Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens

by ERIC D. YORDY*

Introduction

Just north of the historic Route 66 town of Flagstaff, Arizona, sit the San Francisco Peaks, beautiful spectacles of nature and glowing examples of limited government intervention and constitutional interpretation gone awry. For years, native tribes who hold the Peaks sacred have been clashing with the United States Forest Service over approval to develop a ski resort on the Peaks.[1] This recurring dispute between religious sanctity and economic development has been analyzed both under the First Amendment's Free Exercise Clause and under the newer Religious Freedom Restoration Act ("RFRA"), a federal statute signed into law in 1993 in the aftermath of the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*.[2] That 1990 decision, criticized for ignoring the principle of a limited federal government and the First Amendment freedoms of American citizens, engendered a falling-out in Congress and the lower courts that moved religious freedom from its fairly well-defined position under the First Amendment to a position of confusion—where it is somewhat protected under the Constitution, but is now also protected under federal and state statutes with unknown and undefined boundaries.

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1. *See* Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984).

2. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 872 (1990).

Using the dispute between the native tribes of northern Arizona and the federal government over the development of the Peaks, this article will demonstrate how the Supreme Court's decision in *Smith*, as well as the subsequent activities of courts and legislative bodies, has disrupted well-settled law and has created a quagmire of confusion related to religious freedom. The Supreme Court will likely have an opportunity to fix this legal disaster as the current Peaks lawsuit progresses through the court system to an inevitable writ of certiorari. As it faces this particular suit, the Court can and should overrule *Smith*, declare RFRA unconstitutional, and restore the proper test for the analysis of the First Amendment's Free Exercise Clause.

I. Early Free Exercise Jurisprudence

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[3] From the beginning, free exercise of religion was not an unlimited license to behave in any way one saw fit.[4] In its first constitutional free exercise case addressing the amendment, the Supreme Court upheld anti-polygamy laws and noted that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[5] In 1940, when it overturned the conviction of several Jehovah's Witnesses for religious solicitation, the Court affirmed that beliefs were to be free of regulation and that some actions, but not all, were not to be regulated.[6] While these early cases began to interpret the boundaries of the Free Exercise Clause, they did not give any guidance to the extent of government regulation allowed, nor did they enunciate a clear test to determine the constitutionality of regulating religious behavior.[7] Thus, government regulations of behavior were to be reviewed on a case-

3. U.S. CONST. amend. I.

4. For a comprehensive review of religion clause cases and jurisprudence, see Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7 (1993).

5. Reynolds v. United States, 98 U.S. 145, 164 (1878). In 1847, the Court heard a case involving the Catholic Church, but did not mention the Free Exercise Clause at all. Permoli v. Municipality No. 1 of New Orleans, 44 U.S. 589 (1845); *see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (containing a detailed history of the origins of the Free Exercise Clause).

6. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

7. *See* Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward A Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 13 (2001).

by-case basis—a method that was neither a model of judicial efficiency nor helpful to decision makers.[8]

Because cases related to burdens on religion were somewhat rare, the needed guidance did not come from the Court until 1963 with the enunciation of the compelling interest test in the famous case of *Sherbert v. Verner*.[9]

II. The Rise of the Compelling Interest Test

In *Sherbert v. Verner*,[10] the Supreme Court held that South Carolina illegally withheld unemployment compensation from a Seventh Day Adventist who was fired (and could not find other work) because she would not work on her religious day of rest: Saturday.[11] In its analysis, the Court used what has become known as the "compelling interest test."[12] That test mandates that in order for a state action to permissibly burden religion, the action must be the least burdensome way for the state to achieve a compelling state interest.[13]

Nearly ten years later, the Court solidified the compelling interest test as the appropriate test in Free Exercise cases.[14] In *Wisconsin v. Yoder*, Amish children challenged a state compulsory education statute because of their sincerely held religious belief that education in high school or beyond could endanger their salvation.[15] The Court noted that even though the government may have the jurisdiction to control education, 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."[16] Using the compelling interest test, the Court determined that there was no sufficient justification for compulsory

8. One scholar has argued that the Court had actually set forth something of a test in the form of a coherent jurisdictional analysis and that the amendment put certain things outside the jurisdiction of the government, but not others. Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U. L. REV. 7 (1995). While this argument is interesting, the jurisdictional test is based primarily in the idea that certain historically religious practices are exempt from regulation (sacramental use of bread and wine, assembling for worship and proselytizing, for example), but does not take into account non-mainstream religious practices that may be sincere and worthy of protection from regulation.

9. Sherbert v. Verner, 374 U.S. 398, 398 (1963).

10. *Id.*

11. *Id.*

12. *See generally* 42 U.S.C. § 2000bb(b) (West 2008); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 887 n.4; *Id.* at 895 (O'Connor, J., concurring).

13. *Sherbert*, 374 U.S. at 403.

14. Wisconsin v. Yoder, 406 U.S. 205, 205 (1972).

15. *Id.* at 209.

16. *Id.* at 220 (citing *Sherbert*, 374 U.S. at 398).

education as applied to the Amish.[17] In its analysis, the Court rejected the state's interests in preparing students for participation in the political system, as well as protecting children from ignorance and from unscrupulous employers who may violate the child labor laws if children are readily available instead of in school.[18]

After *Sherbert* and *Yoder*, the test for analyzing claims seemed clear, and it seemed that the government had a substantial task in proving that its regulations were necessary and narrowly tailored to satisfy compelling needs—a standard that was possible for the state to satisfy, but that clearly favored preserving religious freedom. Yet, despite the apparent clarity of the test, the Court had never authoritatively defined the terms "compelling interest" or "burden on religion." Consequently, over the next twenty years, the Court struggled with its application, sometimes finding compelling interests to support government action that burdened religion, sometimes creating exceptions to the use of the test, and sometimes failing to apply the test at all.[19]

When using the test, the Court often found that the subject matter in the case before it warranted exception to the compelling interest analysis. Rather than defining the legal terms of the test or fashioning guidance for determining what constitutes a compelling government interest and applying that guidance to the interests before it, the Court avoided the analysis, choosing instead to fashion judicially expedient exceptions or to ignore the compelling interest test altogether. Examples of exceptions created expressly or by omission of the test include military regulations[20] and prison regulations.[21] In addition, the lack of definition of the term "burden" allowed courts to conclude many cases without even looking to the compelling interest provisions by setting the burden on religion at a high standard.[22]

For example, in 1979 the United States Forest Service approved expansion of a forty-four-year-old ski resort, the Arizona Snowbowl, which

17. *Id.* at 234.

18. *Id.* at 222–29. Had the Court reverted to the jurisdictional test hypothetically created in earlier cases, it is likely that the Amish would have been required to attend school even though it was against their religion. *See supra* text accompanying note 8.

