice Holmes' doctrine of Preferred Freedoms in *Lochner* v. *New York* (1905) which states that the freedoms of the First Amendment deserve more judicial protection than others because they are of fundamental importance in a free society (Pritchett 1992, 664). In terms of the Court's ability to make effective change, the footnote "provided a

theoretical basis for future judicial activism in defense of powerless minorities" (Alfange 1992, 307). With the footnote's ideas as its new focal point, the Court began handing down a number of decisions during the 1940s aimed at creating legal protection for the religious rights of minorities. Thus, the first religious regime was born. Free exercise litigation grew substantially in both size and scope, beginning quietly with cases brought by smaller sects in the 1940s and 1950s and eventually growing increasingly complex in the following decades.

The first regime begins with *Cantwell* v. *Connecticut* (1940) where the religion clauses of the First Amendment were incorporated into the realm of the states. This incorporation enabled litigants to bring suit against state and local laws that burdened or inhibited religious observances, and as a result litigation against targeting such laws made its way onto the Court's docket in unprecedented numbers.

The vast majority of the 1940s cases involved the rights of Jehovah's Witnesses within mainstream society, from selling religious tracts on street corners without a license (*Murdock* v. *Pennsylvania* 1943) to forcing schoolchildren to recite the pledge of allegiance during the school day (*Minersville School District* v. *Board of Education* 1940). On the whole, the litigation of this decade allowed greater freedoms for the Jehovah's Witnesses – and consequently other churches and faiths – than had ever been permitted before on a national level. However, free exercise was not given free reign as laws with neutral applications and valid state objectives were upheld in cases such as *Jones* v. *Opelika* (1942) and *Prince* v. *Massachusetts* (1944).

The 1950s continued the same trends of the 1940s. Most cases involved the free exercise rights of Jehovah's Witnesses, while several neutrally applicable laws that inevitably put minor burdens on religious freedom were upheld by the Court. However, the 1950s also saw the entry of other churches into the free exercise debate. *Kunz* v. *New York* (1951) was brought by a Baptist minister and *Kedroff* v. *Saint Nicholas Cathedral* (1952) involved a question of control over ecclesiastical authority posed by the Russian Orthodox Church.

The cases of the 1960s marked a break from the previous two decades in several aspects. First, the number of cases brought by Jehovah's Witnesses decreased drastically. More cases were brought by a number of different churches and religions that had never before sponsored litigation at the Court, such as Orthodox Jews and Seventh Day Adventists. Second, the Vietnam War brought conscientious objectors into the free exercise debate for the first time in *United States* v. *Seeger* (1965). Third, the Court began upholding Sunday "blue laws" on economic grounds against two challenges by Orthodox Jews in *Braunfeld* v. *Brown* (1961) and *Gallagher* v. *Crown Kosher Super Market* (1961). Finally, in one of the most important decisions of the regime, *Sherbert* v. *Verner* (1963), the Court ruled in favor of a Seventh Day Adventist who was denied unemployment benefits because she would not take an available job that required her to work on Saturdays in contradiction to her faith. This case set a precedent in unemployment claims cases and would serve as the point of departure for the second regime in 1990.

Like the previous decade, the 1970s saw an increase in the number of diverse churches and religions litigating at the Court. For example, *Cruz* v. *Beto* (1972) involved a Buddhist inmate suing for relief against a Texas prison that had denied him the opportunity to practice his religion. In addition, three more conscientious objector decisions were handed down, each one validating the constitutionality of conscientious objector clause itself. Finally, another case continued the exemption for religious practices that was the premise behind *Verner*. In *Wisconsin* v. *Yoder* (1972) the Court upheld an exemption from compulsory state education up to age sixteen for the Amish people, who believed that secular education would devalue their religion.

By the 1980s, the Court began to tighten the reigns on the breadth of religious free exercise in unusual circumstances, and as justification it cited overwhelming governmental interest in areas ranging from the maintenance of the federal tax system to prison security. The decisions in *United States* v. *Lee* (1982) and *Bowen* v. *Ray* (1986) were based on the principle that the laws at issue placed only incidental burdens on religious beliefs. Furthermore, those burdens were subordinate to the government's interest in preserving federal programs that affected the entire nation. Similarly, *Goldman* v. *Weinberger* (1986), *O'Lone* v. *Estate of Shabazz* (1987), and *Lyng* v. *Northwest Indian Cemetery Protective Association* (1988) were all decided in favor of the prevailing governmental interests of military obedience and authority, prison security, and land use. However, at the same time the Court also made significant advances in expanding freedom of religious practices associated with workers' rights by expanding upon the precedent set by *Verner*. In *Thomas* v. *Review Board of the Indiana*

Employment Security Division (1981) *Hobbie* v. *Unemployment Appeals Commission of Florida* (1987), and *Frazee* v. *Illinois Department of Employment Security* (1989) the Court upheld the right to receive unemployment benefits of workers who had turned down job opportunities that conflicted with their religious beliefs. Such was the state of the law created by the Court regarding the Free Exercise Clause prior to the 1990s. *Employment Division of the Department of Human Resources of Oregon v. Smith* (1990), however, redirected the Court's philosophy and triggered a shift in regimes.

