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CONSTITUTIONAL LAW—The Supreme Court Can't Have it Both Ways Under RFRA: The Tale of Two Compelling Interest Tests. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006)

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CASE NOTE

CONSTITUTIONAL LAW—The Supreme Court Can't Have It Both Ways Under RFRA: The Tale of Two Compelling Interest Tests. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006).

Aaron D. Bieber*

INTRODUCTION

O Centro Espirita Beneficente Uniao do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals. Founded in Brazil in 1961, the UDV church blends aspects of Christian theology with traditional Brazilian indigenous religious beliefs.¹ In 1993, the UDV officially established a United States branch headquartered in Santa Fe, New Mexico.² Central and essential to the UDV's faith is receiving communion by ingesting hoasca (pronounced "wass-ca"), a sacramental tea made from two plants unique to the Amazon region.³ One of the plants, *psychotria viridis*, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*.⁴ Hoasca is made by brewing together these two indigenous Brazilian plants.⁵ Members of the UDV believe that taking hoasca during communion helps them understand, perceive, and connect with God.⁶ UDV regards the two plants as sacred and does not substitute other plants or materials as its sacrament.⁷ The UDV considers the use of hoasca outside

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¹ *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1240 (D.N.M. 2002).

² *Id.* at 1240.

³ *O Centro*, 126 S. Ct. at 1217.

⁴ *Id.*

⁵ *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1175 (2003). The court explained:

Psychotria contains DMT; *banisteriopsis* contains harmala alkaloids, known as beta-carbolines, that allow DMT's hallucinogenic effects to occur by suppressing monoamine oxidase enzymes in the digestive system that otherwise would break down the DMT. Ingestion of the combination of plants allows DMT to reach the brain in levels sufficient to significantly alter consciousness.

Id. at 1175.

⁶ Brief for Respondents at 5, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1217 (2006) (No. 04-1084). The UDV alleged these facts which are not disputed significantly. *Id.*

⁷ *Id.*

of religious ceremonies to be sacrilegious.⁸ Unfortunately for the UDV, DMT, along with “any material, compound, mixture, or preparation, which contains any quantity of [DMT],” is listed in Schedule I of the Controlled Substances Act (CSA).⁹

Hoasca is prepared by church officials in Brazil and exported to the United States since these plants do not grow naturally in the United States.¹⁰ On May 21, 1999, United States Customs Service agents seized a shipment of three drums of hoasca labeled “tea extract.”¹¹ A subsequent investigation revealed that the American branch of the UDV had received fourteen prior shipments of hoasca.¹² The inspectors seized the intercepted shipment and threatened the UDV with prosecution under the CSA.¹³ UDV filed suit against United States Attorney General John Ashcroft and other federal law enforcement officials seeking declaratory and injunctive relief prohibiting the government officials from applying the CSA to hoasca.¹⁴ UDV alleged, *inter alia*, that applying the Controlled Substances Act (CSA) to sacramental hoasca violated the Religious Freedom Restoration Act of 1993 (RFRA).¹⁵ Before trial, the UDV moved for a preliminary injunction to allow its members to continue their religious practices until the issue could be determined on the merits.¹⁶

During a hearing on the preliminary injunction, the Government conceded that the challenged application of the CSA would satisfy the UDV’s *prima facie* case under RFRA and substantially burden the UDV’s sincere exercise of religion.¹⁷

⁸ *Id.* at 5, 6. Respondents noted that “UDV’s ceremonies also include recitation of church law, invocations, question-and-answer exchanges, and religious teachings A person must be eighteen years old to join . . . prospective members often wait as long as two years before their first [hoasca] ceremony.” *Id.*

⁹ Controlled Substances Act, 21 U.S.C. § 801, 812(c), Schedule I(c) (2006). A drug’s placement in Schedule I indicates that the substance “has a high potential for abuse,” that it “has no currently accepted medical use in treatment in the United States,” and that “[t]here is a lack of accepted safety for use of the drug . . . under medical supervision.” *Id.* at § 812(b)(1).

¹⁰ *O Centro*, 342 F.3d at 1175.

¹¹ *Id.*

¹² *O Centro*, 126 S. Ct. at 1217.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *O Centro*, 282 F. Supp. 2d at 1252-55 (citing Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb (2000)). RFRA states that the government may substantially burden a person’s free exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1 (2000).