19. *See* Titus, *supra* note 8, at 15–22.

20. Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (stating that the "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 . . . .").

21. O'Lone v. Estate of Shabazz, 482 U.S. 342, 342 (1987) (giving great deference to the penal system that is similar to that given the military).

22. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984).

was operated under a Special Use Permit from the Forest Service.[23] The Snowbowl sits on land that is considered sacred by numerous Native American tribes in the northern Arizona region.[24] After the environmental impact statement approved development, the tribes sued under the First Amendment's Free Exercise Clause, alleging that the development of the Peaks constituted a significant burden on their religion without a compelling interest on the part of the government.[25] The three-judge panel at the U.S. Court of Appeals for the District of Columbia Circuit (which included now Supreme Court Justice Ruth Bader Ginsburg) never analyzed the compelling interest prong of the test because the judges held that the tribes failed to show a burden on their religions.[26] This lack of burden was found because the Snowbowl ski resort constituted only a small percentage of the Peaks and the tribes continued to have access to other areas of the Peaks.[27] The panel, while specifically stating that they were not involving the courts in any determination of religious beliefs, went on to affirm the lower court's decision because the religious practices of the tribes could be performed at another site.[28] According to the court, the analysis was not about the centrality of a practice to religion, but about the importance of a specific geographical location to that practice.[29]

Effectively, it was the lack of definition of the term "burden" that led the Court of Appeals to its finding. The Supreme Court of the United Sates denied certiorari,[30] leaving the uncertainty over what constitutes a burden,

23. Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984). In response, several tribes alleged violations of their First Amendment right to free exercise of religion, the American Indian Religious Freedom Act, fiduciary duties that the government owed the tribes, the Endangered Species Act, the National Historic Preservation Act, the Multiple-Use Sustained Yield Act, the Wilderness Act, the National Environmental Policy Act, the Administrative Procedure Act and two federal statutes regulating private use of federal lands. *Id.*

24. The Navajo, the Hopi, the Havasupai, the Hualapai, the Yavapai-Apache, and the White Mountain Apache all consider the San Francisco Peaks to be significant to, if not central to, their religious beliefs and practices. *Id.* at 739–40. This has never been in dispute in the legal actions. *See* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1034–38 (9th Cir. 2007).

25. *Wilson*, 708 F.2d at 739.

26. *Id.* at 740.

27. *Id.* at 744–45 (noting that 777 of 75,000 acres (approximately 1 percent) were in use as the resort at the time of the Wilson opinion).

28. *Id.* at 744.

29. *Id.*

30. Hopi Indian Tribe v. Block, 464 U.S. 1056, 1056 (1984). Many of the activities in the current suit between the tribes and Snowbowl were approved under this 1979 Environmental Impact Statement. Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 870 n.2 (2006).

as well as what constitutes a compelling interest, to be argued among the lower courts.[31]

III. *Employment Division v. Smith*: The Supreme Court Attempts to Clarify Free Exercise Jurisprudence

In 1990, the Supreme Court moved away from the compelling interest test in *Employment Division v. Smith*.[32] This case brought before the Court a terrible dilemma: a challenge to the state of Oregon's version of the Controlled Substances Act ("CSA") on religious freedom grounds.[33] The Court clearly did not want to overturn an important criminal law with tremendous public support and history, such as the state version of the CSA, but was faced with a claim that the law violated the Free Exercise Clause. Employing reasoning that hearkened back to the earliest of the free exercise cases, a majority of the Court upheld the Oregon CSA and reaffirmed that the state would violate the Free Exercise provisions of the First Amendment if it regulated conduct specifically for religious reasons or limited to religious circumstances.[34] The majority opinion, written by Justice Scalia, then took an enormous step away from settled jurisprudence by stating that when "prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[35] In making that statement, the Court rejected the proposition that the compelling interest test of *Sherbert* and *Yoder* applies to laws of general applicability and instead limited the compelling interest test to unemployment compensation rules.[36] Justice Scalia noted the long line of free exercise cases where the test was not applied to facially neutral government action with an incidental burden to religion.[37] What the opinion failed to do was recognize that each

31. The panel in *Wilson* cited a number of lower court decisions from the Sixth and Tenth Circuits as well as District Courts in California, South Dakota, and Alaska where no burden to religion was found in land development cases. *Wilson*, 708 F.2d at 742–43 n.4.

32. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 872 (1990).

33. *Id.* at 874.

34. *Id.* at 877 (noting that it is likely true, but that no Supreme Court decision has specifically stated such). For more on the history of Free Exercise jurisprudence, see *supra* text accompanying note 5.

35. *Id.* at 878.

36. *Id.* at 880–83. In contrast, Justice O'Connor, in concurrence, noted that "[t]he compelling interest test [mandates] . . . that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests . . . ." *Id.* at 895 (O'Connor, J., concurring).

37. *Id.* at 880, 883–84 (majority opinion) (Included in the list were prohibitions on polygamy and child labor, validity of Sunday closure laws, the military draft and the requirements to have a Social Security number, government logging and road building, military dress

of those exceptions constituted what the Court would consider a compelling interest on the part of the government, at least in the eyes of the Justices who made those decisions.

In her concurrence, Justice O'Connor strongly disagreed with the Court's interpretation of First Amendment jurisprudence. Acknowledging the problems the Court had allowed to persist in earlier cases, she nevertheless noted that the First Amendment "does not distinguish between laws that are generally applicable and laws that target particular religious practices."[38] In her analysis of First Amendment jurisprudence, joined by three other Justices, she observed that the Court historically chose not to apply the compelling interest test only in very narrow fields where the government traditionally has great leeway (such as military and prison regulations).[39] Her observations support the proposition that the problem with the prior cases was not that the compelling interest test was flawed, but that the Court itself failed to acknowledge that it was using the test. To be even more correct, Justice O'Connor should have stated that the cases cited by Justice Scalia as examples of not applying the compelling interest test were, in fact, cases where the compelling interest test either implicitly was applied, or instances where the interest was so obvious to the Court that it went unstated.

Justice O'Connor correctly noted, however, that the First Amendment limits on government action as enunciated by the majority were frivolous since "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such."[40] According to Justice O'Connor, using the compelling interest test when evaluating the denial of unemployment benefits, but not using the same when reviewing other statutes that burdened religion was illogical.[41] Instead, the proper constitutional analysis would require applying the test even when it was generally agreed that the state had a compelling interest, such as in cases concerning criminal prohibitions.[42] Justice O'Connor applied the test and determined that the compelling interest in regulating controlled substances, which was the issue in the *Smith* case, was sufficient for the law to be

regulations and prisoner work requirements.). *See supra* note 20 and accompanying text for more discussion on this issue.