Formation of Interest Groups

In Free Exercise litigation no clear delineation exits between interest groups according to which particular issues will divide them. This is most likely due to several factors, including the lack of the one dimensional argument that is present in Establishment Clause cases (the argument is limited to support for governmental accommodation or separation between church and state), the complexity of most Free Exercise Clause claims, and the common overlap between Free Exercise and other First Amendment issues (i.e. free speech and association). As a result, I will examine the groups involved in Establishment Clause litigation on both the separationist and accomodationist sides and track their history through both regimes in order to demonstrate the remarkable shift in allegiances that occurred in the second regime.

In his 1994 article, Kobylka cites a long history of both separationist and accomodationist litigation work done by a host of different organizations. On the separationist side, the major actors include the American Civil Liberties Union (ACLU),

the American Jewish Congress (AJC), the Anti-Defamation League of B'nai B'rith (ADBB), and the Americans United (AU). Beginning with the ACLU's amicus curiae brief in support of the appellants in *Everson* v. *Board of Education* (1947), these groups strongly supported separationist claims by submitting amicus briefs and sponsoring litigation (Kobylka 1994, 111-118). Although two of the major groups listed, the AJC and the ADBB, spring from a mainstream Jewish perspective, separationist groups are not limited to any religion, church, or denomination. As the "nation's oldest mainstream civil liberties group", the ACLU approaches the Establishment Clause from a viewpoint of secular humanism that functions as the middle ground between its historic roots in Jeffersonian separationism and its branch of militant atheism (Weber and Jones 1994, 10; Sorauf 1976, 32-33). In contrast, the AU represents a mix of conservative, traditionalist, and fundamentalist Protestant perspectives that are unified by an underlying fear of Roman Catholic societal power (Sorauf 1976, 33). Adding to its diversity is the fact that the majority of its contributions come from Baptists, Christian Scientists, Seventh-day Adventists, and even Jews (Kobylka 1994, 115).

On the other side of the Establishment Clause, the accommodationists groups began to form and organize later than the separationists. According to Frank Sorauf (1976, 184-190), before 1970 support for accommodation was limited to three groups, the United States Catholic Conference (USCC), the Citizens for Educational Freedom (CEF), and the National Jewish Commission on Law and Public Affairs (COLPA). After the rise of the Religious Right and an increase in awareness and acceptance of conservatism in the 1970s, a host of new groups formed and turned their attention

towards litigation, including the Christian Legal Society (CLS), the National Association of Evangelicals (NAE), Pat Robertson's National Legal Foundation, and the Catholic League for Religious and Civil Rights (Kobylka 1994, 116; O'Connor and Epstein 1983, 487). The emergence of new accommodationist groups caused splits among the religions themselves. The formation of the COLPA caused a rift in the Jewish litigation community that had formerly been entirely separationist. The Protestants fractionalized on an even greater scale as the Baptist Joint Committee on Public Affairs and the Seventh Day Adventists sided with the separationists and the Christian Legal Society and the National Association of Evangelicals began work as accommodationists (Kobylka 1994, 116-117).

Despite such fissures, these groups essentially stayed within the parameters of their original positions on religion cases before the Court during the 1970s. A change came in the 1980s and early 1990s as splits within the separationist camp on church-state cases occurred when traditional separationist stalwarts started to argue accommodationist positions against other separationist organizations (Kobylka 1994, 118-119). On the whole, though, the first regime was a time of relative stability among the competing interest groups after the 1970 rise of the accommodationists.

Supreme Court Trends

At the opening of the first regime, the Supreme Court was under the command of Chief Justice Charles E. Hughes until his retirement in 1941. Justice Harlan Fiske Stone then took over the Chief Justice's Chair until his sudden death in 1946. As the author of

United States v. *Carolene Products Company*'s (1938) famous footnote four, Chief Justice Stone's redirection of the Court towards greater attention to laws targeted at minorities marked the theoretical beginnings of the first regime. Succeeding him was Fred Vinson, who as Chief Justice attempted to avoid overturning precedents and disliked making decisions with far-reaching effects.

