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THE RELIGIOUS LAND UTILIZATION AND INSTITUTIONALIZED PERSONS ACT OF 2000: HOW ZONING OF HOUSES OF WORSHIP AND HOME WORSHIP MAY BE AFFECTED

Although it would be inappropriate for The Rutherford Institute to provide you with legal advice at this time and under these circumstances, we are able to provide you with the following information which we hope you find useful.

The Current Climate for Free Exercise Cases

The U.S. Supreme Court established the current climate for interpreting Free Exercise Clause cases dealing with zoning and religious use of land and property with its 1989 holding in Employment Division v. Smith.[1] Smith announced that laws that burden religious practice do not violate the Free Exercise Clause if they are laws of general application.[2] Under Smith's interpretation, only laws specifically intended to restrict religious practice violate the Free Exercise Clause.[3] Laws aimed at broader portions of the population which only incidentally burden religious practice will not.[4]

Unhappy with Smith, Congress drafted the Religious Freedom Restoration Act of 1993 (RFRA).[5] RFRA required government entities defending laws that burden free exercise of religion to show a compelling governmental interest in the contested law and demonstrate that they had selected the least restrictive means of protecting that interest.[6] RFRA garnered virtually unanimous support in Congress, but only three votes in the Supreme Court.[7] Congress' stated purpose for passing RFRA was "(1) to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder[8] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government interference."[9]

In 1997, the Supreme Court struck down RFRA at least as applied to the states, in City of Boerne v. Flores.[10] Smith and BoerneB greatly enhanced the ability of state and local governments to regulate in areas where churches and other religious groups historically had been left alone. For instance, some religious groups base their corporate worship experience on fellowship groups that meet in private homes. After Boerne groups of that nature zoned out of suburban neighborhoods found no assistance in the Free Exercise Clause, so long as group meetings of all kinds were similarly restricted.[11]

In response to Boerne, Congress passed the Religious Land Utilization and Institutionalized Persons Act (RLUIPA). RLUIPA prohibits state and local governments from imposing a substantial burden on religious exercise through zoning regulations.[12] The government may avoid application of RLUIPA by changing policy or practice in a manner that eliminates substantial burden on religious exercise.[13]

RLUIPA provides:

> A(a) Substantial burdens.
>
> (1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-- (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest. (2) Scope of application. This subsection applies in any case in which-- (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.
>
> (b) Discrimination and exclusion.
>
> (1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination. (3) Exclusions and limits. No government shall impose or implement a land use regulation that-- (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.@

Not much guidance is given for the term Asubstantial burden.@ RLUIPA is intended as a replacement statute for RFRA, and thus the term Asubstantial burden@ is best

interpreted in the meaning that predated the Smith case - as any significant imposition on religiously motivated speech or conduct.

Of the early cases to be reported since the passage of RLUIPA last year, *Murphy v. Zoning Comm=n of New Milford*, 148 F.Supp. 2d 173 (D. Conn. 2001) is perhaps the most representative of the intended scope and effect of RLUIPA. The district court in *Murphy* granted a preliminary injunction against a city zoning commission, prohibiting it from enforcing a cease and desist order against a weekly prayer meeting held by the plaintiffs in their home in a residential neighborhood. 148 F.Supp. 2d at 191. The court found that the order imposed a Asubsantial burden@ upon the plaintiffs, and that direct prohibition on the activity, rather than regulation of secondary effects such as traffic and parking, was a less restrictive means of accomplishing the city=s purposes. 148 F.Supp. 2d at 180, 191. The court concluded:

> In passing RLUIPA, Congress required local governments to be sensitive to the values of religious freedom and expression. It directed that substantial burdens be placed on the exercise of religion only to the extent necessary to accomplish compelling governmental interests. Even absent a federal statute, one would expect that, before banning an ongoing private religious gathering, public officials in a free and tolerant society would enter into a dialogue with the participants to determine if the legitimate safety concerns of the neighbors could be voluntarily allayed.... it is not unreasonable to expect the parties to be able to agree on means of reducing the impact of weekly prayer meetings on this small cul-de-sac without undermining the benefit that participants seek to derive from the practice of their faith.

Id. at 191.

An example of what a Asubstantial burden@ may *not* be held to be is found in *Omnipoint Communications, Inc. v. City of White Plains*, 2001 U.S. Dist. LEXIS 14883 (September 6, 2001). In *Omnipoint*, the loss of the view from the sanctuary of a synagogue due to the erection of a 150-foot telecommunications monopole on a neighboring property was held insufficient to grant the religious corporation standing to challenge the permit for the pole under RLUIPA, as loss of the view did not constitute a Asubstantial burden@ under the Act.

In another recent case, the city of Chicago amended zoning regulations to apply the special use permits required of churches to other organizations with uses allegedly similar to church use.[14] The U.S. District Court for the Northern District of Illinois found that the change in zoning regulations removed any substantial burden on religious exercise and therefore the heightened standard of review required by RLUIPA did not apply.[15]

State statutory and constitutional law should also be referred to, for state provisions may provide for greater protection for religious expression and land use than the federal constitution and RLUIPA. For example, the Supreme Judicial Court of Massachussetts held this year that a municipality could not prohibit the construction of a eighty-three foot steeple over a Mormon temple, although it would be seventy-two feet over the zoning limit for building projections; the state=s Dover Amendment (G. L. c. 40A, ' 3, para. 2) allowed only Areasonable@ regulation of the dimensions of religious structures. *Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 747 N.E.2d 131 (2001). The Supreme Court interpreted similar language in the Illinois Religious Freedom Restoration Act, 775 Ill. Comp. Stat. 35/1, to require reversal of the denial of a special use permit for a church in a commercial zone; although church uses were deemed at odds with the comprehensive plan, there were considered a compatible use for the zone under the zoning code, and the municipality was bound by the code. *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 196 Ill. 2d 1, 749 N.E.2d 916 (2001).

Zoning Laws Effect on Churches and Other Religious Gatherings

Most municipalities in the United States have zoning laws enacted to "regulate the growth and development of the city in an orderly manner."[16] The ability of a given municipality to enact zoning laws does not stem from any inherent authority, but rather from police powers granted by the state government to the municipality through "enabling act" legislation. The power of the municipality to regulate zoning extends only as far as the power granted in the enabling act. Therefore, in researching conflict between a church or issues involving religious uses, it is a good idea to refer to the enabling act of the state in question.[17]

Numerous churches in various parts of the country have recently faced citations of zoning violations regarding either their status as a church, some type of ministry which they are operating out of their church facility, or both. Some religious groups face obstacles concerning their qualification as a "church" under a zoning code's definition. If a city, county, zoning board, or other appropriate authority determines that a building or place of assembly does not qualify under the applicable definition of "church," then that authority can deny the church permission to operate in districts or zones where churches otherwise are permitted.