38. *Id.* at 894 (O'Connor, J., concurring).

39. *Id.* at 900–01.

40. *Id.* at 894.

41. *Id.* at 898.

42. *Id.* at 899.

constitutional.[43] Justice Blackmun, joined by Justices Brennan and Marshall, joined Justice O'Connor's concurrence but dissented as to the result, applying the compelling government interest test but finding no such interest in this case.

IV. The Religious Freedom Restoration Act of 1993

Almost immediately after the *Smith* decision, Congress looked to Justice O'Connor's concurrence and began discussing legislation to restore the compelling interest test.[44] Bills were introduced in 1991 and 1992 before the RFRA finally passed in 1993, almost without opposition.[45] The stated purpose of RFRA was to "restore the compelling interest test as set forth in *Sherbert* and *Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[46]

The key provision of RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[47] However, the statute also provided that the government may substantially burden religion if there is a compelling governmental interest and the burden is a result of the least restrictive means to further that interest.[48] Unfortunately, Congress did no better than the Supreme Court in defining the terms "burden" or "compelling interest."

After the passage of RFRA, commentators and scholars argued at great length whether the statute was constitutional. Opponents of RFRA argued that Congress lacked any authority to pass such legislation and that doing so violated the principles of separation of powers and federalism.[49] Conversely, proponents of RFRA argued that it was not a constitutionally based law as applied to the federal government, but was instead a form of

43. *Id.* at 906. The three justices who joined Justice O'Connor's analysis of First Amendment jurisprudence also applied the compelling interest test but determined that the interests of the state were not sufficient.

44. S. REP. No. 103-11, at 2 (1993).

45. *Id*; *see* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2000) (for the final RFRA as amended in 2000); 139 CONG. REC. 26,416 (daily ed. Oct. 27, 1993) (reporting 97-3 Senate vote in favor of passage of RFRA); 139 CONG. REC. 27,239–41 (daily ed. Nov. 3, 1993) (reporting no objection to unanimous consent request in the House).

46. 42 U.S.C. § 2000bb(b)(1) (2000).

47. *Id.* § 2000bb-1(a) (2000).

48. *Id.* § 2000bb-1(b) (2000).

49. *See, e.g.*, Eugene Gressman & Angela Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996) (arguing that RFRA violates separation of powers principles); Christopher Eisgruber & Lawrence G. Sagar, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) (arguing that RFRA is unconstitutional for various reasons).

self-regulation that committed the government to not burden religion in the future.[50] In 1997, in *City of Boerne v. Flores*, the Supreme Court declared that RFRA was unconstitutional as to state and local governments, but made no comment on its constitutionality as to the federal government.[51]

In its most recent RFRA case, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Supreme Court may have implicitly upheld RFRA as constitutional when it upheld a preliminary injunction granted under RFRA that prevented the enforcement of the Controlled Substance Act.[52] The Court may have implied that RFRA was valid legislation when Justice Roberts wrote in the unanimous opinion, "[There is no] cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one."[53] At best, the Court may have suggested that a court's task under RFRA is legitimate and that the legislation itself is valid.[54]

The few Supreme Court RFRA opinions opened the door to more legislation on religious freedom. In the aftermath of *City of Boerne*, states began passing their own religious freedom acts.[55] In addition, Congress spent three years in debate and then attempted to overturn *City of Boerne* in part by passing the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[56] which mandated the compelling interest test for claims related to government land use regulations[57] and institutionalized persons.[58] Yet instead of clarifying things, Congress merely added to the confusion.[59]

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50. *See generally* Gregory Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903 (2001).

51. City of Boerne v. Flores, 521 U.S. 507, 507–56 (1997).

52. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 418–39 (2006); *see* Frank J. Ducoat, *Clarifying the Religious Freedom Restoration Act: Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 126 S. CT. 1211 (2006), 8 RUTGERS J. L & RELIGION 6 (2006). The Controlled Substances Act can be found at 21 U.S.C. §§ 801–971.

53. *Gonzales*, 546 U.S. at 439.

54. *Id.*

55. *See, e.g.*, R.I. Gen Laws §§ 42-80.1-1 to -4 (2007); 775 Ill. Com. Stat. 35 (2007), Conn. Gen. Stat. § 52-571b (2008); Okla. Stat. tit. 51, § 251 (2008).

56. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2000); *see* Sara Smolik, *The Utility and Efficacy of the RLUIPA: Was It a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723, 724 (2005) (giving a brief legislative history of RLUIPA).

57. 42 U.S.C. § 2000cc(a)(1) (2000). RLUIPA is only available to plaintiffs who can show an ownership interest in the land in order to focus on zoning regulations and to not interfere with government use of government-owned land.

58. *Id.* § 2000cc-1(a). However, RLUIPA was held constitutional by the Court in *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Justice Ginsburg noted in a footnote that the Supreme Court has not addressed the constitutionality of RFRA. *Id.* at 715 n.2.

59. *See* 42 U.S.C. § 2000cc-5 (2000).

The current dispute regarding the Arizona Snowbowl is evidence of this confusion.

V. Free Exercise Confusion in Play: The Current Snowbowl Suit

The Arizona Snowbowl dispute is an ideal example of how the *Smith* developments have created nothing but confusion. In 2002, new owners of Snowbowl submitted a proposal to add a snowplay area and implement snowmaking at the resort using reclaimed water.[60] In response to this proposal, the United States Forest Service issued an environmental impact statement permitting the requested developments to be made.[61]

Again, the Navajo Nation and the Sierra Club jointly filed a lawsuit.[62] As in the earlier case, the plaintiffs alleged violations of the free exercise of religion, but now under RFRA instead of the First Amendment.[63] The tribes could not sue under RLUIPA because their lack of ownership interest in the Peaks precluded such a suit.[64] In addition, the parties could not use the Arizona version of RFRA[65] because federal, rather than Arizona state government action, was implicated.

The district court held an eleven-day bench trial on the RFRA claim and issued an opinion that read very much like the *Wilson* decision.[66] In a few brief paragraphs, Judge Rosenblatt noted that RFRA imposed the compelling interest test as it existed prior to the *Smith* case and acknowledged the definitional problem, stating that the lack of definition in RFRA should be clarified using pre-*Smith* Free Exercise case law.[67] But because the Supreme Court never set forth a satisfying definition either, Judge Rosenblatt referred back to a Ninth Circuit definition.[68] Using that

60. Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 870–71 (2006).

61. *Id.* at 869 n.3.

