UIC Law Review

Volume 29 | Issue 2 Article 7

Winter 1996

Religious Liberty and Fair Housing: Must a Landlord Rent against His Conscience, 29 J. Marshall L. Rev. 455 (1996)

James C. Geoly

Kevin R. Gustafson

RELIGIOUS LIBERTY AND FAIR HOUSING: MUST A LANDLORD RENT AGAINST HIS CONSCIENCE?

JAMES C. GEOLY* & KEVIN R. GUSTAFSON**

INTRODUCTION

A growing number of landlords have asserted that due to their religious faith the government will hold them accountable for the way they use their property. Some of these landlords have refused to rent to unmarried couples who wish to cohabit on the grounds. These landlords believe this cohabitation constitutes participation in sinful conduct. Frequently, the landlord's religiously-inspired conduct is counter to state and local housing codes that prohibit discrimination on the basis of marital status.[1] Landlords, though, are increasingly winning exemptions from local housing discrimination statutes based on the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993.[2] This Article briefly summarizes the legal

---

* B.A., Columbia University, 1982; J.D., University of Chicago, 1985. Mr. Geoly is Counsel to the Religious and Human Services Practice Group of the law firm of Mayer, Brown & Platt in Chicago, Illinois.

** B.A., Wheaton College, 1987; J.D., The John Marshall Law School, 1992. Mr. Gustafson is an attorney with the Religious and Human Services Practice Group of the law firm of Mayer, Brown & Platt in Chicago, Illinois.

1. Under the Fair Housing Act, individuals are generally protected from discrimination in housing on the basis of race, color, religion, sex, handicap, familial status or national origin. 42 U.S.C. § 3604 (1968). Section 3607 of the Fair Housing Act provides a limited exemption from these prohibitions to a "religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society." 42 U.S.C. § 3607 (1996). A qualifying religious entity may limit "the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion." *Id. See also* Claudia Reed, Note, *Housing Law* - United States v. Columbus Country Club*: How "Religious" Does An Organization Have To Be To Qualify For The Fair Housing Act's Religious Organization Exemption?*, 15 W. NEW ENG. L. REV. 61 (1993). Private landlords may also take advantage of the religious exemption, such as to induce religious colleges to house students in their rental units. Wilson v. Glenwood Intermountain Properties, 876 F. Supp. 1231, 1246 (D. Utah 1995).

2. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb; 42 U.S.C. § 1988; 5 U.S.C. § 504). The Act states:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS—The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the

basis of the religious free exercise right as a defense to discrimination claims and as an affirmative right to fair housing.

I. LEGAL SOURCES OF RELIGIOUS FREEDOM[3]

A. First Amendment of the U.S. Constitution

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] The "free exercise" of religion means the right to believe and profess any religious belief, as well as the right to be free from the imposition of religious beliefs by the government.[5] Both rights are absolute except when religious beliefs are expressed through religiously-motivated conduct.[6] In this situation, the court weighs religious beliefs against legitimate concerns for the safety, order

---

United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION.—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding benefits, or exemptions.

Id.

3. In this context, we refer to the right to the free exercise of religion. Although some would characterize the bar of the Establishment Clause as "religious freedom" as well, it does not create the kind of positive right that is the subject of this article.

4. U.S. CONST. amend. I. The Supreme Court has applied the Religion Clauses of the First Amendment to the states by incorporation into the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

5. *Cantwell*, 310 U.S. at 303.

6. *Id.*

or well-being of the nation and its people.[7]

The United States Supreme Court developed a weighted balancing test to resolve this tension between an individual's religious expression and the government restrictions of that expression. In *Sherbert v. Verner*,[8] the Court held that the government must have a compelling governmental interest to justify a substantial burden of a religious practice.[9] "Compelling" requires that the action must be paramount or of the highest importance.[10] Moreover, the government must choose the least restrictive means available to serve the government's "compelling" interest.[11] Thus, the government could not bar a religious activity if mere time or space restrictions could serve its "compelling interest."

In 1990, the Supreme Court departed from thirty years of free-exercise jurisprudence in *Employment Division, Department of Human Services of Oregon v. Smith*.[12] In *Smith*, the Court rejected the claimants' assertion that, as Native Americans, their use of the narcotic peyote was solely for religious purposes and should not be considered "misconduct" sufficient to disqualify them from a claim for unemployment benefits.[13] The Court held that use of peyote, whether religiously inspired or not, was illegal under Oregon's drug laws and that the right to free exercise of religion could not exempt individuals from the scope of such neutral, generally applicable laws.[14]

The Court[15] acknowledged that the heightened constitutional protection of the Free Exercise Clause still applied to intentional and direct assaults on religious activity.[16] Such assaults include laws prohibiting belief in a particular doctrine or banning otherwise legal activities only for religious purposes.[17] The Court, however, refused to apply the *Sherbert* "compelling governmental interest" test to neutral laws.[18] Instead, the Court held that when nuetral laws burden religious free exercise the courts should review these laws under the less demanding "rational

---

7. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

8. 374 U.S. 398 (1963).

9. *Id.* at 403.

10. *Id.* at 406. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (holding that only interests that were of "the highest order" would be considered compelling).