In direct opposition to Vinson's retiring manner was Chief Justice Earl Warren, whose renowned liberal Court dominated a large portion of the first regime from 1953-1969 (Goldman 2003). During that time, the Warren Court handed down more liberal decisions on civil liberties than had ever been seen before, creating equal rights for blacks and enforcing the separation between church and state on Establishment Clause issues, among others (Wasby 1976, Rohde and Spaeth 1976). On the Free Exercise Clause, the Warren Court made a landmark ruling in 1963 with the *Sherbert* decision.

After Warren, the Court underwent a significant transition away from liberalism with the election of Richard Nixon and his subsequent Court appointments, including the new Chief Justice Warren Burger, who served from 1963 until his retirement in 1986. Although under Burger the Court began a return toward the conservatism of the pre-Warren Court, it nonetheless upheld religious exemptions for cases similar to *Sherbert* (Wasby 1976, Spaeth 1979). Thus, a strong precedent for upholding other such exemptions, specifically in unemployment cases, was created in the years leading up to 1990.

The ideological trends of the Court majorities led by the Chief Justices throughout the first regime vary from right to left, especially between the Warren and

Burger courts. However, by tracing Court decisions from the issuance of *Sherbert* in 1963 to those of its progeny, including *Thomas* in 1981, *Hobbie* in 1987, and *Frazee* in 1989, one can see that the same liberal ruling occurred once within the Warren Court and three times in the conservative Courts of Burger and Rehnquist. With history or precedent and not ideology shaping this case trend, the Court was primed to make a similar decision in *Employment Division v. Smith*, despite the differences in *Smith*'s facts from those of the previous unemployment cases. But when the expected decision did not occur, the religious interest groups took notice, and thus the second religious regime was born.

SECOND REGIME

The change in regime occurred in 1990 when the Court made a dramatic adjustment in its controlling idea over the nature of religious exercise by breaking from the prevailing hands-off approach towards religious observances and turning towards a more restricted view where religious rituals are required to conform to neutrally applicable laws. That change in direction greatly disrupted the equilibrium of the previous regime in two major ways. First, religious interest groups that had been former rivals on Establishment Clause cases now joined together with civil liberties groups under a massive coalition promoting free exercise. The inclusion of civil liberties groups and their concern for free speech in addition to free exercise issues, however, complicated the goal of the coalition by adding a second dimension to the one dimensional Establishment Clause issue with which the religious groups had been concerned. Second, the coalition's lobbying efforts in Congress spurred the legislature to create a bill that greatly expanded Congress' authority over religious policy-making and overruled the Court's 1990 decision. As a result, Congress emerged as a rival to the Court and the two institutions proceeded to compete for control over religious policy throughout the regime. This loss of equilibrium demonstrates the increased complexity and unwieldiness that characterize the free exercise debate within the second regime.

Litigation as Catalyst

The facts of *Employment Division of the Department of Human Resources of Oregon v. Smith* (1990) did not appear drastically different from those present in *Sherbert* and its progeny. However, unlike the litigants in previous Free Exercise unemployment cases, Al Smith had not quit his job or been fired because of purely religious beliefs. He had been dismissed from his employer, a private drug rehabilitation firm, on charges of misconduct because he and the other appellant, Galen Black, had ingested peyote, an hallucinogenic drug used for sacramental purposes during a Native American Church ceremony (Epps 2004, 482-483).

After moving through the state appeals process, the Oregon State Supreme Court found that Smith and Black's use of the peyote violated Oregon's controlled substance law, but that such a prohibition against peyote with its religious function violated the appellants' First Amendment rights. Had Oregon's ruling been affirmed by the US Supreme Court, it would have fallen directly in line with *Sherbert*. In view of that precedent there was an expectation for the Court to make that affirmation. Even during oral arguments none of the questions from the Justices implied that the *Sherbert* standard would not be used (Oral Argument 1989).

However, with a 6:3 majority led by Justice Scalia, the Court reversed Oregon's ruling, stating that the Free Exercise Clause did not relieve an individual of the obligation to follow a religiously neutral and generally applicable law that incidentally placed a burden upon religious freedom. Furthermore, the Court distinguished this ruling from previous rulings made under the *Sherbert* precedent by arguing that the

"compelling governmental interest" test is only applicable in cases where the government has assessed an individual's eligibility for unemployment compensation (*Employment Division* v. *Smith* 1990). In cases like *Smith* that involved an "across-the-board criminal prohibition on a particular form of conduct" such a test could not be applied, for to do so would provide grounds to ignore other laws that are not supported by a compelling governmental interest. And as a last recourse, the Court even refused to limit such exemptions from generally applicable laws to practices that were central to an individual's belief system because such a limitation would force the Court to make impermissible judgments on the veracity and intricacies of an individual's beliefs (*Employment Division* v. *Smith* 1990).