62. By the time the case was set for trial, numerous plaintiffs were added and separate complaints were consolidated so that the final list of plaintiffs included the Navajo Tribe, the Sierra Club, the White Mountain Apache Tribe, the Yavapai-Apache Tribe, the Center for Biological Diversity, the Flagstaff Activist Network, the Hopi Tribe, the Hualapai Tribe, the Havasupai Tribe and a number of individual members of those tribes. *See id.* at 869 n.1.

63. *Id.* at 871.

64. *See* 42 U.S.C. 2000cc-5 (2000).

65. A.R.S. §§ 41-1493 to -1493.02 (2008).

66. Judge Rosenblatt cites to the *Wilson* opinion a number of times in coming to the same conclusion. *Navajo Nation*, 408 F. Supp. 2d 866, 904-06 (2006).

67. *Navajo Nation*, 408 F. Supp. 2d at 903.

68. The test used states that "an action 'burdens the free exercise of religion if it puts substantial pressure on an adherent to modify his behavior and violate his beliefs, including when . . . it results in the choice of an individual of either abandoning his religious principle or

definition, and citing *Wilson*, the court then found that the plaintiffs failed to demonstrate that the developments and approved upgrades would burden their religion.[69]

Unlike the panel in *Wilson*, Judge Rosenblatt continued in his opinion to address the "compelling interest" and the "least restrictive means" provisions of the RFRA test to ensure that his rationale was clear to the appellate courts in what would be an inevitable appeal.[70] Interestingly, he did not enunciate any test or definition for determining whether an interest was a "compelling interest."[71] Even so, Judge Rosenblatt articulated three compelling interests to support the decision by the Forest Service: The federal mandate that the Forest Service hold federal lands for multiple uses, the safety of skiers, and the potential violation of the Establishment Clause of the First Amendment if development was blocked.[72]

In determining whether the approved upgrades were the least restrictive means to achieve those compelling interests, the court gave deference to the thorough investigation of alternatives completed by the Forest Service in addition to an inability of the tribes to proffer any means that were less restrictive than the Forest Service's approved means.[73] Judge Rosenblatt found for the defendants on the RFRA claim, allowing the owners of the Snowbowl to improve operations through, among other things, the making of snow using reclaimed water.

Just a year later, a Ninth Circuit panel overturned the district court with regard to the RFRA analysis in *Navajo Nation*.[74] The panel rejected Judge Rosenblatt's *Wilson*-like analysis of the burden and held that the introduction of reclaimed water to the snow areas alters the analysis and would significantly burden the tribes' religions. In moving to the compelling interest prong of the test, the Ninth Circuit rejected the stated compelling interests as too general as well as insufficient to meet the standard of the test.[75] Citing either the lack of evidence or the lack of

facing criminal prosecution.'" *Id.* at 903–04 (citing Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002)).

69. *Id.* at 905–06 (analogizing to Wilson v. Block, 708 F.2d 735, 740, 745 (D.C. Cir. 1983), to highlight that the plaintiffs in *Navajo Nation* would not endure a substantial burden to practice their religion under RFRA.)

70. *Id.* at 906–07.

71. *Id.*

72. *Id.* at 906.

73. *Id.* at 907.

74. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1024 (9th Cir. 2007).

75. *Id.* at 1045.

connection to the stated interest, the Ninth Circuit quickly moved on to a discussion of RFRA and the status of the law.[76]

In its analysis, the panel attempted to clarify the confusion over RFRA by claiming that the protections of RFRA for religion were much larger than the previous protections of the First Amendment.[77] As part of their argument, the panel looked directly to the definitional problem previously noted. They specifically mentioned that the use of the term "burden religion" instead of the First Amendment language of "prohibiting the free exercise thereof" in the statute indicated a difference in meaning.[78] The fallacy of this argument is that the Supreme Court itself consistently used the term "burden on religion" in analyzing cases under the First Amendment. Still, even as fantastic as this statement seems, it was consistent with prior statements made by the Ninth Circuit with regard to RFRA.

Within three years of the passage of RFRA, and even before the amendments of RLUIPA, the Ninth Circuit noted in 1996—eleven years before deciding *Navajo Nation*—that RFRA's language mandates a different analysis than the language of the First Amendment.[79] Specifically, the Ninth Circuit stated that the "statute goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden' . . . ."[80] In *Navajo Nation*, the Ninth Circuit adopted a new definition of burden, stating that it "must prevent the plaintiff 'from engaging in [religious] conduct or having a religious experience.'"[81]

Beyond the definition of "burden," the Ninth Circuit continued to argue that RFRA was broader than the First Amendment even though RFRA directly states the intention of Congress to restore the compelling interest test to cases related to free exercise of religion claims.[82] In their view, RFRA was more protective of religious liberties than the First Amendment was prior to *Smith* because RFRA expanded the compelling

76. *Id.* at 1045–46. The Forest Service and the owners of Snowbowl argued that the economic survival of the resort depended on snowmaking and that the closure of Snowbowl would eliminate the multiple uses required. The court noted that, even if the closure of Snowbowl was a realistic possibility, there is no compelling government interest in avoiding that result.

77. *Id.* at 1032.

78. *Id.*

79. United States v. Bauer, 804 F.3d 1549, 1558 (9th Cir. 1996).

80. *Id.*

81. *Navajo Nation*, 479 F.3d 1024, 1042 (9th Cir. 2007) (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)) (alteration in original).

82. *Id.* at 1033 (ignoring the statutory language found at 42 U.S.C. § 2000bb(b)(1) (2000)).

interest test to *every* government action that may burden religion.[83] The Ninth Circuit panel pointed to those areas where the test apparently was not utilized as examples where courts used less demanding tests to determine if a regulation that impacted religion was valid.[84] The panel also pointed to Justice Kennedy's language in *City of Boerne v. Flores* where Justice Kennedy also failed to acknowledge the implicit judging of the interests when stating that prior cases did not utilize the compelling interest test.[85] It is important to note that the apparent legitimacy of such arguments are premised around the Supreme Court's failure to explicitly use the compelling interest test in applicable instances and choosing instead to write opinions as if the compelling interest test, no matter how implicitly present, did not apply.