11. *Sherbert*, 374 U.S. at 408-09.

12. 494 U.S. 872 (1990).

13. *Id.* at 890.

14. *Id.* at 878, 890.

15. Justice Scalia wrote on behalf of the majority. *Id.* at 872.

16. *Id.* at 877.

17. Employment Div., Dep't of Human Services of Or. v. Smith, 494 U.S. 872, 877 (1990).

18. *Id.* at 880-81.

basis" standard.[19] In addition, the Court acknowledged that the compelling governmental interest test would still apply to neutral, generally applicable laws that affect a religious activity only if the claimant combined a Free Exercise claim with another constitutional right, such as freedom of speech or press.[20] This combination would create a hybrid right entitled to strict scrutiny.[21]

Thus, if a law is "neutrally, generally applicable," the government will meet its burden and overcome a Free Exercise challenge, even if the law does in fact significantly burden the exercise of religion.[22] Instead of "paramount" governmental interest, the government must only show that the law is "reasonable" or "important." For example, a law prohibiting all consumption of alcohol by minors, a seemingly neutral law of general applicability, may impose a special burden on the use of sacramental wine in Catholic, Protestant or Jewish rites. Under *Smith*, clergy could face prosecution if wine were served to a minor, notwithstanding the role of wine in their respective religious traditions.[23] In response to this grave concern, the Court retorted:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[24]

This approach left the entire religious community unprotected from unwanted, unwarranted and even unintended government intrusion into their respective religious activities.[25] In light of

---

19. *Id.* at 878-90. Under the rational basis test, a statute will be upheld if the government had, or could have had any rational basis to enact it. *Id.*

20. *Id.* at 881.

21. *Id.*

22. Some cases have interpreted *Smith* to be limited to laws punishing criminal conduct. American Friends Services Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1407 (9th Cir. 1991); NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1305 (9th Cir. 1991); Alabama & Coushatta Tribes v. Trustees of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1330 (E.D. Tex. 1993).

23. It has been suggested that in the illustration given above, "common-sense, prosecutorial discretion" will prevent abuses through a system of selective enforcement. Of course, if fundamental rights, such as the right of religious expression, were left to the paternalistic discretion of the majority, society would have no need for the Bill of Rights.

24. Employment Div., Dep't of Human Services of Or. v. Smith, 494 U.S. 872, 890 (1990). Justice Scalia believes that "[a]ny society adopting such a system would be courting anarchy." *Id.* at 888.

25. In the wake of *Smith*, several cases involving religious freedom illustrated *Smith*'s disturbing implications. In Yang v. Sterner, 750 F. Supp. 558, 560 (D.R.I. 1990), the court allowed an unnecessary autopsy on a young man despite the vigor-

the emasculation of the Free Exercise Clause under *Smith*, most claimants now base their free exercise claims on the Religious Freedom Restoration Act.

B. Religious Freedom Restoration Act

One of the broadest political coalitions in recent history supported the signing of the Religious Freedom Restoration Act (RFRA) on November 17, 1993.[26] The Act creates a private right of action for violations of the right to freely exercise religion.[27] The Act also creates an affirmative defense against civil and crim-

---

ous protests from his family that, under their religious beliefs, an autopsy would condemn the spirit of the deceased. In *In re* Welfare of T.K. & W.K., 475 N.W.2d 88, 89 (Minn. Ct. App. 1991), two minor children had been taken away from a mother because she had home schooled them and, pursuant to religious beliefs, refused to have them take standardized tests. Although the children were returned under the application of state constitutional protection, the Minnesota Appellate Court acknowledged that under *Smith* the parents had no protection for their religious beliefs. *Id.* at 93. *See also* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 468 (8th Cir. 1991) (allowing city to ban churches in certain areas of city as a valid time, place and manner restriction); Rectors, Wardens & Members of Vestry of Saint Bartholomew's Church v. City of N.Y., 914 F.2d 348, 353 (2d Cir. 1990) (holding that church did not obtain protection of First Amendment to avoid city laws that hindered the Church's ability to raise revenue for religious charitable activities); Greater N.Y. Health Care Facilities v. Axelrod, 770 F. Supp. 183, 188 (S.D.N.Y. 1991) (permitting state to limit services volunteers may perform at non-profit nursing homes).

Perhaps most shocking was the report of Mother Teresa's shelter for the homeless being closed in New York. Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, N.Y. TIMES, Sept. 17, 1990, at B1. The shelter was closed because it did not have an elevator to the second floor and thus was deemed inaccessible to the handicapped. *Id.* The Sisters did not install an elevator as a matter of religious principle (they are committed to a simple life) and offered to *carry* any handicapped residents up the stairs. *Id.* With no fear of reprisal under *Smith*, city officials refused to accommodate the religious shelter, stating "This isn't India, this is America, and carrying people up the stairs is inconstant with American notions of human dignity." *Id.* As a result, Mother Teresa was unable to keep the shelter open. *Id.*

26. For a more comprehensive review of the Act, including its impact and its history, see Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994); Robert F. Drinan & Jennifer Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531 (1993/1994); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Ralph D. Mawdsley, *Issues Facing Religious Educational Institutions That Discriminate on the Basis of Religion*, 97 EDUC. L. REP. 15 (Apr. 1995); Leon F. Szetpycki & Jean B. Arnold, *Religious Freedom Restoration Act*, 88 EDUC. L. REP. 907 (Apr. 1994).