In 1993 the Court chose to apply its newly-created *Smith* precedent to a town upset over the practices of Santeria believers. In *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah* (1993), the city government created a set of laws designed to prevent the ongoing animal sacrifices done by members of the Santeria religion. In its ruling, the Court applied *Smith's* reasoning that a religiously neutral and generally applicable law does not need a compelling governmental interest to be valid under the Free Exercise Clause. However, the Court found the laws to not be neutral or general and consequently they were subject to strict scrutiny where the government is required to present a compelling interest for the laws and show that they were narrowly tailored to meet its stated purposes. The respondents failed to meet these requirements, and thus the laws were invalidated.

In 1997, the Court heard the much anticipated case of *City of Boerne* v. *Flores* (1997), which challenged the constitutionality of the Religious Freedom Restoration Act (RFRA) that was passed by Congress in 1993 to overrule *Smith*. In another 6:3 ruling, the Court determined that the RFRA was a constitutionally impermissible extension of Congress's power under Section Five of the Fourteenth Amendment. Section Five empowered Congress to enforce the Constitutional guarantees that no State 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" through "appropriate legislation."

However, according to prior Court rulings, this power to enforce is only preventative and remedial (*South Carolina* v. *Katzenbach* 1966). According to the majority in *Boerne*, by passing the RFRA Congress exceeded the scope of the Fourteenth Amendment to such a degree as to substantially alter the meaning of the Free Exercise Clause and proscribe state action that the First and the Fourteenth Amendments do not prohibit. Furthermore, the Court claimed that the law served to disrupt the balance between federal and state governments and intruded into the states' traditional areas of control over the health and welfare of their citizens. Thus, the Court invalidated the RFRA and consequently denied Congress's attempt to overrule *Smith* and take control of the free exercise policy-making power.

The *Boerne* outcome was a surprise to many based upon the makeup of the Court. Since the last addition to the natural Court in 1994, there appeared to be an accommodationist majority consisting of Chief Justice Rehnquist and Justices Scalia,

Thomas, and usually O'Connor and Kennedy (Epstein et al. 1996, 380; Ackerman, Jones, and Jennings 2003, 3). Such a majority should in theory have found the closer relationship between the government and religion created by the RFRA within the parameters of the Constitution. But even though containing six Reagan and Bush appointees, the Court shocked Congress by limiting legislative enforcement power and by not following the election returns that had placed a conservative majority in both Houses (Khan 1999, 193). Clearly, the Court saw *Boerne* as more of a threat to their institutional power of judicial review and as Congressional encroachment into their sphere of influence rather than as a partisan issue. Indeed, even the dissents of Justices O'Connor, Breyer, and Souter assumed the validity of the majority's treatment of Congress's power under the Fourteenth Amendment by focusing on their disagreement with the *Smith* outcome (Tushnet 2004, 520).

The last free exercise case did not contain the same history making elements as *Boerne*. In *Watchtower Bible and Tract Society of New York, Inc.* v. *Village of Stratton* (2002), a case reminiscent of those from the 1940s and 1950s, a Jehovah's Witness group brought suit against a city for passing an ordinance requiring a permit for any canvasser who wished to go door to door in support of any cause. Due in part to its own history concerning the rights of Jehovah's Witnesses, the Court invalidated the permit law and chose not to apply the general applicability standard of *Smith* because of the breadth of speech the law covered, including religious proselytizing, anonymous political speech, and the distribution of handbills. Furthermore, the Court found that the permit law was not tailored narrowly enough to meet village's stated interests of

protecting the citizens' privacy and preventing canvassers from defrauding and harming residents.

Without question, *Smith* set the tone for the rest of the free exercise cases in the remainder of the decade and the early part of the next. In the cases of *Lukumi Babalu* and *Watchtower Bible* the first question asked by the justices was whether or not to apply the *Smith* ruling. With the law of general applicability provision applied to *Lukumi Babalu*, this case serves as *Smith*'s first progeny and thus extends the legitimacy of the decision with the high potential for its application to more cases in the future. Yet, despite *Smith*'s reapplication in the 1990s, the change in law that it ushered in disrupted the equilibrium among the religious interest groups and between the Court and Congress.

Coalescence of Interest Groups

Although several prominent religious interest groups had temporarily defected from the separationist to the accommodationist camp in the 1980s, the greatest conversion in past alliances was still to come. Religious leaders reacted with outrage to the *Smith* decision, and as a result, over seventy interest groups, including civil libertarians and major separationists and accommodationists from many different faiths, joined together to create the Coalition for the Free Exercise of Religion (Epps 2004, 498-499). According to its amicus curiae brief in *City of Boerne* v. *Flores* (1997), the Coalition on behalf of its members is "united by the conviction that the protection of

religious liberty is an essential element of a democratic society" ("Brief" 1995). A list of the Coalition's members at the time of *Boerne* can be found in the Appendix.