A situation which frequently arises with regard to church zoning is when an acknowledged church is engaging in some type of ministry -- the operation of a school, homeless shelter, soup kitchen, distribution of clothing, etc. -- and the appropriate authority cites the church's activity as a violation of a zoning ordinance.[18] It is the proposed use of the

land and not the nature of the using organization that determines zoning regulations.[19] A standard provision in many zoning ordinances allows "customary accessory uses and structures" (or similar language) in addition to the permitted structures and uses. A church's principal argument in such cases is that such uses by a church does not violate the ordinance because many outreach services of churches, such as different forms of providing for the poor and needy, are Scripturally mandated, and integrally part of the tenets and ministry of the church. For example, in the Christian religion, this is documented in the Bible, and clergymen of every denomination can testify that such services are customary functions of modern day churches.

Conversely, but in a similar vein, certain communities have taken steps that thwart home worship and bible studies under the guise of zoning laws, arguing that residences which engage in home worship and bible studies are in fact churches and must be zoned as such. The challenged actions have included small meetings of two or three for a catechism class and larger meetings involving bible study, prayer, and singing. Insofar as attempts to prohibit these activities run afoul of the First Amendment's requirement of content-neutrality, such attempts under the color of zoning laws to limit small informal gatherings in the home are unconstitutional.

Proponents have hailed zoning as an effective use of the state's delegated police power to regulate for the health, safety, morals, and general welfare of local communities.[20] Land use legislation "allocates land uses throughout the community to prevent conflicts between incompatible uses that might otherwise locate adjacent to each other."[21] Zoning, in theory, not only segregates incompatible uses to avoid nuisance conflicts, it also preserves property values[22] and promotes social values by "laying out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[23] In the landmark zoning decision, Village of Euclid v. Ambler Realty Co.,[24] the United States Supreme Court upheld the constitutionality of comprehensive and restrictive zoning[25] used to protect residential areas from nonresidential uses. The Court supported its decision by reference to nuisance law which bases the acceptability of land use on the "circumstances and the locality,"[26] not necessarily the use itself.

Historical Background to Zoning Laws

Prior to the acceptance of zoning in this country as a constitutional and effective land use control method,[27] communities controlled the quality of life in neighborhoods by using nuisance litigation.[28] Land use nuisance cases reflected the adage that a landowner may use his land as he pleases so long as he does not unreasonably interfere with the use of land by others.[29] However, with the advent of zoning as a proactive means of land use control, rather than the reactive nuisance litigation approach, nuisance actions have become less

important as a way to resolve land use disputes.[30] Local governments have overwhelmingly opted for the use of zoning ordinances to regulate land uses such that incompatible uses are segregated and land use conflicts are minimized in advance.[31]

Because zoning regulations are proactive in nature, ordinances which are found to restrict a religious use can be challenged as an unconstitutional prior restraint on the free exercise of religion. The majority of cases involving challenges to zoning ordinances based upon the theory of prior restraint appear to be First Amendment freedom of speech cases.[32]

For example, in Nichols v. Planning & Zoning Commission, a resident in the Town of Stratford, Connecticut, was informed by the Town Zoning Enforcement Officer that he was in violation of a town ordinance because he conducted regular religious meetings in his home each week.[33] The regulations, applicable to single-family residential districts, required special approval for a "church, parish hall, or other religious use."[34] The court determined that the ordinance was unconstitutionally vague because the phrase "other religious use" does not have the "certainty necessary to forewarn the plaintiffs here that a small group of like-minded individuals, followers of The Way, may not meet in Nichols' home to interact as their religion may dictate."[35]

In addition to not giving citizens adequate warning of what type of activity is prohibited, the court found that the regulation was impermissibly subject to arbitrary and discriminatory application by zoning officials.[36] Finally, the court observed that a regulation "which gives an administrative official discretionary power to control in advance the right of citizens to exercise constitutionally protected activities--specifically the free exercise of religion and the right to freely associate with others" is invalid as a prior restraint on such freedoms.[37] The Court concluded that to "allow the Zoning Board or the Zoning Enforcement Officer indiscriminately to continue to declare one's use of his home an `other religious use' and thereby prohibit that use....would plant the seed for `covert forms of discrimination,' and provide the means by which the Town of Stratford could suppress a particular point of view."[38]

Courts and legislatures have historically protected religious freedom to some degree from the application of zoning regulations.[39] The Majority of jurisdictions have concluded that religious uses may not be excluded from areas zoned for residential use only.[40] This majority rule is, at times, supported by an application of the Free Exercise Clause, but many cases have upheld the rule based on state constitutional grounds or a finding that the exercise of the local government's police power was arbitrary and in violation of due process.[41]

In a New York case, American Friends of the Soc'y of St. Pius, Inc. v. Schwab, the court stated in its opinion that "human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds [in other terms]."[42]

In another New York case, Independent Church of the Realization of the World of God, Inc. v. Zoning Bd. of Appeals, the court concluded that the proposed religious retreat house was not a church because it would not be open to the public for worship or any other purpose.[43]

In Lake Drive Baptist Church v. Village Bd. of Trustees, the Wisconsin court pointed out that "over-generous reliance upon the presumption of validity of a zoning decision may cloak discriminatory action against a religious group which is too small a minority in the community to have an effective voice."[44]

Furthermore, in Vermont Baptist Convention v. Burlington Zoning Bd., the Vermont court held that a zoning ordinance must be construed according to the use of the land and that a distinction based upon the identity of the owner rather than the public health, safety, morals or general welfare would be invalid.[45]

Defining Terms

In limiting home worship, municipalities often argue that such worship, in effect, turns the home into a "church" which can be either prohibited in a residential area or limited by requiring a special use permit.[46] However, applying an ordinance which prohibits "churches" to home worshippers may run afoul of the constitutional protection against vague laws. A zoning ordinance must enable a person of common intelligence to understand whether contemplated conduct is lawful or it will be unconstitutionally vague.[47] Moreover, zoning ordinances which affect first amendment liberties must be scrutinized scrupulously for vagueness.[48]

This vagueness often stems from the fact that ordinances frequently do not define "church."[49] Thus, definitional disputes often arise and center around whether a particular use constitutes a church, not because of the beliefs of the group members, but rather because of the use to which the building will be put.[50]

There are two ways to challenge a law for vagueness: "facially" or "applied." A statute that is challenged "facially" may be voided if there is no conduct which is proscribed with sufficient certainty.[51] A statute is challenged "as applied" if the law does prohibit the

conduct which is sought to be enforced with sufficient clarity.[52] If a statute is vague as to the conduct it is sought to be applied against, it will not be enforced against that conduct, even though it can be enforced against other conduct which it clearly prohibits.