27. 42 U.S.C. § 2000bb-1(c). The RFRA also provides for attorneys fees for prevailing plaintiffs. 5 U.S.C. § 504(b)(1)(C)(iv). *See also* Helbrans v. Coombe, 890 F. Supp. 227 (S.D.N.Y. 1995) (illustrating the amount and rate of attorneys' fees a court will allow under the RFRA).

inal charges that creates burdens on the free exercise of religion.[28] The RFRA was intended to restore the protection of religious liberty eviscerated by the *Smith* decision.[29]

Importantly, the RFRA does not, nor does it attempt to, overturn *Smith*. Instead, Congress created a free-standing federal statutory right which simply adopts the pre-*Smith* free exercise jurisprudence as its legal standard.[30] Because of the lesser protection of the First Amendment under *Smith*, most claims involving religious freedom now should include the RFRA with the First Amendment and state constitutional claims.

Under Section Three of the RFRA, if the claimant's religious activity is substantially burdened, the government must show that the restriction on the religious activity serves a compelling governmental interest and that the restriction serves that interest through the least restrictive means available.[31] Even though the RFRA makes the level of scrutiny of a governmental action strict, the court will only apply this scrutiny if the action actually burdens a religious activity.[32] Thus, insignificant burdens on religious activities or significant burdens on non-religious activities will not enjoy the heightened legal standard.

Although the government restriction may devastate a particular religious group, the restricted activity must be considered "religious" in order to obtain protection by the RFRA.[33] In order

---

28. 42 U.S.C. § 2000bb-1(c).

29. Specifically, the purpose of the RFRA is "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

30. *But see* P.L. Flores v. City of Boerne, 877 F. Supp. 355, 362 (W.D. Tex. 1995) (holding the RFRA unconstitutional because Congress attempted to overturn *Smith*); *In re* Tessier, No. 94-31615-13, 1995 U.S. Bankr. WL 736461, *4 (D. Mont. Dec. 8, 1995) (holding the RFRA unconstitutional because Congress attempts to adopt legal standard already rejected by Supreme Court). See *infra* pages 18-21 and accompanying notes for a discussion of these cases and the issues of the RFRA's constitutionality.

31. 42 U.S.C. § 2000bb-1(b).

32. This statement does not imply that an individual must endure discrimination or irreversible harm to invoke the protection of the law. Instead, the claimant need only show that on its face the law or intended governmental action substantially burdens one's religious beliefs. Fence v. Jackson County, 900 P.2d 524, 528 (Or. Ct. App. 1995) ("person challenging a law's compliance with the [RFRA] need not await a formal implementing action that denies a specific use.").

33. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (allowing the government to build roads over Native American lands even though undisputed that activities "could have devastating effects on traditional Indian religious practices"); Bowen v. Roy, 476 U.S. 693 (1986) (permitting the government to require a Social Security number to apply for and receive certain benefits even if contrary to religious beliefs).

to constitute religious conduct, the activity must be motivated primarily by corresponding religious beliefs.[34] The drafters of the RFRA ensured that the RFRA would not limit religious activity to a finite list of officially recognized activities.[35] Apart from the obvious Establishment Clause concerns that such a list would present, a list would be difficult to compile and would risk significant omissions.

Moreover, the governmental burden on the religious activity must be more than slight or inconsequential.[36] In applying the compelling governmental interest standard, the Supreme Court has previously described as "substantial" those burdens arising:

> where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[37]

If the claimant shows that the government has substantially burdened his or her religious conduct, the government must then show that its restriction is necessary to advance a "compelling" purpose.[38] Thus, the government must articulate a specific compelling reason for not accommodating the religious activity.[39] The RFRA does not provide examples of sufficiently-compelling governmental interests but leaves this issue to a case-by-case analysis.[40] Even if the government's interest is so important to the public as to constitute "compelling," the courts will still strike the governmental action as invalid if the government had an alternative means that was less restrictive on the religious activity.[41] In other words, if granting a religious exemption to the government provision will not substantially harm the government's compelling interest, the government must accommodate the free exercise of religion.

Since the passage of the RFRA in 1993, more than one hundred decisions have interpreted or implicated the RFRA.[42] These

---

34. Much of the activity of churches and believers is not grounded in religious "commands" or "prohibitions," but is nonetheless motivated by deeply-held religious convictions. *See* Berg, *supra* note 26, at 52.

35. *See* Laycock & Thomas, *supra* note 26, at 218-19.

36. *See, e.g.*, Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (finding that the school's reading program imposed no substantial burden on free exercise of religion rights of parents and their children because it did not compel either parents or children to do or refrain from doing anything religious in nature).

37. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 708 (1981).

38. *Id.*

39. Berg, *supra* note 26, at 31-40.

40. *See* Laycock & Thomas, *supra* note 26, at 218-19.