Between 1990 and 1993, the Coalition drafted legislation for the Religious Freedom Restoration Act and through its lobbying efforts helped to achieve the Act's passage. In 1997 the constitutionality of that Act was challenged in *Boerne*, and the Coalition filed an amicus curiae brief in favor of the respondents. When the Act was struck down, the Coalition continued its efforts to pass legislation similar to the RFRA that was acceptable to the Court. Despite two failed bills and a loss of membership due to politics and concerns about the possibility of religious freedoms trumping civil liberties, the Coalition finally succeeded in passing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Although RLUIPA does not have nearly the scope as did the RFRA, the Coalition nevertheless sees it as a victory in the battle for religious freedom.

More importantly, the creation of the Coalition for Free Exercise of Religion is one of the defining aspects of the second regime. Although the separatist groups had begun to advocate positions from the accommodationist viewpoint during the 1980s, never before had so many groups come together to work for a common goal. Nor had such an extensive bill like the RFRA been passed in large part by the efforts of any type of religious interest group. In addition, despite a loss of membership after the RFRA was created, the Coalition achieved remarkable stability that enabled it to live on past the RFRA and present its amicus curiae brief in *Boerne* as well as draft legislation and lobby

for the passage of the Religious Liberty Protection Acts (RLPA) in 1998 - 2000 and the RLUIPA in 2000.

Yet, the formation of the Coalition also signals an increase in the complexity of the religious freedom environment in the second regime. Among the religious groups present in the Coalition are civil liberties groups that do not include religious litigation as one of their primary goals. The reason that these groups initially joined the Coalition is due to the free speech issues frequently embedded within free exercises cases. As in the Jehovah's Witnesses cases during the 1940s, the right of religious advocates to practice their religion feely often intersects squarely with their right to speak freely. Without the ability to speak about their religion to passersby on the street, these individuals cannot fully practice their beliefs. Recognizing the dependence of free exercise on free speech in many situations, the religious interest groups welcomed the civil liberties proponents into Coalition.

However, their inclusion and their resulting differences of opinion on the primacy of exemptions for religious believers created divisions among the Coalition members during the drafting of the two RLPA's from 1998 through 2000. The great fear among many of them was that if legislation such as the RLPA did pass and withstand the Court's review, the interests of churches and other religious groups might supersede anti-discrimination statutes as well as federal, state, and local tax and building regulations (American Atheists 2000a). The end result is that the instability created by the *Smith* decision forced these interest groups from diverse backgrounds and competing ideologies to align themselves into what ultimately amounted to a "coalition of

convenience." At the same time, the existence of such a coalition adds to the instability of religious policy-making by complicating the issues surrounding the creation of free exercise legislation, as seen in the struggle for the RLPA.

Congress v. the Court

The change in regime brought with it a change in the relationship between the Court and Congress over religious policy. Prior to 1990, Congress had remained separate from the religious issue, addressing it superficially in the Elementary and Secondary Education Act of 1965 with guidelines on providing federal funding to parochial schools. Thus for the entirety of the first regime the legislature offered no impediment to the Court's ability to set the boundaries on religious exercise. Once the *Smith* decision spurred a policy shift, the relationship between the two institutions developed into a struggle for control over policy-making power. At the heart of that struggle lies the question of who determines what the Constitution actually means. Mark Tushnet describes the point of contention accurately: "Justice Kennedy says [in *Boerne*] that RFRA alters the meaning of the Free Exercise Clause; this phrasing assumes that the Court's decision in *Smith* determined that meaning. He says that Congress changed the right to free exercise of religion; this phrasing assumes that the Court's decision in *Smith* is unalterable except by the Court itself (or by the arduous process of constitutional amendment)" (2004, 521).

As a result, the contention between Congress and the Court developed into one of competing legitimacies, where each institution had a vested interest in preserving and

asserting its power over the other. Reverting to the origins of judicial review, the Court saw its institutional prerogative as including "the province and duty ... to say what the law is," while Congress viewed its role as that of a coequal branch endowed with the will of the people to write the law (*Marbury* v. *Madison* 1803). Within this framework of opposing roles inspired by *Smith*, the Court and Congress engaged in a pattern of action where the Court issued a ruling, Congress responded with a law to override the Court's decision, and the Court would then overrule Congress's new law. This pattern first appeared in the chain of events from *Smith* to the RFRA to *Boerne*, and it is set to appear again with *Boerne*, the RLUIPA, and eventually a case that would invalidate RLUIPA.