¹⁶ *O Centro*, 126 S. Ct. at 1217.

¹⁷ *O Centro*, 282 F. Supp. 2d at 1252.

The United States argued, however, the injunction did not violate RFRA because applying the CSA was the least restrictive means of advancing three compelling governmental interests: (1) protecting the health and safety of UDV members; (2) preventing the diversion of hoasca to recreational uses; and (3) complying with the 1971 United Nations Convention on Psychotropic Substances.¹⁸ The district court heard arguments from both parties on the health risks of hoasca and the potential for its diversion away from the church.¹⁹ The district court found the evidence regarding the health risks of hoasca to be “in equipoise.”²⁰ In addition, the court determined that the evidence was “virtually balanced” regarding the hoasca’s diversion away from the church to recreational users.²¹ In light of such an even showing, the court held that the Government failed to demonstrate a compelling interest to justify the application of the CSA after it acknowledged the substantial burden enforcement would have on the UDV’s sincere religious exercise.²² The court further rejected the Government’s position that it had a compelling governmental interest in complying with the 1971 Convention on Psychotropic Substances by finding that the convention does not apply to hoasca.²³

Since the Government did not meet its burden under RFRA, and the UDV demonstrated a substantial likelihood of success as to their RFRA claim, the district court turned to the question of whether the preliminary injunction should be granted to the UDV.²⁴ Under Tenth Circuit law, “[a] movant is entitled to a preliminary injunction if he can establish the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant

¹⁸ *Id.* at 1252-53.

¹⁹ *Id.* at 1255-66. The Government and UDV presented conflicting expert testimony about the health risks hoasca posed to the members of the UDV and the risk of diversion hoasca would have outside of the UDV’s religious uses. *Id.* On the issue of health risks, the Government presented evidence to the effect that the use of hoasca, or DMT more generally, can cause adverse drug reactions including psychotic reactions and cardiac irregularities. *Id.* at 1256-62. UDV countered by citing studies documenting the safety of its sacramental use of hoasca and presenting evidence that minimized the likelihood of the health risks raised by the Government. *Id.* at 1255-62. On the issue of diversion of hoasca, the Government cited a general rise in the illicit use of hallucinogens, and pointed to interest in the illegal use of DMT and hoasca in particular. *Id.* at 1262-65. UDV countered by emphasizing the thinness of any market for hoasca, the relatively small amounts imported by the church, and the absence of any diversion problem in the past. *Id.* at 1265-66.

²⁰ *Id.* at 1262.

²¹ *Id.* at 1262, 1266. On the issue of health risks, “in equipoise” meant that evidence presented by both sides was “virtually balanced.” *Id.* at 1262. It is also noteworthy that on the issue of risk of diversion the evidence presented by the UDV’s experts “may even tip the scale slightly in favor of the Plaintiff’s position.” *Id.* at 1266.

²² *Id.* at 1255.

²³ *Id.* at 1266-69 (citing 32 U.S.T. 543, T.I.A.S. No. 9725).

²⁴ *O Centro*, 282 F. Supp. 2d at 1241, 1270-71.

outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.”²⁵ In considering irreparable injury, the district court stated that “tenth circuit law indicates that the violations of the religious exercise rights protected under RFRA represent irreparable injuries.”²⁶ Next, the court weighed the threatened injury to the movant (the UDV) against the injury to the other party (the Government) and considered whether the grant of the injunction would be adverse to the public interest.²⁷ The district court stated that the Government’s inability to prove a compelling interest coupled with the public’s interest in protecting First Amendment rights satisfied these elements.²⁸ In conclusion, the court held that since the UDV was likely to succeed on the merits of its claim under RFRA, the grant of a preliminary injunction was proper.²⁹

Due to its findings, the district court entered a preliminary injunction prohibiting the Government from enforcing the CSA against the UDV for its importation and use of hoasca.³⁰ The injunction allowed the church to import the tea if it complied with federal permits, restricted control over the tea to persons of UDV church authority, and warned of the dangers of hoasca to those particularly susceptible UDV members.³¹

The Government appealed the preliminary injunction and the Tenth Circuit Court of Appeals affirmed the district court’s grant of the preliminary injunction.³² Subsequently, a majority of the Tenth Circuit sitting en banc affirmed.³³ The Supreme Court granted the Government’s petition for certiorari to determine whether the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV’s sacramental use of hoasca.³⁴

²⁵ *Id.* at 1241 (citing *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)).