41. Berg, *supra* note 26, at 40-45.

42. Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994) (mem.);

decisions have established protection for religiously inspired conduct which might not have been protected under the weaker standard of *Smith*.[43] Due to these decisions, some commentators have criticized the RFRA as an attempt by Congress to "overturn" the Supreme Court and the *Smith* decision.[44]

Hamilton v. Schriro, No. 94-3845, 1996 U.S. App. WL 11119 (8th Cir. Jan. 12, 1996); Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995); Brown v. Hot, Sexy and Safer Prods., 68 F.3d 525 (1st Cir. 1995); Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995); Malik v. Brown, 65 F.3d 148 (9th Cir. 1995); Brown v. Borough of Mahaffey, Pa., 35 F.3d 846 (3d Cir. 1994); Vernon v. Los Angeles, 27 F.3d 1385 (9th Cir. 1994); First Assembly of God of Naples, Fla. v. Collier County, Fla., 27 F.3d 526 (11th Cir. 1994); Doe v. Louisiana Psychiatric Medical Ass'n, No. Civ.A. 95-2122, 1995 U.S. Dist. WL 746657 (E.D. La. Dec. 14, 1995); *In re* Tessier, No. 94-31615-13, 1995 U.S. Bankr. WL 736461 (D. Mont. Dec. 8, 1995); Hanrahan v. Housing & Redevelopment Auth. of Duluth Minn., No. Civ. 5-95-19, 1995 U.S. Dist. WL 783254 (D. Minn. Nov. 13, 1995); United States v. Myers, 906 F. Supp. 1494 (D. Wyo. 1995); Battles v. Anne Arundel County Bd. of Educ., 904 F. Supp. 471 (D. Md. 1995); Snyder v. Murray City Corp., 902 F. Supp. 1444 (D. Utah 1995); Van Dyke v. Washington, 896 F. Supp. 183 (C.D. Ill. 1995); Tenacre Found. v. INS, 892 F. Supp. 289 (D.D.C. 1995); Dickerson v. Stuart, 877 F. Supp. 1556 (M.D. Fla. 1995); P.L. Flores v. Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, No. 95-50306, 1996 U.S. App. WL 23205 (5th Cir. Jan. 23, 1996); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 876 F. Supp. 445 (E.D.N.Y. 1995); Lee v. Oregon, 869 F. Supp. 1491 (D. Or. 1995); Church of Iron Oak v. Palm Bay, Fla., 868 F. Supp. 1361 (M.D. Fla. 1994); Bessard v. California Community Colleges, 867 F. Supp. 1454 (E.D. Cal. 1994); United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994); Western Presbyterian Church v. Board of Zoning Adjustment of D.C., 862 F. Supp. 538 (D.D.C. 1994); Germantown Seventh Day Adventist Church v. Philadelphia, No. 94-1633, 1994 U.S. Dist. WL 470191 (E.D. Pa. Aug. 26, 1994), *aff'd*, 54 F.3d 768 (3d Cir. 1995); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994); Fordham Univ. v. Brown, 856 F. Supp. 684 (D.D.C. 1994); Celestial Church of Christ v. Chicago, No. 93 C 7610, 1994 U.S. Dist. WL 282304 (N.D. Ill. June 22, 1994); *In re* Faulkner, 165 B.R. 644 (Bankr. W.D. Mo. 1994); Osborne v. Power, 890 S.W.2d 574 (Ark. 1994); Smith v. Fair Emp. & Hous. Comm'n, 30 Cal. Rptr. 2d 395 (Cal. Ct. App.), *superseded by*, 33 Cal. Rptr. 2d 567 (Cal. 1994); DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. Ct. App. 1994); Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); Jesus Ctr. v. LC Farmington Hills Zoning Bd. of App., No. 163536, 1996 Mich. App. WL 14771 (Mich. Ct. App. Jan. 12, 1996); Porth v. Roman Catholic Diocese of Kalamazoo, 532 N.W.2d 195 (Mich. Ct. App. 1995); Geraci v. Eckankar, 526 N.W.2d 391 (Minn. Ct. App. 1995); Ryslik v. Krass, 652 A.2d 767 (N.J. 1995); Williams v. Bright, 632 N.Y.S.2d 760 (N.Y. Sup. Ct. 1995); Tilton v. Marshall, 38 Tex. Sup. Ct. J. 1140 (1995); Hunt v. Hunt, 648 A.2d 843 (Vt. 1994).

43. *See, e.g.*, Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995). In *Cheema*, the Ninth Circuit recently held that although a school district had a compelling interest in maintaining a "no-knife" policy for students, the school district had to accommodate the religious beliefs of certain Muslim students who wished to carry kirpans (long ceremonial knives). *Id.* at 885. Under *Smith* alone, the student would appear to have had no recourse.