The history of Congress's struggle begins after *Smith* was handed down by the Court in April of 1990. Immediately, members of Congress began work on a bill to protect once and for all the exercise of religious observances from interference by the Supreme Court and to protect citizens from another possible *Smith*-style usurpation of their constitutional rights. The result of their efforts was the 1993 Religious Freedom Restoration Act (RFRA) which:

> "[prohibited] any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling

> governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." (Religious Freedom Restoration Act 1993)

The text of the RFRA was designed to overturn *Smith* by destroying its precedent that made incidental burdens on religion permissible under laws of general applicability. It also attempted to solidify the pervious line of reasoning begun in *Sherbert* by requiring that any burden on religion be legitimized by a compelling governmental interest. But the greatest victory of the RFRA in the eyes of religion advocates was its creation of a seemingly separate and insular position for religion that general laws of society could not touch. The bill was extremely popular in Congress, especially so with the Democrats who controlled both houses. Sponsored by Representative Charles Schumer (D-NY) the bill passed the House by voice vote with no opposition and with 170 cosponsors (73% of whom were Democrats). It passed 97-3 in the Senate with only two of the chamber's fifty-six Democrats opposed ("Bill Summary, H.R. 1308"). Yet, as mentioned earlier, the *Boerne* decision of 1997 overruled the RFRA and sent free exercise proponents back to the Congressional drawing board.

In 1999, several years after the Republicans gained control of Congress, Representative Charles Canady (R-FL) presented the first bill aimed at piecing together the broken RFRA. The major portion of his bill, a Republican piece of legislation entitled the Religious Liberty Protection Act of 1999 (RLPA), prohibited

> "a government (defined as a State, an entity created under State authority, the United States, an instrumentality or official of the United States, or any person acting under color of State or Federal law) from substantially burdening a person's religious exercise: (1) in a government-operated program or activity receiving Federal financial assistance; or (2) in any case in which the burden affects or in which removal of the burden would affect, international or interstate commerce or commerce with Indian tribes. It allows a substantial burden if the government demonstrates that it is the least restrictive means of furthering a compelling governmental interest" (RLPA).

The bill also forbade a state from discriminating against religious assemblies or institutions when imposing a land use regulation and from burdening any religious belief in any manner. Furthermore, the RLPA amended the RFRA by ending its applicability to the States and applying its precepts to the federal government only. It also added an additional plank to the definition of the "exercise of religion" so that it now included "any exercise of religion…including: (1) the use, building, or converting of real property for religious exercise; and (2) any conduct protected as a religious exercise under the First Amendment to the Constitution" (RLPA).

Overall, the language of the bill recommended strongly that the Act be interpreted in favor of broad protections for religious exercise. The bill contained thirty-nine cosponsors, twenty-nine of whom where Republican, and it passed the House with a

strong majority of 306 – 118. However, the RLPA stalled indefinitely in the Senate and eventually died in the Judiciary Committee ("Bill Summary, H.R. 1691").

The failure of RLPA to pass the Senate caused many religious supporters to ask how a bill based upon the RFRA, which was eagerly approved by Congress, could not succeed this time around. According to the American Atheists, RLPA's inability to succeed was due to a combination of three factors.

First, there was dissension in the ranks over the exact wording of the bill itself. Some religious conservatives felt that the current form of the bill could extend federal authority past what RFRA had allowed. Others withdrew their support after the House Subcommittee on the Constitution removed one of the bill's provisions that relied on the Commerce Clause of the Constitution. According to Canady, the Committee's Chairman, the removal was necessary because it "presented an insurmountable obstacle to the movement of this bill" (Byrd 1998).

Second, opposition that was not present in 1993 developed against the bill as civil rights groups, neighborhood and environmental coalitions, and even medical and child welfare groups argued that its focus on religion could trump neutral civil liberties statutes.

Finally, the Coalition for Free Exercise began losing members over RLPA in 1998 due to "practical and ideological reasons," including the Concerned Women for America, the Traditional Values Coalition, the Christian Action Network, and the Home School Legal Defense Fund in 1998, and the Anti-Defamation League, the National Council of Churches, and the Baptist Joint Committee in 1999 (American Atheists 1998;

Byrd 1998). Although the Coalition remained intact and retained the membership of several of its prominent civil liberties groups such as the ACLU and the People for the American Way, the ACLU still felt forced to admit in August of 1999 that "some courts may turn RLPA's shield for religious exercise into a sword against civil rights." (Bernstein 1999).