²⁶ *O Centro*, 282 F. Supp. 2d at 1270-71 (citing *Kikumura*, 242 F.3d at 963).

²⁷ *Id.* at 1271.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 1270-71.

³¹ See *O Centro*, 126 S. Ct. at 1218; Appellant Pet. for Cert. at 5-9, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) (No. 04-1084); Appellee Mem. in Opp’n to Pet. for Cert. at 5-7, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) (No. 04-1084).

³² *O Centro*, 342 F.3d at 1181 (holding that “[the] UDV has demonstrated a substantial likelihood of success on the claim for an exemption to the CSA for sacramental use of hoasca”).

³³ *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004). The court “granted rehearing to review the different standards by which we evaluate the grant of preliminary injunctions, and to decide how those standards should be applied in this case.” *Id.* at 975.

³⁴ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 544 U.S. 973 (2005).

The Supreme Court held that “[t]he courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV’s sacramental use of hoasca.”³⁵

This case note will demonstrate how the Supreme Court’s interpretation of RFRA is contradictory, and does not give a clear definition of which compelling interest test RFRA demands. Specifically, this case note will examine the indistinct legislative intent of RFRA and demonstrate how the Court’s decision is ambiguous in light of the legislative intent. When enacting and codifying RFRA, Congress approved of stronger, more fact specific applications of compelling interest standards previously applied by the Supreme Court, and a weaker, more generalized applications that the Court used throughout the later half of the twentieth century.

First, this case note will display how the Court’s approval of a stronger and a weaker compelling interest standard does not clarify which standard the Court will use in the future. Second, this case note will analyze the Court’s reasoning in denying the Government’s proffered compelling interest of the uniformity of enforcement of the CSA for denying a religious exemption and explain how the Court gives conflicting reasoning to justify their holding on that matter. Finally, this case note will conclude that *O Centro* gives a nebulous and conflicted interpretation of RFRA that is unsuitable for future use.

BACKGROUND

The Free Exercise Clause of the First Amendment guarantees that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”³⁶ From 1791 to just prior to the 1960s, the Supreme Court ruled that the Free Exercise Clause protected religiously motivated beliefs, not actions, against general regulation.³⁷

In 1961, in *Braunfield v. Brown*, the Supreme Court decided that a Sunday closing law did not inflict constitutionally recognized harm on Orthodox Jewish shopkeepers, who kept a Saturday Sabbath, because the laws did not directly stop their religious practice.³⁸ The Court held that the state can regulate conduct by a generally applicable law despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose that

³⁵ *O Centro*, 126 S. Ct. at 1213.

³⁶ U.S. CONST. amend. I.

³⁷ See *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming a Mormon leader’s bigamy conviction). Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (recognizing two aspects of free exercise: freedom to believe and freedom to act, and that the former is absolute and the latter is not).

³⁸ *Braunfield*, 366 U.S. 599, 606-10 (1961).

burden.³⁹ The shopkeepers argued that the purpose of the statute, a day of rest for the people of the state, could still be fulfilled by granting an exemption because they rested on Saturdays.⁴⁰ The Court found, however, that the possibility that the shopkeepers might receive an economic advantage over those adhering to the statute justified denial of an exemption.⁴¹ *Braunfield* represented the possibility courts could grant an exemption to a general law of applicability for religious conduct.⁴² But under *Braunfield*, the Court still gave much deference to the Government's reasons for enforcing a general law despite its admitted negative consequences on religious exercise.⁴³

The Court Increased Protection Under the Free Exercise Clause

Protection under the Free Exercise Clause dramatically increased after the Supreme Court's decisions in *Sherbert v. Verner* and *Wisconsin v. Yoder*.⁴⁴ In *Sherbert*, a Seventh Day Adventist woman was fired from her job because her religion prohibited her from working on Saturdays.⁴⁵ Since she could not work on Saturdays, she was ineligible for South Carolina's unemployment compensation plan.⁴⁶ The Court considered the question whether a law denying the plaintiff unemployment compensation benefits violated her right to free exercise.⁴⁷ The Court looked at three criteria: (1) whether the law infringed on a person's free

³⁹ *Id.* at 607.