44. For a discussion of the separation of powers issues related to the constitutionality of RFRA, see Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and the Separation of Powers*, 56 MONT. L. REV. 5 (1995); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to*

In *P.F. Flores v. City of Boerne*,[45] a federal district court in San Antonio Texas held in an interlocutory ruling that the RFRA is unconstitutional on its face because it violates the separation of powers doctrine.[46] According to the court, Congress did not attempt to create a statutory right but attempted to overrule the Supreme Court's decision in *Smith*, and thereby restored earlier First Amendment jurisprudence.[47] Obviously, Congress cannot "overrule" the Supreme Court on a matter of constitutional interpretation. The district court, though, was mistaken in its first premise. The RFRA is neither a constitutional opinion nor purports to be one. The RFRA merely imports standards from certain cases into a statute and establishes a rather explicit *statutory* right. Following this reasoning, the appellate court reversed the federal district court in *Flores*.[48]

In re Tessier[49] also held that the RFRA was unconstitutional.[50] In *Tessier*, a bankruptcy judge rejected a Chapter Thirteen plan for debtors which included a proposed ten percent tithe to their church.[51] When the debtors asserted that they had a right to tithe under the RFRA, the court rejected their claim by holding that the RFRA was unconstitutional as a legislative attempt to overrule the Supreme Court.[52] Moreover, the bankruptcy court took *Flores* one step further by holding that courts were prevented from applying the *Sherbert/Yoder/RFRA* test because it violated the central holding of *Smith*.[53] Thus, the legislature could not adopt a judicial test specifically rejected by the Supreme Court as unworkable.[54] Courts could not use the test because any inquiry

---

Counter Judicial Doctrine, 21 GA. L. REV. 57 (1986); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995).

45. 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, No. 95-50306, 1996 U.S. App. WL 23205 (5th Cir. Jan. 23, 1996).

46. *Id.* at 357.

47. *Id.* at 356.

48. *See* P.F. Flores v. City of Bourne, No. 95-50306, 1996 U.S. App. WL 23205 (5th Cir. Jan. 23, 1996).

49. No. 94-31615-13, 1995 U.S. Bankr. WL 736461 (D. Mont. Dec. 8, 1995).

50. *Id.* at *11.

51. *Id.* at *2-4, *11.

52. *Id.* at *9-11.

53. *Id.* at *10.

54. *In re* Tessier, 1995 U.S. Bankr. WL 736461, *10-11 (D. Mont. Dec. 8, 1995). The court stated that:

> [T]hrough RFRA Congress purports to force the Judicial Branch to apply a statutory standard that it has specifically rejected as judicially unworkable in the constitutional context. To do so without tailoring the statute to address the Supreme Court's specific reasoning for its rejection of the standard can only doom the Act to constitutional infirmity. . . . To apply RFRA, the Bankruptcy Court has to fly directly in the face of the Supreme Court's admonition that it cannot adequately evaluate and compare the competing

into or evaluation of religious activity would present unsurmountable difficulties.[55]

On the other hand, most courts have upheld the constitutionality of the RFRA.[56] These courts correctly point to the language of the statute and its legislative history.[57] The RFRA remains a legislative act, creating a separate, federal statutory right guaranteeing the free exercise of religion with a standard of review that is imported from previous, but now superseded, Supreme Court cases.[58]

C. *Free Exercise of Religion under State Constitutional Law*

Several states recognize a constitutional right to free exercise of religion under their own constitutions. Although most of these states interpret their provisions as coextensive with the U.S. Supreme Court's interpretation, a few states have recognized a separate right to free exercise independent of the Supreme Court's analysis.[59] This separate right rose particularly in light of the weakened protection under the *Smith* decision.

II. APPLICATION OF THE RFRA TO LANDLORD OWNERS

Courts have applied these Free Exercise principles to disputes in which landlords refuse to rent to unmarried couples who

---

interests implicated by the facts sub judice. Had the Congress not merely sought to reinstate the same indefinite language of the *Sherbert/Yoder* test; had it instead furnished RFRA with definitions for a 'substantial burden' on religious exercise, what constitutes a 'compelling governmental interest' in the free exercise context, and most important perhaps, direction as to how courts should weigh the competing interests; the Act may not have offended *Smith*. Nevertheless, this Congress did not do, and therefore RFRA cannot stand.

Id. at *10-11 (citations omitted).

55. *Id.* at *11.

56. *See, e.g.*, Abordo v. Hawaii, 902 F. Supp. 1220, 1230-33 (D. Haw. 1995). As one of a handful of federal appellate courts reviewing cases on the RFRA's constitutionality, the Eight Circuit Court of Appeals has recently declined to hold the RFRA unconstitutional. Hamilton v. Schriro, No. 94-3845, 1996 U.S. App. WL 11119 (8th Cir. Jan. 12, 1996).

57. *See, e.g.*, *Abordo*, 902 F. Supp. at 1230-33.

58. Drinan & Huffman, *supra* note 26, at 533; Laycock & Thomas, *supra* note 26, at 217.

59. *See generally* Donahue v. Fair Employment & Hous. Div., 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); Porth v. Roman Catholic Diocese of Kalamazoo, 532 N.W.2d 195 (Mich. Ct. App. 1995); Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Geraci v. Eckankar, 526 N.W.2d 391 (Minn. Ct. App. 1995); First Covenant Church v. Seattle, 840 P.2d 174 (Wash. 1992); Russell Bonds, First Covenant Church v. City of Seattle: *The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks against Historic Preservation Restrictions*, 27 GA. L. REV. 589 (1993).

wish to "cohabit" — live together in a sexual relationship.[60] For example, an unmarried couple will attempt to rent an apartment. The landlord will turn them away because the landlord "does not rent to unmarried couples." The landlord sincerely believes that cohabitation constitutes "fornication," which is a sin prohibited by the Bible. Moreover, the Bible provides that anyone who aids, abets or facilitates the commission of serious sin is as guilty as the sinner.[61] Thus, if the landlord rents to the fornicators, he will have committed a sin under the tenets of his own faith.