However, the 1999 RLPA failure did not deter other members of Congress from attempting to push through religious bills again. In February of 2000, Senator Orrin Hatch, a Republican from Utah, introduced the Religious Liberty Protection Act of 2000. The bill was a shortened version of the RLPA of 1999, including only the first section that prohibited the government from substantially burdening a person's religious exercise in government programs that were federally funded or where that burden affected interstate commerce. Yet, despite Senator Hatch's efforts at paring away the parts of the 1999 RLPA that may have hindered its acceptance in the Senate, the same concerns that plagued the 1999 bill were still present and his bill failed to leave the Senate calendar ("Bill Summary, S. 2081).

By the latter part of 2000, though, Senator Hatch succeeded in making the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) a public law. Like both the RLPA's, the RLUIPA was a smaller, more specific version of the RFRA that prohibited the government from imposing or implementing a land use regulation that imposed a substantial burden on the religious exercise of a person, or from imposing a substantial burden on the religious exercise of a person residing in or confined to an institution, even if both cases of burdens result from laws of general applicability.

However, the government could sustain such burdens if it demonstrated that they "(1) [are] in furtherance of a compelling governmental interest; and (2) [are] the least restrictive means of furthering that compelling governmental interest" (RLUIPA).

Although the bill's focus on prohibition of the burdening of religious land usages appears inconsequential within the scheme of expanding free exercise rights, it succeeds in eliminating the very issue that gave rise to *Boerne* and the overruling of the RFRA. RLUIPA's success was ensured when the ACLU endorsed it as a compromise between RLPA supporters and the concerns of civil liberties groups that free exercise privileges may trump other rights ("Hatch Rushing"). The bill passed with unanimous consent in the Senate on July 27, 2000, it passed again with unanimous consent in the House that same night, and by September 22 President Clinton signed it into law ("Bill Summary, S.2869).

An explanation for the passage of RFRA and RLUIPA could be political partisanship. At the time of the *Smith* decision, a conservative majority controlled the Court, led primarily by Justice Scalia and Chief Justice Rehnquist. According to data complied by Epstein and Knight on the years 1986-1995, that majority translated their conservatism into votes against increased civil liberties. Based on that information, the decision to withhold an exemption from Smith for religious peyote use is not unexpected. *Boerne*'s invalidation of the RFRA in 1997 is also in keeping with the Court's conservative trend, especially with the addition to the Court of ultra-conservative Clarence Thomas in 1993. Meanwhile, in the early 1990s Congress was controlled by a Democratic majority, placing Congress well to the left of the Court on

the political spectrum. The passage of the RFRA in early November of 1993 can be seen as the Democratic Congress's retaliation against a conservative Court's shift in judicial precedent.

However, the Republican Congressional takeover in 1993 severely undercuts this hypothesis. The new conservative majority should not have attempted to overturn a conservative Court decision, nor should it have attempted to reconstruct Democratic legislation in the form of the RLPA's and RLUIPA. The fact that Congress's majority did act out of conservative character demonstrates that as a whole it was pursuing its institutional interest in preserving policy-making power against Supreme Court challenges, regardless of the ideology of its members. Such disregard for ideology is also present in the religious interest groups' Coalition and once again reveals the lack of stability within the second regime's religious policy environment.

Since 1997, the Court has been silent in its debate with Congress over religious policy setting superiority. However, with RLUIPA finally in place as the "son of RFRA" the opportunity exists for litigation contesting its constitutionality to eventually make its way to the Court. As of now, three Circuit Courts of Appeals, including the sixth, seventh, and ninth, have heard appeals with RLUIPA claims and held in each that RLUIPA is constitutional. The Fourth Circuit has also heard a RLUIPA appeal and is alone in its denial of RLUIPA's constitutionality. These cases have been appealed to the Supreme Court, and with disagreement among four Circuits many consider RLUIPA as ripe for review.

If the High Court places a RLUIPA case on its docket and invalidates the law as it did the RFRA, the Court will have continued the pattern of contention between it and Congress that began with *Smith* and undoubtedly the debate for policy-making supremacy will persist. However, a decision to uphold RLUIPA would be a significant departure from *Smith*'s rule enshrining laws of general applicability from religion, although such departures are not unusual in the Court's history. Also, the Court would in effect be ceding a portion of its authority on religious policy to Congress, which may in turn satisfy some of the demands of the Coalition for Free Exercise. Nonetheless, these are merely predictions and can be confirmed only if the Court makes the pivotal decision to review a RLUIPA case. What is certain is that as long as the contention persists between the Court and Congress, a reemergence of the previous regime's stability is unlikely.