If a court finds that an ordinance prohibiting "churches" is not vague either facially or as applied, other interpretative issues will arise as to whether the religious use that takes place in a home can constitute a "church" within the meaning of the ordinance.[53] "The term `church' encompasses various possible meanings, and subtle distinctions in meaning can have critically different consequences when sought to be applied as part of a penal statute in a context that involves constitutionally protected interests."[54]

If "churches" are prohibited in a residential zone, and the word "church" is not defined, then home worshippers should emphasize a definition of "church" that distinguishes it as a structure separate from a home. "An interpretation that recognizes the relevance of architectural structure, as well as the use of the property, is particularly appropriate in the context of municipal land use regulation which concerns itself with the use and physical characteristics of the land."[55] Secondly, homes that are primarily used for residential purposes, and are used only infrequently and incidentally for religious services, do not fall within the common meaning of church.[56]

If the word "church" is specifically defined in the ordinance, home worshippers should look to the ordinance to determine what activities constitute a house becoming a "church." Advertising home religious services to the general public may make it more likely that a court or a zoning board will find that the home is being used as a "church," which means that it can be limited or prohibited in a residential district.

The Supreme Court in Larkin v. Grendel's Den, Inc., approved of a zoning ordinance construed to "apply to any building used primarily as a place of assembly by a bona fide religious group."[57] That definition embodies two requirements.[58] First, the building must be used as a place of assembly by the group, and second, group worship and assembly must be the buildings primary purpose.[59] In a similar vein, Blacks Law Dictionary defines church property as property used principally for religious worship and instruction.[60]

In State v. Cameron, the New Jersey Supreme Court stated that the interpretation of the term church should also recognize the relevance of architectural structure and held that the zoning boards interpretation and use of the term "church" was so vague as to render an ordinance prohibiting churches in a single-family residential district to be unconstitutional as applied. Factually, the case involved a small congregation which met temporarily in the home of its minister, apparently disturbing some of the neighbors in the process. According to the majority, the ordinance was clearly applicable to church buildings, but the intended

situation as to regular religious gatherings elsewhere was not at all clear. Hence, the majority concluded that to prosecute the minister-homeowner would violate fundamental notions of due process, since he would not have been sufficiently forewarned of the potential quasi-criminal nature of his activities. A concurring opinion by Justice Clifford took the position that the state cannot, absent some overriding interest, prohibit activities which occur within the privacy of one's home.[61]

Although churches currently face challenges from zoning boards seeking to limit the scope of many church's activities, courts historically have recognized the expansiveness of both the terms "church" and "religion." In the case of Community Synagogue v. Bates, the New York Court of Appeals stated:

> A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer....To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation.[62]

Another New York case held that a zoning board which denied a church a permit to build a school and a day care center failed to respect the church's right to use its facilities for non-religious purposes which serve to support and strengthen its religious practices.[63] Similarly, in Board of Zoning Appeals v. Wheaton, an Indiana court stated:

> The word "church" applies not only to a building used for worship, but to any body of Christians holding and propagating a particular form of belief....any building intended to be used primarily for purposes connected with the faith of such religious organizations may be said to be used for church purposes.[64]

In addition to defining the term "church" broadly, the courts define "religion" broadly as well. In United States v. Seeger, the Supreme Court described religion as "belief that is sincere and meaningful and occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" of mainstream religions.[65] In Torcaso v. Watkins, the Supreme Court ruled that in order to constitute a religion, belief in a deity is no longer of the essence.[66]

Defining "church" and "religion" in broad terms, the courts have recognized numerous activities as religious and customary church functions for zoning purposes. These

include providing shelter for the homeless,[67] providing a day care center on church facilities,[68] and the operation of drug center for youth located in a parish house.[69] Even merely recreational activities have been considered an integral part of a church's program and permissible under zoning laws.[70]

City or county governments do not have the authority to determine what is a legitimate ministry of a church. The power to determine what activities are constitutionally acceptable church functions cannot be accorded to secular authorities. Such a determination violates both the Establishment and Free Exercise Clauses of the First Amendment. The prohibition by a state or local authority of certain church activities will result in excessive entanglement of that authority with churches located within its bounds. The appropriate authority will be left in the untenable position of determining what church activities are "customary accessory uses," and therefore permissible for churches in that area.

Several courts have addressed this issue and found that the question demands deference to the Religion Clauses of the First Amendment. The New York Supreme Court, in Islamic Society of Westchester and Rockland, Inc. v. Foley,[71] stated that municipalities must apply zoning ordinances in a more flexible manner to religious institutions in view of constitutionally protected status under the Free Exercise Clause. One court held that a city could not through zoning deny a church its right to care for the poor, stating that:

> Under the First Amendment, government must be neutral toward religion....Government may breach that neutrality if it denies or unreasonably limits the religious use of land. It is indeed late in the day for government to interfere with religion....Courts have placed constitutional constraints upon municipal attempts to impose zoning regulations upon churches and other religious institutions....The range of religious conduct is wide, and the structures which house it are various. Religious use is not defined solely in terms of religious worship....Its use has been extended to education...a day care center...an orphanage...and a center for counseling drug users.[72]

In a zoning case in Pennsylvania, the court dismissed an argument that the use of a building as sleeping quarters for two-day retreats was not "an accessory use customarily incident to the permitted use of property as a church." The court emphasized the following:

> Where religious beliefs or practices are involved, the constitutional principle of freedom of religion demands that we do not concern ourselves with what is required by other sects, or even by the religious authorities of the same church, or what is the usual practice in performing certain religious activities. Religious freedom....means that the individual group is free to deviate from

> what is customary or done in most instances, or from what is approved by others. Religious freedom means freedom to follow not only one's own beliefs, but one's own practices and procedures, unhampered and uninfluenced by majority practices....Society may impose limitations, but only where substantial considerations of public health, safety, morals, and public welfare so require.[73]

The United States Supreme Court does not allow inquiry into what are customary church practices. As it has repeatedly stated, the First Amendment permits no such analysis:

> Courts should not undertake to dissect religious beliefs. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as to not be entitled to protection under the Free Exercise clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all...courts are not arbiters of scripture interpretation.[74]

The courts have also found zoning regulations in the form of a special use permit unconstitutional. In such instances, the building of churches may not occur unless there is a special use permit granted by the zoning board. When the only basis for granting such permits is the resident's preferences or based on particular beliefs, there is a colorable claim for a First Amendment violation. In Islamic Center of Miss. v. Starkville, Miss.,[75] the city blocked the creation of a mosque by not granting a special use exception, even though it had done so for twenty-five other Christian churches, including one next door to the mosque cite. This, combined with the general hostility which the city had exhibited toward the plaintiff, supported the fact that the zoning laws violated the First Amendment. Similarly, in Church of Jesus Christ of Latter Day Saints v. Jefferson County,[76] the county, which required a variance for all churches, denied one for the Mormon church, based on neighborhood opposition to the church. The court stated: "Allowing churches to go only where they are welcome smacks of an unreasonable burden, even if the opposition is not related to the denomination of the church."[77]

Equal Protection Claims

In addition to raising First Amendment arguments against zoning ordinances, some religious organizations have also brought up allegations of discrimination based on the Fourteenth Amendments guarantee of equal protection of the laws.[78] The standard for this type of argument is much more deferential to the government=s zoning ordinances and decisions than the strict scrutiny standard for Free Exercise claims. The test is whether or not the provision is rationally related to a permissible state objective.[79] Two

examples of instances where there was no rational reason are the aforementioned cases of Islamic Center of Miss. v. Starkville, Miss. and Church of Jesus Christ and Latter Day Saints v. Jefferson County where a particular church was treated differently from other churches for no rational reason and the zoning decisions were declared unconstitutional.[80] However, if a rational reason is found, then the ordinance or decision is not unconstitutional.

Although this type of argument is more difficult to win than a Free Exercise claim, a recent Supreme Court decision, Village of Willowbrook, et al. v. Grace Olech, has made certain that individual discrimination suits can be won when brought by a class of one, where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.[81]

Fair Housing Act

The Fair Housing Act (FHA) makes it unlawful "to refuse to sell or rent...or otherwise make unavailable or deny, a dwelling to any person because of...religion."[82] The phrase "otherwise make unavailable" has been interpreted to include discriminatory zoning practices.[83] Where it has been established that a zoning ordinance will likely be applied in a discriminatory manner, it is unnecessary that the municipality actually so apply it before the ordinance may be properly challenged.[84]

There are two theories under which a FHA claim can be established: the disparate treatment theory and the disparate impact theory. Under the disparate treatment theory, a plaintiff can establish a prima facie case by showing that animus against the religious group was a significant factor in the position taken by the zoning commission.[85] If the motive of the zoning commission is discriminatory, it does not matter that the complained-of conduct would be permissible if taken for non-discriminatory reasons.[86]

Discriminatory intent may be inferred from the totality of the circumstances, including the fact that the law bears more heavily on one group than another.[87] Furthermore, the historical background of the zoning decision, the sequence of events leading up to the decision, contemporary statements by members of the decision-making body, and "substantive departures..., particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached."[88] Thus, if home worshippers can show animus against them which was a significant factor in the action taken by the zoning board, the Fair Housing Act was violated.

To establish a prima facie case of disparate impact under the FHA, "A plaintiff must show at least that the defendant's actions had a discriminatory effect."[89] "Discriminatory effect" describes conduct that actually or predictably resulted in discrimination.[90] Discriminatory effect can be shown by submitting data

that shows that people of a particular faith are disproportionally segregated from the challenged zoning district. Once a prima facie case is made, the burden shifts to the government. The government may be able to escape liability if it can show that its zoning ordinance promoted some other interest. Different circuits have different tests for how strong an interest the government needs to show.[91] Some courts require a "compelling government interest," others a "legitimate, bona fide interest" and still others a "no alternative course of action" test. The likelihood of success by home worshippers may depend on the strength of the necessary showing of interest by the government. In any event, disparate impact analysis under the FHA is likely to be a balancing test between the interest of the home worshippers and the government's interest in zoning.

State Constitutional Protection

Home worshippers may also find protection in the free exercise clauses of their state's constitution, which may be interpreted to give stronger protection than the U.S. Constitution. For example, the New Jersey Constitution states that "no person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience." In Farhi v. Commissioners of the Borough of Deal,[92] a zoning commission attempted to enforce an ordinance to prevent a rabbi from conducting religious service in his home. The New Jersey court held that the "guarantee of freedom of worship as set forth by our State Constitution forecloses any use by a municipal authority of its zoning power to prohibit the free exercise of religious activity in the privacy of one's home."[93]

While the legal academic community focuses on the Supreme Court, a steady but quiet transformation is taking place in the state courts. Several state supreme courts responded to the decision in Smith (note: Smith held that laws burdening religious practice do not violate the Free Exercise Clause if they are laws of general application) by reaffirming that their own state free exercise (or equivalent) clauses continued to require judicial enforcement of the compelling interest standard. In many cases, the states appear to be much more generous in their interpretation of their own free exercise provisions than the Supreme Court was in its pre-Smith but post-Yoder free exercise jurisprudence. In short, the concept of strict judicial protection for religious liberty is beginning to flourish in the state courts, quite apart from RFRA and the federal debate.[94]

Many state constitutions contain civil liberty guarantees approximating or copying those of the Bill of Rights. Ever since the federal courts used the Fourteenth Amendment to apply most of the Bill of Rights against the states,[95] many states have simply tied the meaning of their own religious liberty guarantees to the meaning of the Free Exercise Clause. Smith changed all of this. Suddenly, the state courts were presented with a serious choice: join the Supreme Court's sudden break with tradition or give independent effect to

their own freedom of religion clauses. Many have seized the opportunity to do the latter with surprising vigor.[96]

A growing number of state supreme courts have flatly refused to follow the Smith approach in interpreting their state constitutions. This, of course, they may do freely.[97] The Supremacy Clause of the Constitution requires only that the state courts accord precedence to the dictates of the Constitution in any conflict with state law.[98] However, the Constitution does not require that the states interpret their own constitutions in the same manner as the Supreme Court interprets the Constitution, even if the state provision precisely mirrors the federal provision.[99] Unless the states choose otherwise, the meaning of their constitutions rests entirely with the state courts.[100]