On May 28, 2007, the United States Forest Service and the owners of the Snowbowl filed a petition for rehearing with the Ninth Circuit.[86] On August 8, 2008, the en banc panel issued its opinion that reflected much of the debate during oral arguments.[87] During those arguments of December of 2007, it was clear that the judges were struggling with the definitions and scope of RFRA. Chief Judge Kozinski questioned one of the tribe's attorneys regarding the scope of RFRA and the textual basis for expansion beyond pre-*Smith* doctrine.[88] Other questions related to how far RFRA could expand prior First Amendment jurisprudence without facing an Establishment Clause violation and whether a broad interpretation of RFRA would create some "categorical exclusion" of the ability of the government to control and use government lands.[89] Discussion with counsel from all parties also covered the terminology in the statute,

83. *Id.*

84. *Id.*

85. City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

86. *See* Cyndy Cole, *Snowbowl Owner Vows to Pursue Snowmaking*, ARIZ. DAILY SUN, Mar. 13, 2007, at A1, *available at* http://www.azdailysun.com/articles/2007/03/13/news/20070313_news_12.txt; *see also* Howard Fischer, *Snowbowl Fight Rages On*, ARIZ. DAILY SUN, Mar. 13, 2007, at A1, *available at* http://www.azdailysun.com/articles/2007/03/13/news/20070313_news_11.txt; Cyndy Cole, *Denial of Snowmaking Appealed*, ARIZ. DAILY SUN, May 31, 2007, at A1, *available at* http://www.azdailysun.com/articles/2007/05/31/news/20070531_front%20page_11.txt. The en banc panel included Chief Judge Alex Kozinski and Judges Pregerson, O'Scannlain, Rymer, Kleinfield, Silverman, Fletcher, Fisher, Clifton, Bea and Ikuta. The hearing is available online at http://www.ca9.uscourts.gov/ [hereinafter En Banc Oral Arguments] (follow: "Audio Files" hyperlink and enter "06-15371EB" as the "case number").

87. Navajo Nation v. U.S. Forest Serv., No. 06-15371, 2008 U.S. App. LEXIS 16860 (9th Cir. Aug. 8, 2008).

88. En Banc Oral Arguments, *supra* note 86.

89. *Id.*

specifically the term "substantial burden."[90] Specifically, one judge asked for a unified definition of "substantial burden" from the tribes and individuals who brought suit.[91] The term "compelling government interest" also came into the debate as one judge asked why the management of the government's own land by the government simply would not be a compelling interest.[92]

The six-judge majority's opinion attempted to clarify the definitional issues addressed in the oral arguments, focusing on the term "substantial burden."[93] The opinion focused on RFRA's stated purpose of restoring the compelling interest "as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*."[94] Taking this to mean that Congress intended a limited definition of the term to situations directly like those in *Sherbert* and *Yoder*, the Court stated that a "substantial burden" only occurs "when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).[95] Under this combined definition, the Court found no burden on the tribe's religion and thus did not need to address the definition of "compelling government interest." In the dissenting opinion, three of the panel judges argued that the majority's definition was unduly restrictive and ignored all of the opinions interpreting the Free Exercise Clause between *Yoder* and *Smith*.[96] The dissent pointed to the historical jurisprudence as well as the broad scope of RFRA as stated in the statute to support a broader interpretation of the term "substantial burden."[97] The dissent adopted a prior Ninth Circuit definition, stating that religion is burdened "where government action prevents an individual 'from engaging in [religious] conduct or having a religious experience' and the interference is 'more than an inconvenience.'"[98]

Because the Ninth Circuit majority's definition was created by the panel and is not founded in any direct Supreme Court language, it is

90. *Id.*

91. *Id.*

92. *Id.* Other topics of discussion related to the ability of the Forest Service to rely on the Arizona Department of Environmental Quality's determination of the safety of the water. *Id.*

93. Navajo Nation v. U.S. Forest Serv., No. 06-15371, 2008 U.S. App. LEXIS 16860 at *16 (9th Cir. Aug. 8, 2008).

94. *Id.* at *21 (referring to the language in 2 U.S.C. § 2000bb(a)(5)).

95. *Id.* at *24.

96. *Id.* at *74–75.

97. *Id.* at *76–100.

98. *Id.* at *108 (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)) (alteration in original).

expected that the native tribes will ask the Supreme Court to hear the case, opening the door for the Justices to clear up the confusion they began with the *Smith* opinion.

VI. Relieving the Current Burden

The Snowbowl dispute is a clear example of the confusion that has been created by the *Smith* decision and the enactment of RFRA in response to it. The Supreme Court must address this confusion and is likely to have the opportunity with the Snowbowl dispute. The discussion of the issues that need resolution revolves around the constitutionality of RFRA, the viability of *Smith*, and the vocabulary and definitions of key Free Exercise terms. The Supreme Court has three viable options with regard to the problem. The first option is to declare RFRA constitutional and then address the two issues set out by the Ninth Circuit panel in *Navajo Nation*: the scope of RFRA and the definitions of the terms of RFRA. While this option is viable, it does not address the concerns of multiple religious freedom laws or the proper constitutional place for religious freedom. The second option is to declare RFRA unconstitutional, and do nothing else, leaving the *Smith* analysis as the current state of the law. The final, and most preferable approach, would entail declaring RFRA unconstitutional, overturning *Smith* and setting forth appropriate definitions for the terms of the compelling interest test.

A. Option 1: Working Within the Current Structure and Patching the Problem

Should the Supreme Court declare RFRA constitutional as to the federal government, then they must address two other questions: the scope of RFRA and the interpretation of defined terms in RFRA.

1. The Scope of RFRA

If RFRA is constitutional, then the Supreme Court must address the concerns of the original Ninth Circuit panel with regard to the scope of RFRA.[99] The legislative history of RFRA provides clear evidence of Congress's intent to reverse the effect of the *Smith* decision.[100] For instance, Representative Brooks of Texas stated that RFRA "will restore the standard for addressing claims under the Free Exercise Clause of the

99. *See supra* notes 74–85 and accompanying text.

100. *See, e.g.*, 139 CONG. REC. E1243-03 (1993) (statement of Rep. Franks); 139 CONG. REC. E1234-01 (1993) (statement of Rep. Cardin); 139 CONG. REC. H2356-03 (1993) (statement of Rep. Brooks); 139 CONG. REC. H2356-03 (1993) (statement of Rep. Tucker); S. REP. 103-111, at 1898 (1993); H.R. REP. No. 103-88 (1993).

First Amendment as it was prior to the Supreme Court's Smith decision in 1990."[101] In addition, Representative Hyde of Illinois spoke in support of RFRA stating that it "will overturn the 1990 decision of the U.S. Supreme Court in Employment Division versus Smith."[102] Further, current Speaker of the House Nancy Pelosi, then a California Representative, stated that "it is necessary to return the criteria for abridging religious freedom to pre-*Smith* days."[103] Moreover, the committee report to the full U.S. Senate declared that RFRA was "intended to restore the compelling interest test previously applicable to free exercise cases."[104] Never in the available legislative history did a senator or representative argue that RFRA should be passed because it increased the protections to religion. Therefore, if the Court takes this route, it will have to contend with a Ninth Circuit interpretation of the statute that in no way took this legislative history into account.