⁴⁰ *Id.* at 608.

⁴¹ *Id.* at 608-09. The Court also noted that denying the exemption would reduce the amount of commercial noise and activity. *Id.* at 608.

⁴² See Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J. L. & SOC. PROBS. 653, 664-65 (1995). Recognizing the change that *Braunfield* brought about in free exercise jurisprudence, Saison stated:

Though the claimants did not prevail in that case, the manner which the Supreme Court reached its decision marked a radical departure from the Reynolds rationale, and suggested that the Court would not always accord deference to legislative enactments. Unlike the approach used in Reynolds, the Braunfield Court explored the effect the statute would have on religious practice. A balancing informed the decision.

Id. (citations omitted).

⁴³ *Braunfield*, 366 U.S. at 606. Writing for the majority, Justice Warren stated: "[i]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of various religions." *Id.* See also Justice Brennan's dissent: "It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is mere convenience of having everyone rest on the same day." *Id.* at 614 (Brennan, J., dissenting).

⁴⁴ *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴⁵ *Sherbert*, 374 U.S. at 398.

⁴⁶ *Id.*

⁴⁷ *Id.* at 402-03, 407-08.

exercise of religion; (2) whether the law served a compelling state interest; and (3) whether the law was proportionately made to achieve the means by the method least intrusive of the religious freedom.⁴⁸ Despite the fact the law was not explicitly written to discriminate against Seventh Day Adventists, the Court stated that a law of general applicability could violate an individual's free exercise rights whether the law placed a direct or indirect burden on the person.⁴⁹

The *Sherbert* Court held that the plaintiff was entitled to unemployment compensation.⁵⁰ The Court reasoned that the Government's reason of uniform application of the unemployment compensation statute, when applied to the specific facts of the case, was not a compelling interest because the government had not shown evidence of "unscrupulous claimants feigning religious objections to Saturday work."⁵¹ *Sherbert* demanded the Government show fact-specific evidence of how allowing an exemption to the plaintiff would dilute the unemployment compensation fund and disrupt work scheduling.⁵² In addition, the holding required the Government to show there were no alternative regulations that would fulfill its interest without infringing First Amendment rights.⁵³ Although *Sherbert* found that the Government's interest in the uniform application of the unemployment compensation statute was not compelling, it suggested that a bare interest in uniform application of a law might justify burdens on religious practice.⁵⁴

The Supreme Court reaffirmed this standard nine years later in *Wisconsin v. Yoder*.⁵⁵ In that case, the Court held that the Free Exercise Clause entitled Old Order Amish to an exemption from Wisconsin compulsory school laws for children between the ages of fourteen and sixteen.⁵⁶ The high court applied the compelling interest test in which it measured the state's interest for the education of its youth against the likely impact on the Amish community if compliance were forced by

⁴⁸ *Id.* at 403, 404 (citing *Braunfield v. Brown*, 366 U.S. 599 at 607 (1961) ("For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or it is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'")).

⁴⁹ *Id.* at 403-04.

⁵⁰ *Id.* at 408-09.

⁵¹ *Sherbert*, 374 U.S. at 407-09 (reasoning that there was a need for uniform application of the unemployment statute to prevent "unscrupulous claimants feigning religious objections to Saturday work").

⁵² *Id.* at 407.

⁵³ *Id.*

⁵⁴ *Id.* at 408. The Court noted that applying a Sunday closing law to Orthodox Jewish merchants, who were already closed on Saturday due to their religious practice, had been justified by a "strong state interest in providing one uniform day of rest for all workers." *Id.* (citing *Braunfield v. Brown*, 366 U.S. at 605).

⁵⁵ *Yoder*, 406 U.S. 205 (1972).

⁵⁶ *Id.* at 234-36.

the law's criminal penalties.⁵⁷ As in *Sherbert*, the *Yoder* Court rejected sweeping claims of a compelling interest in uniform application in a general law of applicability.⁵⁸ Instead, courts must use a fact specific inquiry to "examine the interest that the State seeks to promote by its requirement of compulsory education to age 16, and that impediment to those objectives that would flow from recognizing the claimed Amish exemption."⁵⁹ In rejecting the State's asserted compelling interest of uniformity in the compulsory attendance law, the *Yoder* Court again affirmed that general laws of applicability can violate the Free Exercise Clause.⁶⁰ By holding that the Government, in this instance, did not have a compelling interest in uniform application of its education laws, the Court focused its decision on the unique history and success of the Old Amish Order's community in educating its youth.⁶¹ The compelling interest set forth by *Sherbert* and *Yoder* has been said to be the "high water mark" of free exercise.⁶²

⁵⁷ *Id.* at 214-34. Although providing public schools ranked at the "very apex" of the function of the state, and the state had a very strong interest in the health, welfare, and public education of its children, applied to the facts of the case, the compulsory school law "would do little to serve those interests." *Id.* at 213, 222.