To date, at least six state supreme courts have explicitly rejected the Smith "generally applicable and neutral law" approach and reaffirmed the strict scrutiny standard of Sherbert and Yoder under their respective free exercise clauses.[101] The supreme courts of at least four other states, Nebraska,[102] Kansas,[103] Maine,[104] and Montana[105] have applied a heightened scrutiny standard under their free exercise clauses without considering the conflict with Smith. Additionally, the Supreme Court of Michigan has cast doubt on whether it will follow Smith under its free exercise clause,[106] and the Supreme Court of California has hinted that it is likely to reject the Smith approach under its own constitution.[107] Since the Smith decision, more than a fifth of the states have charted an independent course. Additionally, Tennessee[108] and Mississippi[109] had explicitly determined that their own state standards independently required the use of the compelling interest test even prior to Smith.[110]

A number of state intermediate appellate courts have also applied a strict scrutiny standard to generally applicable and neutral laws burdening the exercise of religion.[111] Not all of these cases make clear whether the court is applying the state constitution independently from the First Amendment.[112] Some courts rely on both the state and federal free exercise provisions.[113] Others simply rely on the "right to free exercise of religion protected by constitutional guarantees," without differentiating between the state and federal standards.[114] Still others apply strict scrutiny under the state free exercise clause in situations which could be considered "hybrid rights" cases under Smith.[115]

Smith holds that where two or more constitutional rights are implicated by government action, the religious claimant can assert this "hybrid" claim and will obtain heightened protection.[116] For example, the U.S. Supreme Court has ruled that parents have a constitutional right to direct the upbringing of their children and to make decisions about their education. Accordingly, when a free exercise claim on behalf of students is joined with this parental right, government limitations should arguably receive strict scrutiny. Moreover, where religion is targeted for discriminatory treatment, strong federal constitutional protection

applies.[117] So, when the City of Hialeah passed an ordinance prohibiting the practitioners of Santerias from sacrificing animals within the city limits, the Court performed strict scrutiny even after Smith, and unanimously struck down the law.[118]

Thus, despite the doctrinal incongruities and uncertainty that Smith has generated, the neutral and generally applicable law rule is not being followed in many of the state courts or state courts of appeal.[119]

For example, in Swanner v. Anchorage Equal Rights Comm'n, the Alaska court noted that "we are not required to adopt and apply the Smith test to religious exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution."[120]

The state court trend rejecting Smith and embracing strict scrutiny for religious exemptions is encouraging to proponents of a vigorous free exercise jurisprudence.[121] However, despite this encouragement, and even though some states have already adopted "little-RFRA's,"[122] and others--Florida, Maryland, Michigan, Ohio, New Jersey, Pennsylvania, California and New York-- have legislation pending or are in the process of considering such legislation,[123] the fact remains that if religious protection is left to the states, protection may vary radically from state to state:

> A wide variation in protections might promote migration to and polarization among various states, leaving certain states religiously diverse and certain states homogeneous in their religious practices. This variation can contribute to regionalism and disunity, generating hostility among states and ultimately fragmenting tenuous consensus on the appropriate levels of religious protections in America. This fragmentation might erode the respect and value that we as citizens grant to religion in general and religious minorities in particular. It would also lead to a lack of deep understanding of different religious cultures, which often breeds dislike and distrust. Promoting wide variation in religious protection signals that we as a society do not value religious protection, and that religious or secular majorities are charitable if they choose to enact religious protections but are not bound to do so.[124]

When Smith arrived, commentators may have been shocked at the doctrinal foundations of the opinion, but they had little reason to be shocked at the result.[125] Even Justice O'Connor, a proponent of mandatory free exercise exemptions, concurred in the judgment.[126] Given the national mood in the midst of the "war on drugs," it was perhaps too much to hope that the court would grant a free exercise exemption in a case involving narcotics.[127] "Smith, let us recall, was a case about the religious use of hallucinogenic substances, and it was decided at the height of the War on Drugs."[128]

Regardless of what Smith was or was not about, several of the state courts have remarked that they will not follow the Smith approach because their free exercise provisions are even broader than the First Amendment.[129] Indeed, the states, dating back to colonial times, have a long history in the free exercise of religion arena. For example, there were agreements between settlers and proprietors of Carolina, New York and New Jersey that suggested that "these colonies appeared to recognize that government should interfere in religious matters only when necessary to protect the civil peace or to prevent `licentiousness.'"[130]

In Boerne, Justice O'Connor claimed that pre-Smith cases followed the same policy that "government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest."[131] The state constitutions follow the same line.[132] For instance:

> The New York Constitution of 1777: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: Provided, that liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."
>
> The New Hampshire Constitution of 1784: "Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience and reason....provided he doth not disturb the public peace, or disturb others, in their religious worship."
>
> The Maryland Declaration of Rights of 1776: "No person ought by any law to be molested in his person or estate on account of religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights."
>
> The Georgia Constitution of 1777: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the state."

Additionally:

> The Northwest Ordinance of 1787: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his worship or religious sentiments..."[133]

RLUIPA reinstates the pre-Smith standard applying to land use, requiring that government regulation of land use which Aimposes a substantial burden@ on religious exercise further a compelling governmental interest, and be the least restrictive means of achieving that interest.[134] RLUIPA broadly protects the religious use of land by Apersons, religious assemblies, and institutions.@

Thus, it is arguable then, notwithstanding all the state and federal constitutional issues and case law, the vagueness issues, Fair Housing Authority arguments -- that the crux of the argument comes down to zoning regulation versus nuisance litigation.

Conclusion

Churches, church functions and church property, along with home worship, bible studies and religious uses should be given great deference when zoning regulations are applied to such uses because of their contribution to the general welfare of our country and because of First Amendment protection.[135] Notwithstanding the fact that many local zoning ordinances are fundamentally vague as to what constitutes a church or church use, the problem of local municipalities' controlling religious uses of land in advance with zoning regulation remains an issue which may constitute an invalid prior restraint on the free exercise of religion.[136] Nuisance litigation, on the other hand, provides a possible remedy to landowners who are actually damaged by an unreasonable interference with the quiet enjoyment of their property. Nuisance litigation also provides a less restrictive means than zoning for regulating religious land uses and avoids the problem of prior restraint that is inherent in proactive zoning regulation.[137] Although religious uses may not be excluded in most jurisdictions, they may be subject to reasonable regulation for purposes such as public health and safety.[138] This all but mirrors what the framers of the original state constitutions were attempting to say in the first place.