CONCLUSION

Overall, the second regime represents a definite shift away from the first regime as major changes have occurred in the ideas promulgated by the Supreme Court, the ability of concerned religious groups to have their interests heard, and the relationship of the institutions involved in religious policy-making. The equilibrium that existed prior to 1990 among all the involved actors and institutions collapsed. In its place emerged a highly complex environment where interest groups that were traditionally divided against one another have broken down barriers and joined together, despite major historical, institutional, and doctrinal differences among them. Conversely, the congenial relationship that existed between the Court and Congress disintegrated when, provoked by the Court's decision in *Smith*, Congress reawakened its long dormant Section Five powers located in the Fourteenth Amendment and applied them to the Free Exercise Clause. From this environment, two major goals have developed. The first is, obviously, the advancement of greater freedoms for religious observances. Both Congress and the remaining members of the Coalition continue to work towards this end, which can only be achieved with the Court's approval. The second goal is the attainment of dominance by either the Court or Congress over religious policy-making power and ultimately constitutional interpretation. There is no definite explanation as to why Congress has chosen to wage its interpretational war with the Court on the grounds of the First Amendment. The answer may lie in the pressure applied by the Coalition in the first years after Smith, or it may be found in the reinstatement of Republican

majorities in both Houses in 1993. Whatever the explanation, in its struggle against the Court, Congress has taken Justice Holmes' 1905 Preferred Freedom Doctrine and singled out the freedom of religion to be *the* preferred freedom, the first among equals. But no matter the tactics used or the grounds chosen, as long as the Court continues to have the last word on Congressional legislation, the battle for supremacy will continue.

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APPENDIX

MEMBERS OF THE FREE EXERCISE OF RELIGION
COALITION AT THE TIME OF *BOERNE* V. *FLORES*

- Agudath Israel
- American Association of Christian Schools
- American Baptist Churches USA
- American Civil Liberties Union
- American Conferences on Religious Movements
- American Ethical Union
- American Humanist Association
- American Jewish Committee
- American Jewish Congress
- American Muslim Council
- Americans for Democratic Action
- Americans for Religious Liberty
- Americans United
- Anti-Defamation League of B'nai B'rith
- Association on American Indian Affairs
- Association of Christian Schools International
- Baptist Joint Committee on Public Affairs
- Central Conference of American Rabbis
- Christian Church (Disciples of Christ)
- Christian Legal Society
- Christian Life Commission, Southern Baptist Convention
- Christian Science Committee on Publication
- Church of the Brethren
- Church of Scientology International
- Coalition for Christian Colleges and Universities Coalitions for America
- Concerned Women for America
- Council of Jewish Federations
- Council on Religious Freedom
- Council on Spiritual Practices
- Criminal Justice Policy Foundation
- Episcopal Church

Friends Committee on National Legislation
General Conference of Seventh Day Adventists
Guru Gobind Singh Foundation
Hadassah, the Women's Zionist Organization of America
Home School Defense Association
International Association of Jewish Lawyers and Jurists
International Institute for Religious Freedom
The Jewish Reconstructionist Federation
Mennonite Central Committee US
Muslim Prison Foundation
Mystic Temple of Light, Inc.
National Association of Evangelicals
National Campaign for a Peace Tax Fund
National Committee for Public Education and Religious Liberty
National Council of Churches of Christ
National Council of Jewish Women
National Council on Islamic Affairs
National Jewish Commission on Law and Public Affairs
National Jewish Community Relations Advisory Council
National Sikh Center
Native American Church of North America
Native American Rights Fund
North American Council for Muslim Women
People for the American Way
Peyote Way Church of God
Clifton Kirkpatrick, as stated clerk of the General Assembly of the Presbyterian Church
Rabbinical Council of America
Sacred Sites Inter-faith Alliance
Soka-Gakkai International, USA
Traditional Values Coalition
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregation of America
Unitarian Universalist Association of Congregations
United Church of Christ, Office for Church in Society
The United Methodist Church and the General Board of Church and Society and the General Council on Finance and Administration
United Synagogue of Conservative Judaism
Wisconsin Judicare
Women of Reform Judaism, Federation of Temple Sisterhoods

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Emerging Leader Award, ADPi
Foundation Graduation Honors
Phi Eta Sigma National Honor Society
Phi Kappa Phi National Honor Society
Silver Key International Honor Society
Golden Key International Honor Society
Order of Omega National Honor Society
Texas A&M Dean's Honor Roll
University Graduation Honors
Research Fellows Graduation Honors

Leadership

Texas A&M Student Government Association Judicial Court
Associate Justice

Texas A&M Student Senate
Off-campus Senator

Texas A&M Legal Education Group for Aggie Law Students (LEGALS)
President
Vice President of Mock Trial