⁵⁸ *Id.* at 221.

⁵⁹ *Id.*

⁶⁰ *Id.* at 220. The Court stated "[a] regulation neutral on its face, may in application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id.*

⁶¹ *Id.* at 222-26.

⁶² Ira C. Lupu, *Of Time And The RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 185 (1995). Professor Lupu stated that between 1972 and 1980,

[T]he Court had announced a strict review standard to govern claims, and had not yet created exceptions or limiting doctrines to funnel claims in a different, more government favoring direction. During that period, however, those principles were never put to any test and no Supreme Court decisions relied upon them.

Id. at 185.

The Supreme Court Applied the Compelling Interest Test

In the years following *Sherbert*, the Court upheld numerous laws against free exercise challenges using the compelling interest test.⁶³ The only exception to the Supreme Court's deference to the government during this time was a line of unemployment compensation cases.⁶⁴ The Supreme Court used a variety of methods to deny free exercise exemptions during this time and academics differ

⁶³ *Seeger v. United States*, 380 U.S. 163 (1965) (denying claimant's exemption from the Universal Military Training and Service Act because language defining "religious training and belief" as used in the statute exempting conscientious objectors from military service excludes those persons who, disavowing religious belief, decide on basis of essentially political, sociological or economic considerations that they will not participate in the war); *Johnson v. Robison*, 415 U.S. 361 (1974) (denying religious conscientious objector's claim to benefits under the Veterans Readjustment Act because the legislation furthered the objectives of enhancing and making more attractive service in the armed forces of the United States which was plainly within the power of Congress to raise and support armies); *Gillette v. United States*, 401 U.S. 437 (1971); *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying claimant's requested classification under the tax code because the government's fundamental, overriding interest in eradicating racial discrimination in education substantially outweighed whatever burden denial of tax benefits placed on the exercise of the religious beliefs of nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religion); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (denying claimant's exemption to the Fair Labor Standards Act because the Act placed no substantial burden on the free exercise of the claimants); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denying claimant's exemption from prison regulations because State prison officials acted in reasonable manner in precluding prisoners who were members of Islamic faith from attending religious service held on Friday afternoons, and prison regulations to that effect did not violate free exercise of religion clause of the First Amendment); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

⁶⁴ *See Thomas v. Review Bd. of the Ind. Employ. Sec. Div.*, 450 U.S. 707 (1981) (denying unemployment benefits to applicant whose religion forbade him to fabricate weapons found unconstitutional under Free Exercise Clause); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (denying unemployment benefits to religious convert who resigned position that required her to work on the Sabbath found unconstitutional under Free Exercise); *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829 (1989) (denying unemployment benefits to a claimant who refused a position because the job would have required him to work on Sunday found unconstitutional under Free Exercise Clause, even though refusal was not based on tenets or dogma of an established religious sect).

as to classification of these methods.⁶⁵ One way the Supreme Court denied free exercise exemptions was by giving great deference to military policy.⁶⁶

The Supreme Court also gave great deference to the government when the government argued that a religious exemption is precluded by a policy embodied in a congressional statute or government policy.⁶⁷ For example, in *Bowen v. Roy*, a Native American family requested an exemption from an Aid to Families with Dependent Children (AFDC) policy requiring a Social Security number to receive

⁶⁵ See Lupu, *supra* note 62, at 177-78; Thomas A. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 5-12 (1994); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 264-83 (1995). Professor Lupu states that in employing the compelling interest test from *Sherbert* and *Yoder* prior to *Smith*, the Court rarely granted an exemption:

This startling trend, in which the existence of a purportedly religion protective doctrine turned out to be no barrier to a long string of religion-suppressing decisions, had three crucial components—the exemption doctrines triggering mechanism [using the substantial burden requirement to find that the religious person or groups were not actually burdened by the application of the general law], its exclusion of certain government enclaves [military and prison policy was given deferential treatment by the courts], and the force and focus of its demand for governmental justification [watering down the compelling interest test by citing the general importance of tax laws].