Since regulating religious uses through zoning in anticipation of potential problems may act as an invalid prior restraint on religious freedom, nuisance litigation -- not zoning regulation -- should be used to determine a remedy when religious land uses, such as churches, church functions, home worship and bible studies, actually do interfere with the use and enjoyment of neighboring property.[139] As Justice O'Connor so aptly has noted: "Our Nation's Founders conceived of a Republic receptive to voluntary religious

expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law."[140]

ENDNOTES

1. *Employment Division v. Smith*, 110 S.Ct. 1595 (1989).
2. Id.
3. Id.
4. Id.
5. 42 U.S.C. 2000bb(a)(3) & (4).
6. Ricker, Di Mari, "Courts Soul-Searching In Religious Law Claims,"
7. RFRA won unanimous approval in the House of Representatives and won by 97-3 in the Senate. The vote was 6-3 in the U.S. Supreme Court. Steward, David O., "Power Surge: Asserting Authority Over Congress In Religious Freedom Case," 83 A.B.A. J.46 (1997).
8. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
9. 42 U.S.C. 2000bb(b)(1) & (2).
10. *City of Boerne v. Flores*, 117 S.Ct.2157(1997).
11. See Debusk, Thomas L., "RFRA Came, RFRA Went," 10 Regents U.L. Rev. 223 (1998).
12. *See Id.*
13. 42 USCS ' 2000cc-3(e) provides: A Governmental discretion in alleviating burdens on religious exercise. A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.@
14. *See C.L.U.B.* 2002 U. S. Dist. Lexis 3791.
15. *Id.* at 42.
16. *Naylor v. Salt Lake City Corporation*, 410 P.2d 764, 765 (Utah 1996).
17. Hammer, Richard R., *Pastor, Church and Law.* Gospel Publishing House: Springfield, 1983. p. 267.
18. *See Needham Pastoral Counseling Center v. Board of Appeals of Needham*, 557 N.E.2d 43 (Mass. App. Ct. 1990) in which the Court ruled that "services which pastoral counseling center planned to offer resembled mental health clinic more than religious activity; therefore, denial of building permit for the center did not violate statute which exempts from zoning regulation the use of land or structures for religious purposes."
19. Zitter, Jay M., "What Constitutes Accessory Or Incidental Use Of Religious Or Educational Property Within Zoning Ordinance," 11 A.L.R. 1084 (1982); Ghent, Jeffrey F., "What Constitutes `Church,' `Religious Use,' Or The Like Within Zoning Ordinance," 62 A.L.R. 3rd. 201 (1975).
20. Mandelker, Daniel R., "Land Use Law," 2.32, at 53 (3d ed. 1993) (explaining that the purpose of land use regulation is to "advance legitimate government interests that serve the public health, safety, morals, and general welfare").
21. *Id.* 2.05, at 22.

22. Anderson, Robert M., "American Law Of Zoning," 7.02, at 689-90 (3d ed. 1986) (citing Standard Zoning Enabling Act 3 (1926) (stating that local zoning regulations shall be made "with a view to conserving the value of buildings")).

23. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (*citing Berman v. Parker*, 348 U.S. 26 (1954)).

24. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

25. Mandelker, 2.17, at 34.

26. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

27. *Id.*, (holding an ordinance restricting uses of land not facially unconstitutional).

28. See Mandelker, 4.01, at 94 (explaining that courts resolved land use disputes through nuisance cases which provided a model for zoning legislation).

29. *Id.*, 4.02, at 94.

30. *Id.*, 4.02, at 95-96.

31. *Id.*, (stating that "most municipalities have adopted zoning ordinances").

32. See Saxer, Shelly Ross, "When Religion Becomes A Nuisance," 84 Ky. L.J. 507 (1996).

33. *Id.*

34. *Nichols v. Planning and Zoning Comm'n*, 667 F. Supp. 72, 78 (D. Conn. 1987) (holding that a zoning regulation which gives discretionary power to administrative official to control in advance free exercise of religion is invalid as a prior restraint).

35. *Id.* at 77 ("`Other religious use' does not provide for the citizen of ordinary intelligence a clear standard by which to regulate his activities.").

36. *Id.*, at 78 (finding that regulations did not sufficiently articulate the standard for enforcement).

37. *Id.* (quoting *Kunz v. New York*, 340 U.S. 290 (1951)).

38. *Id.* (quoting *Heffron v. International Soc'y for Krishna Consciousness, Ind.*, 452 U.S. 640 (1981)).

39. See Saxer, Shelly Ross, "When Religion Becomes A Nuisance," 84 Ky. L.J. 507 (1996).

40. *Lucas Valley Homeowners v. County of Marin*, 233 Cal. App. 3d 130, 143 (Ct. App. 1991) (citing *Minney v. City of Azusa*, 330 P. 2d 255 (Cal. Ct. App 1958), appeal dismissed, 359 U.S. 436 (1959)); 2 Rathkopf, Arden H. & Daren A., *The Law of Zoning And Planning*, 20-23 (4th Ed. 1975); *Margaret Boyajian v. Thomas Gatzunis*, 212 F.3d 1 (U.S. App. 1st Cir. 2000). Some states, such as California, however, treat religious uses the same as any nonsectarian use when applying zoning restrictions.

41. Godshall, Scott D., "Land Use Regulation And The Free Exercise Clause," 84 Column. L.Rev. 1562, 1569 (1984); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 312 P.2d 195, 199 (Wash. 1957) (Holding that refusal by city officials to issue a special permit was an arbitrary and unreasonable action, not in furtherance of health, safety, morals, or general welfare).

42. *American Friends of the Soc'y of St. Pius, Inc. v. Schwab*, 417 N.Y.S. 2d 991 (N.Y. App. Div. 1979).

43. *Independent Church of the Realization of the World of God, Inc. v. Zoning Bd. of Appeals*, 81 A.D. 2d 585, 586, 437 N.Y.S.2d 443, 444 (1981).