Also, nowhere in the legislative history is there any discussion of the exceptions that were made in First Amendment jurisprudence prior to *Smith*. For example, in *Lyng v. Northwest Indian Cemetery Protective Association*, decided just two years prior to the *Smith* opinion, Justice O'Connor refused to apply the compelling interest test where Native American tribes brought a First Amendment claim stating that the government violated their free exercise rights by putting a highway through sacred lands and thus destroying the sacred nature of the lands.[105] Justice O'Connor relied on an exception related to the conduct of the "government's internal procedures" to state that the land at issue was federal land and that individuals do not have the right to extract behavior from the government.[106]

Even if the Court adopts the Ninth Circuit's broad reading of RFRA, the Court would then be forced to reconcile that compelling interest analysis with the *Lyng* decision. In their *Lyng* dissent, Justices Brennan, Marshall, and Blackmun noted that the majority "[did] not for a moment suggest that the interests served by the . . . road are in any way compelling,

101. 139 CONG. REC. H2356-03 (statement of Rep. Brooks).

102. *Id.* (statement of Rep. Hyde).

103. *Id.* (statement of Rep. Pelosi).

104. S. REP. No. 103-111 at 1898 (1993).

105. Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439 (1988). Interestingly, Justice O'Connor wrote the *Lyng* opinion and then dissented in *Smith*, the very case that resulted in the passage of RFRA and the potential new standard that will create a result distinctly different from the *Lyng* opinion.

106. *Id.* at 448–53.

or that they outweigh the destructive effect construction of the road will have on the [tribe's] religious practices."[107]

In *Lyng*, Justice O'Connor failed to recognize that she was on some level applying the compelling interest test to the facts to determine that the interest was compelling. Instead, she fell into the same trap as prior Justices in looking to an "exception." As noted above,[108] the Court should review its cases where exceptions were created or where the compelling interest test was omitted from opinions and clarify that the use of the test was there, albeit implicit. As such, the Court should be faithful to the language and legislative history and clarify the scope of the statute, noting that the use of the test in all cases is appropriate and more true to precedent than the Ninth Circuit indicated.

2. *The Language of RFRA*

Though the Supreme Court has explicitly stated that RFRA mandates the adoption of pre-*Smith* standards, the lack of definitions for key terms in RFRA, as well as the passage of RLUIPA and its cross-referenced terms, continues to create ambiguity in lower courts.[109] Because the definition of "exercise of religion" in RFRA is referenced to the definition in RLUIPA, it is informative to look at the two together.[110]

In 2006, the Ninth Circuit looked to Supreme Court jurisprudence to determine the meaning of "substantial burden" for RLUIPA and stated that a substantial burden "must impose a significantly great restriction or onus" on a religious exercise.[111] In *Navajo Nation*, the original Ninth Circuit panel adopted yet a different definition for RFRA, stating that a burden "must prevent the plaintiff 'from engaging in [religious] conduct or having a religious experience.'"[112] Thus for two statutes with similar language, the Ninth Circuit has different definitions to follow.

In interpreting RLUIPA, the Fifth Circuit quoted the legislative history to conclude that the term "substantial burden" should be interpreted

107. *Id.* at 465.

108. *See supra* note 37 and accompanying text.

109. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423, 430 (2006) (citing Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990)), the Supreme Court stated, "[RFRA] adopts a statutory rule comparable to the constitutional rule rejected in *Smith*," and that "Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test."

110. *See* 42 U.S.C. § 2000bb-2(4) (2000).

111. Guru Nanak Sikh v. Sutter, 456 F.3d 978, 988 (9th Cir. 2006).

112. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1042 (9th Cir. 1995) (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)).

under the Supreme Court's prior Free Exercise jurisprudence.[113] In reviewing prior cases, the court stated that a substantial burden exists "if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[114] In coming to a similar conclusion in 2006, the Seventh Circuit looked to the legislative history of RLUIPA, where co-sponsors Senators Kennedy and Hatch released a joint statement explaining that RLUIPA did not define "substantial burden" precisely because it was not intended to create a new standard and that prior Supreme Court jurisprudence should guide courts in interpreting the statute.[115] In its final determination, the Seventh Circuit adopted a very different definition, stating that a substantial burden is one that "bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[116]

As to the definition of the term "compelling interest," the courts have not enunciated a clear definition; nonetheless, there is some general agreement as to the meaning. In 2007, the Ninth Circuit hearkened back to *Yoder* and stated, "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[117] Even so, the Supreme Court has had a hard time over the years defining interests as "compelling" and instead created exceptions to the rules. They should instead reaffirm a definition and then give examples from prior cases of "exceptions" that really were compelling interests. They will not need to overturn any other precedents, merely restate and clarify their opinions in those other cases.

At a minimum, the Supreme Court needs to set forth standard definitions for the terms "substantial burden" and "compelling interest" if they accept RFRA as constitutional. The end result in the Snowbowl dispute will depend on the scope and definition adopted by the Court.[118] Should the Court narrowly define "compelling interest" but broadly look at the term "burden," the government may be forced to close down the ski resort on federal land.[119]

113. Adkins v. Kaspar, 393 F.3d 559, 569 (5th Cir. 2004).

114. *Id.* at 570.

115. Vision Church v. Long Grove, 468 F.3d 975, 997 (7th Cir. 2006).

116. *Id.*

117. *Navajo Nation*, 479 F.3d at 1043 (citing Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

118. More important than the actual result of the case is a cleaner legal environment in which to move forward.

119. It is unclear how many other businesses would be affected by this interpretation of the Court.

B. Option 2: The Death of RFRA and Resurrection of *Smith*

As mentioned above, several commentators have argued that RFRA is unconstitutional for several different reasons.[120] Debate among scholars often focuses on the power of Congress to pass RFRA under Section 5 of the Fourteenth Amendment.[121] Professors Eisgruber and Sagar of New York University argued that RFRA was unconstitutional because it increased free exercise to beyond pre-*Smith* understandings.[122] This is exactly what the Ninth Circuit noted *Navajo Nation* when describing how RFRA differs from the First Amendment.[123] In addition, Eisgruber and Sagar properly argue that RFRA is an assault on the integrity of judicial independence as Congress is usurping the judiciary's role as interpreter of the Constitution through the statutory process instead of the amendment process.[124] Professor Gressman of North Carolina and Professor Carmella of Seton Hall posit that RFRA is an unconstitutional violation of the separation of powers principle.[125] Regardless of the rationale, a declaration that RFRA is unconstitutional would move the law in the right direction.