Upset at their rejection,[62] the couple files a complaint with the city or state under the applicable law prohibiting discrimination in housing on the basis of "marital status." At least under the cases decided thus far, the administrative body charged with the initial enforcement of the statute typically upholds the claim. Furthermore, the administrative orders reported thus far are actually rather severe. They include tens of thousands of dollars in damages, attorneys' fees and the requirement that the landlord post a sign branding himself a discriminator. When the landlord has raised his religious beliefs as a defense to the requirement that he rent to "sinners," the administrative body replies that nobody forced him to become a landlord and that he should take the units off the market if he wants to avoid a conflict with his religious principles.

A. Current Law

A case like the example is now pending on appeal in Illinois. In *Jasniowski v. Chicago Commission on Human Relations*,[63] the landlord is a born-again Christian whose sole proprietorship leases a building from his mother.[64] He subleases a small apartment that is located on the premises.[65] A couple responding to his ad told him that they were married and wrote that they were married on the rental application.[66] Later, the landlord discovered

---

60. For further discussion of discrimination in housing and the free exercise of religion rights of landlords, see Kelly Eckel, *Legitimate Limitation of a Landlord's Rights — A New Dawn for Unmarried Cohabitants*, 68 TEMP. L. REV. 811 (1995); Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699 (1995); *Constitutional Law — Free Exercise of Religion — Alaska Supreme Court Holds that Housing Anti-Discrimination Laws Protecting Unmarried Couples Withstand A Free Exercise Challenge by a Religious Landlord* — Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994), 106 HARV. L. REV. 763 (1995).

61. *See* 1 *Corinthians* 6:16.

62. This rejection may well be expected if the renters are actually "test casers."

63. No. 94 CH 5546 (Cook Cty. Cir. Ct. Ill. 1994).

64. *Id.*

65. *Id.*

66. *Id.*

that the couple had lied and refused to rent the apartment to them.[67] He stated that he could not allow fornication to happen on the premises and that he did not rent to people who lied on their rental applications.[68]

The Chicago Commission on Human Relations, applying the city's prohibition against discrimination in housing on the basis of marital status, held that Jasniowski had violated the law and ordered him to pay $634 in damages and $14,000 in attorneys' fees.[69] The Commission also ordered the landlord to refrain from renting his apartment in accordance with his religious beliefs.[70] If the landlord could not refrain, he must surrender his leasehold in order to avoid the conflict between his religious beliefs and the City's fair housing ordinance.[71] The case is now on appeal to the Illinois Appellate Court.

The leading decisions in this area essentially involve the facts outlined above, except not all couples lied about their marital status. In each of the cases, the local law in question barred discrimination on the basis of marital status. Also, in these cases, the landlord sought an exemption from this requirement on the grounds that his discrimination was based upon his sincere religious belief that to rent to the couple would endanger his own soul.

In a few cases, though, landlords have successfully brought the alternative argument that they did not violate the prohibition against marital status discrimination. In some states or cities, a landlord could argue that "marital status" does not refer to whether a couple is actually married but whether an *individual* is married, single, widowed or divorced. In other words, one might discriminate against two people according to what they propose to *do* in their bedroom and not because of their status as "married" or "unmarried."

This argument has succeeded in Illinois in *Mister v. A.R.K. Partnership*.[72] In *Mister*, the Illinois Appellate Court expressly held that the Illinois Human Rights Act's ban on discrimination on the basis of marital status did *not* apply to cohabitation.[73] The court observed that the State discriminated in many ways in favor of marriage.[74] Also, the court held that Illinois enacted the Human Rights Act at a time when the its criminal fornication

67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 553 N.E.2d 1152 (Ill. App. Ct. 1990).
73. *Id.* at 1161.
74. *Id.* at 1158.

statute outlawed cohabitation.[75] Thus, the state could not have intended to protect cohabitation in the Human Rights Act if it prohibited cohabitation in the fornication statute.[76] The Supreme Court of Minnesota, in *Minnesota v. French*,[77] also adopted this approach. States, however, have rejected this approach where fornication was not illegal nor where clear legislative intent included unmarried couples in the term "marital status."[78]

Assuming that a statute does prohibit landlords from discriminating between married and unmarried *couples*, the landlord has only one real defense to the discrimination charge. The landlord must assert that the law, as applied, places an undue burden on his free exercise of religion that cannot be justified by any compelling state interest. This argument has prevailed in some jurisdictions, failed in others and has been fought to a draw in one.