44. *Lake Drive Baptist Church v. Village Bd. of Trustees*, 108 N.W. 2d 288, 297 (Wis. 1961).
45. *Vermont Baptist Convention v. Burlington Zoning Bd.*, 613 A.2d 710, 711 (Vt. 1992).
46. See Cordes, Mark, "Where to Pray?: Religious Zoning And The First Amendment," 35 U. Kan. L. Rev. 697, 754 (1987).
47. *Grayned v. City of Rockford*, 92 S.Ct. 2294 (1972).
48. *State v. Cameron*, 498 A.2d 1217 (N.J. 1985).
49. Ordinances frequently do not define "church." E.G., *Lakewood, Ohio Cong. of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 308-09 (6th Cir. 1983), cert. denied, 104 S. Ct. 72 (1984); *Abram v. City of Fayetteville*, 281 Ark. 63, 64, 661 S.W. 2d 371, 372 (1983). Contra *Larkin v. Grendel's Den. Inc.*, 459 U.S. 116, 120 (1982).
50. See Reynolds, Laurie, "Zoning The Church: The Police Power Versus The First Amendment," 64 B.U.L. Rev. 767 (1984).
51. *State v. Cameron*, 498 A.2d 1217 (N.J. 1985).
52. *Id.*
53. See Ghent, Jeffrey F., "What Constitutes `Church,' `Religious Use,' Or The Like Within Zoning Ordinance," 62 A.L.R. 3rd, 197 (1975).
54. *State v. Cameron*, 498 A.2d 1217, 1222 (N.J. 1985).
55. *Id.*
56. *Id.*
57. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 120-21 (1982).
58. See Reynolds, Laurie, "Zoning The Church: The Police Power Versus The First Amendment," 64 B.U.L. Rev. 767 (1984).
59. *Id.*
60. Black, Henry Campbell, *Blacks Law Dictionary*, West Publishing Co., St. Paul, Minn., 1990.
61. Williams, Norman Jr. *American Planning Law: Land Use And The Police Power*, Callaghan and Co. Wilmette, Illinois 1985 (1995 update).
62. *Community Synagogue v. Bates*, N.Y. 2d 445, 136 N.E. 2d 488, 493, 154 N.Y.S.2d 15 (1956).
63. *In re Covenant Community Church, Inc.*, 111 Misc. 2d 537, 444 N.Y.S.2d 415, 422 (N.Y.Sup. 1981).
64. *Zoning Appeals v. Wheaton*, 118 Ind. App. 38, 76 N.E.2d 597, 601 (1948).
65. *United States v. Seeger*, 380 U.S. 163 (1985).
66. *Torcaso v. Watkins*, 367 U.S. 488 (1965).
67. *St. John's Evangelical Lutheran Church v. Hoboken*, 195 N.J. Super. 414, 479 A.2d 935, 937-38 (1983); *Western Presbyterian Church v. Board of Zoning Adjustment*, 1994 WL 145033 D.D.C.
68. *Unitarian Universalist Church of Central Nassau v. Shorten*, 63 Misc. 2d. 978, 314 N.Y.S.2d 66, 70-72 (N.Y. Sup. 1970).
69. *Slevin v. Long Island Jewish Medical Center*, 66 Misc. 2d 312, 319 N.Y.S.2d 937, 843-46 (N.Y. Sup. 1971).

70. *Corporation of Presiding Bishop v. Ashton*, 92 Idaho 571, 448 P.2d 185 (1968).
71. *Islamic Society of Westchester and Rockland, Inc. v. Foley*, 96 A.D. 2d 536, 464 N.Y.S.2d 844, 845 (1983).
72. *St. John's Evangelical Lutheran Church v. Hoboken*, 195 N.J. Super. 414, 479 A.2d 935, 937-38 (1983).
73. *Appeal of Stark*, 72 Pa. D. & C. 168, 178-79 (1950) (emphasis in original); *See also* Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972).
74. *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981); *accord* Frazee v. Illinois Dep't of Employment Sec., 109 S.Ct. 1514, 1517 (1989).
75. *Islamic Center of Miss. v. Starkville, Miss.*, 840 F.2d 293 (5th Cir. 1988).
76. *Church of Jesus Christ of Latter Day Saints v. Jefferson County*, 741 F. Supp. 1522 (N.D. Ala. 1990).
77. Id. at 1534.
78. *See, e.g. Cohen v. City of Des Plains*, 8 F. 2d 1082 (U. S. App. 7th Cir. 1993); *Christian Gospel Church, Inc. v. City & City of San Franciso*, 896 F. 2d 1221 (U.S. App. 9th Cir. 1990).
79. *Christian Gospel Church*, 896 F.2d 1221, .
80. *Islamic Center of Miss. v. Starkville, Miss.*, 840 F. 2d 293; *Church of Jesus Christ of Latter Day Saints v. Jefferson County*, 741 F. Supp. 1522.
81. *Village of Willowbrook, et al. v. Grace Olech*, 120 S. Ct.1073, 1074 (2000).
82. 42 U.S.C. 3604(a).
83. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2nd Cir. 1995).
84. *Id.* at 425.
85. Id.
86. Id.
87. *Id.*, (citing *Washington v. Davis*, 96 S.Ct. 2040, 2049 (1976)).
88. *Id.*, (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 97 S.Ct. 555, 564 (1977).
89. *Keith v. Voipe*, 858 F.2d 467, 482 (9th Cir. 1988) (citing *Resident Advisory Bd. v. Rizzo*, 564 F2d 126, 146-48 (3d Cir. 1977)).
90. Id.
91. See Schwartz, "The Fair Housing Act And `Discriminatory Effect': A New Perspective," 11 Nova L. Rev. 71 (1986).
92. *Farhi v. Commissioners of the Borough of Deal*, 499 A.2d 559 (N.J. Super 1985).
93. *Id.* at 563.
94. See Crane, Daniel A., "Beyond RFRA," 10 St. Thomas L.Rev. 235 (1998).
95. Incorporation is the means by which the provisions of the Bill of Rights, which originally constrained the federal government alone, *see Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833), were made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See generally* Nowak, John E. & Rotunda, Ronald D., Constitutional Law, 10.2, at 339-43 (5th ed. 1995).
96. *See* Crane, Daniel A., "Beyond RFRA," 10 St. Thomas L. Rev. 235 (1998).

97. *Id*.

98. U.S. Const. art 6, cl. 2.

99. *See* Collins, Ronald K.L., "Reliance On State Constitutions - Away From a Reactionary Approach," 9 Hastings Const. L.Q. 1, 15 (1981).

100. The Supreme Court may review a state court judgement when it is so interwoven with federal law as to prevent the Court from determining whether the opinion rests on federal or state grounds. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1982). For a situation when the state court judgement about a state law issue explicitly turns on a determination of the meaning of federal law, *see* Delaware v. Prouse, 440 U.S. 648, 652-53 (1979).