If the Court does this, with no other action, *Smith* becomes the law of the land once again. This result is clearly unacceptable to Congress and could result in a battle between the judicial and legislative branches to either amend the Constitution or develop a religious freedom law that the Court would find constitutional. In either case, RLUIPA and the state religious freedom laws would still be in effect, giving multiple statutes and analyses for many different types of free exercise claims. Still, without more action, an opinion that RFRA is unconstitutional would do little or nothing to correct the confusion that currently exists. Clearly more action is required of the Court.

C. Option 3: The Death of RFRA and *Smith*: Maintaining the True Balance

By adopting the third option—declaring RFRA unconstitutional and overturning *Smith*—the Court has an opportunity to clarify the confusion

120. *See supra* note 49 and accompanying text. In addition, Justice Stevens, in concurrence in *Boerne*, stated that he believed RFRA "'is a law respecting an establishment of religion' that violates the First Amendment to the Constitution." Boerne v. Flores, 521 U.S. 507, 536 (1997).

121. *See, e.g.*, Robert Drinan & Jennifer Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION, 531, 533 (1993) (noting a general agreement that Congress had authority to pass the statute but also noting some debate on the issue).

122. Eisgruber & Sager, *supra* note 49, at 444. As mentioned in the text, this argument may be somewhat fallacious.

123. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1032 (9th Cir. 1995).

124. Eisgruber & Sager, *supra* note 49, at 469–73.

125. *See, e.g.*, Gressman & Carmella, *supra* note 49.

and develop a universal standard for free exercise claims. The Court should take this approach and put religion back in its proper place as a key civil liberty. In doing so, the Court still must face two issues: the scope of the test and the definitions of terms used in the test. The Court can do this within the constitutional framework. Finally, the Court could go even one step further and use the Snowball dispute to encourage more transparency in government.

1. Religion's Proper Place

The current federal paradigm for religious freedom law includes RFRA for federal actions, RLUIPA for any government actions covering land use or incarceration, and the First Amendment for analysis of state and local laws or regulations. There also are state acts that parallel RFRA that were passed after the Supreme Court decided *City of Boerne*.[126] This splintered approach to free exercise analysis could lead to different results for the same actions depending on which government entity took the action. For a right that was foundational enough to warrant inclusion in the First Amendment, this is not acceptable. The Supreme Court must take this opportunity to render this confusion null by declaring RFRA unconstitutional, by overturning *Smith*, and by clarifying the compelling interest test. These actions will restore religious freedom to its proper place as a constitutionally protected right.

As noted above, declaring RFRA unconstitutional has been supported by a numbers of legal scholars.[127] The Court should not only do so, but should also revisit the *Smith* opinion. This too is not surprising. As early as 1996, Professor Gressman of North Carolina and Professor Carmella of Seton Hall noted that reconsideration of *Smith* would be an appropriate step to take.[128] One year later, Justice O'Connor dissented in the *Boerne* case and argued that the parties should be ordered to brief whether *Smith* represents the appropriate or correct understanding of the Free Exercise Clause.[129] In fact, the only way to fix the underlying issue of the *Smith* interpretation of the First Amendment is for the Court overturn *Smith*.

In overturning *Smith*, the Court should acknowledge that a clarified and properly defined compelling interest test is the appropriate test for any

126. *See, e.g.*, 775 ILL. COMP. STAT. § 35 N.M. STAT. §§ 28-22-1 to -5 (1978).

127. *See supra* note 49 and accompanying text.

128. Gressman & Carmella, *supra* note 49, at 141. Gressman and Carmella note that one of the majority voters and three of the four dissenters in *Smith* had retired by the time their article was written. *Id.* at 141 n.288. As of this writing, only Justices Stevens, Scalia and Kennedy, all from the *Smith* majority, remain on the Court.

129. City of Boerne v. Flores, 521 U.S. 507, 544 (1997).

governmental burden on religion. While Professors Eisgruber and Sagar argue that the compelling interest test is "wholly unworkable,"[130] I argue that the test is perfectly workable if the Court will take the appropriate steps in defining scope and terminology.

As to scope, the Court should look to the RFRA arguments on scope to clarify the scope of the First Amendment.[131] The confusion created by RFRA has provided a clearer picture of some of the problems with prior First Amendment jurisprudence. It has noted the exceptions to, and omissions of, the test in prior judicial opinions.[132] To clarify what the First Amendment really means, and to alleviate uncertainty on the part of legislative bodies that may burden religion in their actions, the Court should give direction for the application of the test. As mentioned above, the test is appropriately applied to all government action. The exceptions created to the application of the test were actually implicit judgments on the compelling nature of the government interest.

As to the definitional problems, those too are easily resolved. The Court should give some guidance to the definitions of "burden" and "compelling interest."[133] Discussion of these terms can be found previously in this article, but the exact definition at this stage is less important than the fact that guidance comes from the Court.

One key aspect of the test that was not addressed in the Snowbowl dispute is the "least restrictive manner" element.[134] Analyzing this factor is more objective than analyzing whether an interest is compelling or whether a religion is burdened. One can do an economical cost-benefit analysis of alternatives to determine if the chosen activity is the least restrictive (or least burdensome) way to achieve the compelling government interest.

No matter what alternatives meet the "burden," "compelling interest," and "least restrictive manner" definitions, this analysis would properly place religion back on the level of constitutional primacy. A Supreme Court decision to unify free exercise analysis under the First Amendment, with use of the compelling interest test, would be consistent with the

130. Eisgruber & Sager, *supra* note 49, at 451.

131. *See supra* Part VI.A.1.

132. *See* discussion *supra* Part II for an examination of the compelling interest test.

133. *See supra* Part VI.A.1.

134. *See* Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 907 (D. Ariz. 2006) (discussing the lack of less restrictive alternatives without discussion of what the term "least restrictive" means); Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1045 (9th Cir. 2007) (stating that the court was not convinced that the least restrictive means were used, but failing to define that term); Navajo Nation v. U.S. Forest Serv., No. 06-15371, 2008 U.S. App. LEXIS 16860 (9th Cir. Aug. 8, 2008) (no discussion of the meaning of the term "least restrictive means" because of a lack of burden to the plaintiff's religion).

desires of the nation, as evidenced by the strength of the vote for RFRA.[135] It also would create the predictability and stability desired of the law.

In addition to correcting the place of religion, the changes spurred by the decision recommended could also help the legislative branch and administrative agencies re-focus on the Constitutional limits to their authority.[136] The Court should remind these governmental entities that they have limited power, and that it is the responsibility of those entities to demonstrate from where the authority to act comes.