In California, the argument has succeeded in every conceivable way. In *Donahue v. Fair Employment and Housing Commission*,[79] the court dealt with the issue before the enactment of the RFRA, but after the decision in *Smith*. The court held that the California constitution's protection of religious liberty was broader than that afforded by the U.S. Constitution.[80] Therefore, the Supreme Court's decision in *Smith* did not constrain the California court's treatment of the landlord's free exercise claim under the California constitution.[81] The court held that under California's constitution the government must justify any burden on the free exercise of religion with a compelling state interest and the burden is the least restrictive means available to advance that interest.[82]

Predictably, the court found that forcing a landlord to rent his own property to "fornicators" substantially burdened his sincerely held religious beliefs and thus his exercise of religion.[83] Furthermore, the court held that the government could not justify this burden with the purported state interest to prevent discrimination against unmarried couples.[84] Interestingly, although no dispute arose that this statute *did* prohibit discrimination against unmarried couples,[85] the state's explicit policy favoring marriage

---

75. *Id.* at 1157-58.
76. *Id.* at 1158.
77. 460 N.W.2d 2, 5-7 (Minn. 1990).
78. Some of the states include Massachusetts, Alaska and California.
79. 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1993).
80. *Id.* at 38-40.
81. *Id.* at 39-40.
82. *Id.*
83. *Id.* at 46.
84. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 46 (Cal. Ct. App. 1993).
85. However, both Illinois and Minnesota found a dispute over this matter. *See*

was still relevant to show that the state did not have a compelling state interest in protecting cohabitation.

The decision in *Smith v. Fair Employment and Housing Commission*,[86] echoed the *Donahue* decision. This court, however, reached beyond the California constitution to apply both the First Amendment and the RFRA in favor of the landlord. The court held that under *Smith* this was a "hybrid" case because the government burdened the landlord's religious belief to deny the rental unit to the couple and burdened the landlord's right to express his view that he preferred not to rent to unmarried couples.[87] In addition, the Commission ordered the landlord to post a sign essentially promising to rent to unmarried couples.[88] Because of the restrictions on religion and the compelled speech elements of the case, the court held that under *Smith* the compelling state interest test would apply and, as in *Donahue*, found that the state did not have a compelling state interest to prevent discrimination against unmarried couples.[89] The court also reached the same conclusion under the California Constitution and the RFRA as well.[90]

In *French*, the Minnesota Supreme Court applied the state constitution to reach this same conclusion.[91] The court held that the state constitution offered more protection than the federal First Amendment.[92] Also, the court held that the state could not justify the anti-discrimination statute with any compelling state interest.[93] In Minnesota, the court, however, included in its decision the question, "[h]ow can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it?"[94]

The Supreme Court of Alaska has issued the only appellate opinion that flatly rejects the landlord's religious liberty claims in this context. In *Swanner v. Anchorage Equal Rights Commission*,[95] the court held that refusal to rent to an unmarried couple did violate the state's "marital status" provision.[96] Also, the landlord could not escape this violation because he believed that renting to the unmarried couple would constitute a sin on his own

---

supra notes 63-78 and accompanying text.

86. 30 Cal. Rptr. 2d 395 (Cal. Ct. App. 1994).
87. *Id.* at 403.
88. *Id.* at 397-98.
89. *Id.* at 403-05.
90. *Id.* at 410, 412.
91. Minnesota v. French, 460 N.W.2d 2, 11 (Minn. 1990).
92. *Id.* at 8-10.
93. *Id.* at 10-11.
94. *Id.* at 10.
95. 874 P.2d 274 (Alaska 1994).
96. *Id.* at 278.

part.[97]

The court first held that the landlord could not state a claim under the First Amendment based upon the *Smith* decision because the law was neutral and generally applicable and no "hybrid" claim was made.[98] The court next held that under Alaska's Constitution, as in California and Minnesota, citizens had greater protection than under the First Amendment.[99] This allowed the court to apply the compelling state interest test.[100] The court, however, held that Alaska *had* a "compelling" state interest in preventing *all* forms of discrimination, which justified a burden on religion.[101]

As the dissent noted, the court held that ensuring the right of unmarried couples to rent from unwilling landlords was "a per se obligation 'of the highest order,'" and such a discrimination was "an affront to human dignity."[102] This reasoning, said the dissent, debases the currency of prohibitions against truly invidious discrimination, such as on the basis of race.[103] Finally, the court disposed of the RFRA in a footnote by questioning its constitutionality and its application to the case, and stating that, in any event, the state did have a compelling state interest.[104]

The U.S. Supreme Court denied certiorari on the RFRA ruling in *Swanner*.[105] In a rare memorandum dissent, Justice Thomas castigated the Alaska court for its misperception of the impact of the RFRA on this dispute, and for erroneously balancing the State's supposedly compelling interest against religious values which Congress sought to place on a higher plane.[106] Justice Thomas stated:

> If, despite affirmative discrimination by Alaska on the basis of marital status and a complete absence of any national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a 'compelling' interest — that is, a 'paramount' interest, an interest 'of the highest order' — then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word compelling of any meaning and seriously undermines the protection for exercise of

---

97. *Id.* at 278-80.
98. *Id.* at 280.
99. *Id.* at 280-83.
100. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994).
101. *Id.* at 282-83.
102. *Id.* at 287.
103. *Id.* at 288-89.
104. *Id.* at 280 n.9.
105. Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994).
106. *Id.* at 461-62.