101. *See State v. Miller*, 549 N.W.2d 235, 241 (Wis. 1996); *Hunt v. Hunt*, 648 A.2d 843, 850 (Vt. 1994); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-82 (Alaska 1994); *Attorney General v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185-88 (Wash. 1992); *State v. Hershberger*, 462 N.W. 2d 393, 398-99 (Minn. 1990).

102. In *Palmer v. Palmer*, 545 N.W.2d 751, 755

103. In *State v. Van Winkle*, 889 P.2d 749, 755 (Kan. 1995), the Supreme Court of Kansas upheld the trial court's revocation of a convicted felon's probation after the defendant had violated a condition of probation by leaving a drug treatment center. The defendant claimed that the revocation of probation prohibited the free exercise of her religion in violation of the Kansas Constitution. *See id.*, at 754-55; see also Kan. Const., Bill of Rights 7. In discussing this claim, the court cited with the apparent approval of an earlier court of appeals decision, which had held that in the context of probation determinations, "only those interests of the highest order ought to override the free exercise of religion." *State v. Evans*, 796 P.2d 178, 180 (Kan. Ct. App. 1990). Additionally, the court noted that "restrictions on constitutional rights or freedoms as a condition of probation are permitted if such restrictions bear a reasonable relationship to the rehabilitative goals of probation, the protection of the public, and the nature of the offense." *Van Winkle*, 889 P.2d at 754. This test sounds more like intermediate scrutiny than strict scrutiny. *See Dolan v. City of Tigard*, 114 S.Ct. 2309, 2319 (1994) (describing reasonable relationship test as intermediate scrutiny). Nonetheless, the imposition of intermediate scrutiny would probably contravene the *Smith* rule, which would require no scrutiny under such circumstances.

104. In *Rupert v. City of Portland*, 605 A.2d 63, 65-66 (Me. 1992), the Supreme Judicial Court of Maine applied the *Sherbert* compelling interest test to a generally applicable and neutral state statute prohibiting the ownership of drug paraphernalia. This is a clear departure from the Smith approach.

105. In *St. John's Lutheran Church v. State Compensation Insurance Fund*, 830 P.2d 1271, 1278 (Mont. 1992), the Supreme Court of Montana reaffirmed an earlier decision holding that "the essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *St. John's*, 830 P.2d at 1276 (quoting *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794, 796 (Mont. 1986); *See also* Mont. Const. art. 2, 5.

106. In *People v. DeJonge*, 501 N.W.2d 127, 134 (Mich. 1993), the Supreme Court of Michigan applied the strict scrutiny standard in invalidating a teacher certification requirement as applied to home schoolers.

107. In *Smith v. Fair Employment and Housing Commission*, 913 P.2d 909, 931 (Cal. 1996), the Supreme Court of

California cited two conflicting lines of California precedent concerning free exercise exemptions. However, the court noted that "although California and federal standards in this area appear to be analogous, it might be argued that Section 4 offers broader protection because it specifically refers to `liberty of conscience.'"

108. *State ex re. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975) (applying strict scrutiny to free exercise claims of snake handlers); *State v. Loudon*, 857 S.W.2d 878, 882 (Tnn. Crim. App. 1993) (adopting the Smith approach under the Tennessee Free Exercise Clause).

109. *In re Brown*, 478 So. 2d 1033, 1042 (Miss. 1985) (stating that an individual has a free exercise right to refuse blood transfusion).

110. *See* Crane, Daniel A., "Beyond RFRA," 10 St. Thomas L. Rev. 235 (1998).

111. *See, e.g., Horen v. Commonwealth*, 479 S.E.2d 553, 558 (Va.Ct.App. 1997); *State v. Bontrager*, No. 6-95-17, 1996 WL 612374, at *2 (Ohio Ct. App. Oct. 18, 1996); *Geraci v. Eckankar*, 526 N.W.2d 391, 399 (Minn. Ct. App. 1995).

112. If courts continue to apply strict scrutiny under the First Amendment in non-hybrid rights situations, this would conflict with Smith.

113. *See, e.g., Roppolo v. Moore*, 644 So. 2d 206, 210 (La. Ct. App. 1996).

114. *See Village Lutheran Church v. City of Ladue*, 935 S.W.2d 720, 722 (Mo. Ct. App. 1996).

115. *See In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. Ct. App. 1994). The other constitutional right at issue in Baby Doe was the Fourteenth Amendment due process liberty interest in avoiding unwanted medical treatment. *See id.*, at 331 (*citing Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 277 (1990)).

116. *See* Walker, J. Brent, "Religious Liberty: An Endangered Right," 2 Nexus J. Op. 63 (1997).

118. *Id.*

118. *Church of Lukami Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1983).

119. *See* Crane, Daniel A., "Beyond RFRA," 10 St. Thomas L. Rev. 235 (1998).

120. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-81 (Alaska 1994).

121. *See* Crane, Daniel A., "Beyond RFRA," 10 St. Thomas L. Rev. 235 (1998).

122. *See, e.g.*, R.I. Gen Laws 42-80.1-3 (1993).

123. *See* Walker, J. Brent, "Religious Liberty: An Endangered Right," 2 Nexus J. Op. 63 (1997).

124. *See* Toker, Rachel, "Tying The Hands of Congress: City of Boerne v. Flores," 33 Harv. CR.-C.L. L.Rev. 273 (1998).

125. *See* Crane, Daniel A., "Beyond RFRA," 10 St. Thomas L. Rev. 235(1998).

126. *Employment Division v. Smith*, 110 S.Ct. 1595 (1989).

127. *See* Lupa, Ira C., "Of Time And The RFRA: A Lawyer's Guide To The Religious Freedom Restoration Act," 56 Mont. L. Rev. 171, 186 (1995).

128. *Id.*

129. *See First United Methodist Church of Seattle v. Hearing Exam'r*, 916 P.2d 374, 380 (Wash. 1996); *State v.*

Hershberger, 462 N.W. 2d 393, 397 (Minn. 1990).

130. *See Dubusk*, Thomas L., "RFRA Came, RFRA Went," 10 Regent U.L. Rev. 223 (1998).

131. *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997).

132. Relevant portions of document cited in "'Connor's opinion in *Boerne*, *Id.*

133. *Id.* at 2180-81.

135. 42 U.S.C. ' 2000cc (a)(1)(A), (B).

135. *See* Saxer, Shelly Ross, "When Religion Becomes A Nuisance," 84 Ky. L.J. 507 (1996).

136. *Id.*

137. *Id.*

139. *Id.*

139. *Id.*

140. *City of Boerne v. Flores*, 117 S.Ct. 2157, 2185 (1997).