2. Transparency of Government

Just as the duty to enunciate the compelling government interest should reside with the government when regulating religion, the duty to enunciate the authority to act at all should also reside with the government and should be addressed before laws are passed or regulations issued. This supports the principles of accountability in government and the limited nature of the federal government as found in the Constitution.[137]

In declaring RFRA unconstitutional, the Court should specifically note that any mention of the authority of Congress to pass RFRA was buried in legislative history.[138] Congress and the administrative agencies are involved in thousands of different issues.[139] Yet the source of Congressional authority to regulate is not clear in reviewing recent bills. Moreover, none of the bills give the slightest inclination as to the source of power to Congress.[140] Definitive statements by the Court indicating that the legislative bodies bear the responsibility of enunciating their source of power to regulate could result in clearer, and perhaps fewer, pieces of legislation. The Court could go so far as to analyze First Amendment free exercise cases by evaluating the government's own declaration and evidence of its compelling interest. The Court could encourage Congress to take this responsibility by declaring any law which substantially burdens

135. *See supra* note 45.

136. *See* U.S. CONST. art. I; U.S. CONST. amend. X.

137. *See* U.S. CONST. amend. X. A cursory review of the bills before the 110th Congress indicates that none of the bills states any authority for Congressional regulation. See http://thomas.loc.gov/home/c110bills.html for a list of bills before the 110th Congress (last visited Dec. 21, 2007).

138. *See, e.g.*, Drinan & Huffman, *supra* note 121, at 533.

139. The 110th Congress had over 7200 bills before the House or Senate in 2007. *See* http://thomas.loc.gov/home/c110bills.html (last visited Dec. 21, 2007).

140. *Id.* As noted in *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997), the Supreme Court rendered RFRA unconstitutional as to the states in an analysis of the Fourteenth Amendment. RFRA itself never mentions the authority under which Congress portended to pass the statute. 42 U.S.C. §§ 2000bb–2000bb-4.

religion—yet lacks Congress's express statements both defining the interest to be furthered and defending it as "compelling"—as an unconstitutional violation of the Free Exercise Clause.

For example, in the *Lyng* case, the Court did not use the compelling interest test because the burden on religion stemmed from internal government procedures.[141] Instead, the Court should have declared the government action as unconstitutional given the lack of a clearly enunciated compelling interest. If the government could not enunciate a compelling interest, perhaps none existed and the road should have been relocated to another route. In fact, with regard to the road in *Lyng*, Congress denied funding.[142] Had the government agency been forced to defend its compelling interest prior to approving the route, it may have seen that there really was no compelling interest. Other "exceptions" can be viewed similarly.[143] While to some this may be viewed merely as a matter of semantics, it is an important difference that could result in a systemic change should the Court send the right message to Congress and the other government bodies.

Congress itself has shown some concern over accountability in government. Unfortunately, its concern looks at external sources, internal administrative processes, and lobbying; rarely, if ever, is the legislative process examined. On March 13, 2007, the Openness Promotes Effectiveness in our National Government Act of 2007 ("OPEN Government Act") was introduced by Senator Patrick Leahy[144] and later signed into law by President Bush on December 31, 2007.[145] This act specifically amended the Freedom of Information Act so that citizens have

141. Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 448–53 (1988). In *Lyng*, the government was building a road to connect two California towns. *Id.* at 442. The Forest Service placed the road in a particular location to avoid soil stability problems as well as potential eminent domain problems. *Id.* at 443. It is unclear whether the need for the road between the two towns would be a compelling interest.

142. *See* Gressman & Carmella, *supra* note 49, at 94.

143. See, for example, *Goldman v. Weinberger*, 475 U.S. 503 (1986), for a case in which the Supreme Court did not apply the compelling interest test to a challenged military regulation prohibiting a Jewish man from wearing a yarmulke. The Court exempted the military from the compelling interest test out of deference to the military's role and its standing as a separate governmental entity, distinct from civilian society. *Id.* at 509–10. The Court just as easily could have stated that the uniform dress in the military is a compelling government interest for any number of reasons. The key difference would be that the military would have to set forth those interests.

144. Openness Promotes Effectiveness in our National Government Act of 2007, S. 849, 100th Cong. (2007).

145. The OPEN Government Act was signed as Pub. L. No. 110-175 (codified as 5 U.S.C. § 552).

easier and faster access to information.[146] And though it did not address accountability of Congress to justify its actions, it may have increased the ability of the people to search through government documents. The Honest Leadership and Open Government Act of 2007 became law on September 14, 2007.[147] This law addresses lobbying issues, issues of employment negotiations for outgoing members of Congress, and issues of earmarked spending.[148] The only issue it addresses regarding public accountability is to improve internet access for committee hearings.[149] It also does not address the issue of transparency in legislative authority.[150] The Improving Government Accountability Act was introduced in the House and currently sits in committee with the Senate.[151] This legislation would amend the Inspector General Act but, again, does not address transparency in the writing of legislation or regulation by federal agencies.[152]

While it appears that Congress is concerned about transparency and accountability in government, it has not yet addressed (and possibly has not thought about) its own responsibilities to exercise those powers specifically granted to it by the Constitution.[153] The Supreme Court should use the Snowbowl dispute to remind Congress of these limitations and chastise it to identify its authority in each bill it introduces.

Conclusion

The Free Exercise Clause of the First Amendment has suffered through a number of growing pains in the history of our country. As demonstrated by the Snowbowl dispute, religious freedom jurisprudence is complicated and fragmented. The most appropriate analysis used by courts has been the compelling interest test, enunciated in the 1960s and used directly until 1990. The Supreme Court has an opportunity, through the Snowbowl dispute, to correct the series of complications. The Justices should take this opportunity to place religion back in its rightful sphere as a constitutionally protected civil liberty and to encourage Congress and the

146. *See* Openness Promotes Effectiveness in our National Government Act of 2007, S. 849, 100th Cong. (2007).

147. Senate Majority Leader Harry Reid (D-NV) introduced Senate Bill 1 on January 4, 2007. It was signed into law as Pub. L. No. 110-081 on September 14, 2007 and codified throughout the United States Code and the Rules of the House of Representatives.

148. Honest Leadership and Open Government Act of 2007, S. 1, 100th Cong. (2007).

149. *Id.*

150. *Id.*

151. Improving Government Accountability Act, H.R. 928, 110th Cong. (2007). This bill is currently in the Senate Committee on Homeland Security and Government Affairs.

152. *Id.*

153. U.S. CONST. amend. X.

other federal units to become more accountable for the authority of their actions.

By adopting the approach in this article, the Court also has an opportunity to require the federal government to increase its awareness of the relationship between business and religion. By clarifying what constitutes the test for Free Exercise challenges, and by encouraging the government to clearly identify and defend the compelling interests it intends to advance when it passes regulation or legislation that impacts religion, all parties affected by such regulation will have a better sense of the difficult issues facing our government in balancing the competing interests of religion and business.

* * *