religion that Congress so emphatically mandated in RFRA.[107]

Finally, one state has fought this battle to a draw. In *Attorney General v. Desilets*,[108] the Supreme Judicial Court of Massachusetts found, as in California, that a landlord's refusal to rent to an unmarried couple for religious reasons violated the marital status protection.[109] As in *Donahue*, the case came before the court purely on state constitutional grounds.[110] Also, the court held that Massachusetts' constitution afforded more protection than the First Amendment, which mandated the imposition of the compelling state interest test.[111] Then, in a stunning move, the court did not uphold a grant of summary judgment to the landlord, but not because it doubted the sincerity of his beliefs or the burden on his exercise of religion.[112] Rather, the court refused because the state should have the opportunity to develop evidence on the subject of whether it has a compelling state interest to protect unmarried couples from discrimination.[113] The court acknowledged that the state's general interest in preventing discrimination was not enough.[114] Instead, it encouraged the state to conduct a market study: "We have no sense . . . of the numbers of rental units that might be withheld from [cohabitants] because of the religious beliefs of the owners of rental housing."[115] As the dissent observed:

> No combination of facts that might be found after a trial would legally justify the imposition of [an imposed choice between violating one's religiously informed conscience or withdrawing from commercial endeavors]. . . . '[M]arital status discrimination is not as intense a State concern as is discrimination based on certain other classifications.' In contrast, *the right to free exercise of religion is a fundamental right*.[116]

Assuming that the RFRA is upheld as constitutional, it is hard to understand how any of the "marital status" statutes can be applied to landlords refusing rentals on the basis of sincerely held religious beliefs. Notwithstanding the Alaska court's anomalous ruling, the RFRA compels the balance of a federal statutory right against a purported state interest in preventing discrimination in housing against unmarried couples. Unmarried couples are

---

107. *Id.* at 462.
108. 636 N.E.2d 233 (Mass. 1994).
109. *Id.* at 235.
110. *Id.*
111. *Id.* at 236.
112. *Id.* at 237.
113. Attorney General v. Desilets, 636 N.E.2d 233, 241 (Mass. 1994).
114. *Id.* at 239.
115. *Id.* at 240.
116. *Id.* at 246, 247 (emphasis added).

simply not the kind of "protected class" that should receive heightened protection. Thus, that class' right to housing should not supersede an individual's right to the free exercise of religion.

B. The Koinonia House Illustration

Although relatively few cases have used the RFRA as a shield to liability, even fewer cases have used the RFRA or the First Amendment as a sword to create housing rights. This illustration involves the First Amendment and the RFRA.

Koinonia House is an evangelical organization which ministers to men in prison and continues the relationship after their release. The organization bought a house in Wheaton, Illinois, where its executive director lived with his wife and son. This was a single family home in a single family zone. Generally, "families" were permitted occupants of "single family" homes. Under Wheaton's zoning ordinance, a "family" could consist of any number of immediate family members *plus* up to four unrelated adults. It did not matter that the other adults paid rent.

Realizing that most men released from prison ultimately return to prison, Koinonia House undertook the ministry of changing this destructive cycle. Koinonia House identified what it called "Christians," genuinely born-again Christians, while they were in prison, and groomed them for entry into the house in Wheaton upon release. When the men came to Wheaton, they lived as a family in the house (always fewer than four at a time) where they studied the Bible, prayed and prepared for re-entry into society. They were also linked with local churches which integrated them into the congregation and provided a social support network.

Needless to say, neighbors of Koinonia House were displeased. In response to pressure from the neighbors, the City of Wheaton passed a "Group Care Home Ordinance" which required burdensome regulation of any "group care home" by a newly constituted "Group Care Home Commission." The Commission had jurisdiction over any group care home that was not otherwise regulated by the State or County. In other words, the city created the Commission solely for Koinonia House.

The ordinance defined group care home as a home in which "special needs individuals" received "counseling." The City found that Koinonia House was a "group care home" under its ordinance because the intense Bible study and worship at the house constituted "counseling."

Koinonia House filed suit in the U.S. District Court for the Northern District of Illinois, bringing a number of claims. For this Article's purpose, the relevant analysis is that the ordinance, as applied, was a direct regulation of religion because the City used purely religious observances as a means to bring the house under

its "neutral" regulatory scheme.[117] For the RFRA purposes, the house was subject to the burden of regulation supposedly because "counseling" occurred in the house. However, the only conduct forming the basis of this claim was the residents' exercise of their right to study the Bible and pray together.

The parties resolved this case in its early stages. Koinonia House agreed to establish that it did not provide counseling services. The City agreed not to regulate Koinonia House.

CONCLUSION

Anti-discrimination statutes and policies protect individuals and couples from invidious descrimination, such as on the basis of race, and serve legitimate governmental purposes. The government, however, does not have a "compelling" interest in preventing discrimination against unmarried couples who wish to cohabit. Accordingly, under the RFRA, a landlord may act in accordance with his religious principles and deny accommodation to cohabitants as a matter of conscience, consistent with his free exercise of religion.

117. Thus, the regulation is subject to the compelling state interest test even under *Smith*.