See generally Lupu, *supra* note 62, at 264-83 (citations omitted).

⁶⁶ See *Goldman*, 475 U.S. 503 (1986); *Seeger*, 380 U.S. 163 (1965); *Robison*, 415 U.S. 361 (1974); *Gillette*, 401 U.S. 437 (1971). In *Goldman* a Jewish Air Force captain sought a religious exemption from a military regulation prohibiting headgear indoors so that he could wear his yarmulke, which is traditional Jewish headgear. *Goldman*, 475 U.S. at 505. The Government's interest for the policy was to maintain discipline, morale, order and hierarchical unity. *Id.* at 507-08. The Court refused to apply a compelling interest standard stating that "great deference" must be given to the judgment of military officials in applying their uniform policies. *Id.* at 507. *See also Gillette*, 401 U.S. at 437, 462 (holding that the "substantial governmental interest" of procuring necessary manpower to raise an army precluded an exception under the conscientious objector's statute, despite the objector's "incidental burdens"); *Robison*, 415 U.S. at 384-85 (finding the compelling interests of making the military more attractive and raising manpower for the military justified a burden on the religious convictions of the plaintiff religious conscientious objector).

⁶⁷ See *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *Lyng* presented a similar line of reasoning to that used in *Bowen*. *Lyng*, 485 U.S. 439 (1988). In *Lyng*, a group of Native Americans sought to enjoin the U.S. Forest Service from building a road through a sacred area which "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.* at 442. The group argued that the burden on their religious practices was heavy enough to violate the Free Exercise Clause unless the Government could demonstrate a compelling need to

benefits because giving their daughter a Social Security number would “rob her spirit.”⁶⁸ The Court declined to use the compelling interest test stating:

Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a *reasonable means of promoting public interest*.⁶⁹

Since the law was facially neutral, the Court reasoned that Congress made no individualized exemptions within AFDC and the Government had a compelling interest in preventing fraud and facilitating administrative ease by using social security numbers.⁷⁰ The Court noted that there was no proof of fraudulent attempts to obtain benefits from the AFDC through use of false Social Security numbers.⁷¹ A “slight risk,” however, would justify the Government’s reasons to disallow an exemption.⁷²

During this time, the high court also deferred to the government’s interest in uniform application of its laws.⁷³ In *United States v. Lee*, a member of the

complete the road. *Id.* at 447. The Court disagreed stating the Government’s determination to use its land in the manner it did was a compelling interest in itself. *Id.* at 452. The Court basically provided a rule that admitted no judicially crafted exemptions:

The First Amendment must apply to all citizens alike, and it can give to none of them a veto power over public programs that do not prohibit the free exercise of religion. The Constitution does not, and the courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislature and other institutions.

Id.

⁶⁸ *Bowen*, 476 U.S. at 696.

⁶⁹ *Id.* at 707-08 (emphasis added).

⁷⁰ *Id.* at 709-12.

⁷¹ *Id.* at 711.

⁷² *Id.* The Court stated that:

[W]e know of no case obligating the Government to tolerate a slight risk of “one or perhaps a few individuals” fraudulently obtaining benefits in order to satisfy a religious objection to a requirement designed to combat that very risk. Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs.

Id.

⁷³ See *United States v. Lee*, 455 U.S. 252 (1982); *Hernandez v. C.I.R.*, 490 U.S. 680 (1989).

Old Amish Order challenged his mandatory participation in the Social Security system.⁷⁴ The Order's claim rested on the ground that "the Amish believe it sinful not to provide for their own elderly and therefore are religiously opposed to the national social security system."⁷⁵ The Court held that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."⁷⁶ The Court's reasoning did not rest on applying the exemption to the Amish so much as to any religious objector.⁷⁷ The Court used general statements regarding the importance of uniformity rather than a fact-specific inquiry into the Social Security system's feasibility in allowing an exemption for the Amish.⁷⁸

Similarly, the issue in *Hernandez v. Commissioner* was whether religious training sessions (called "auditing") conducted by the Church of Scientology were deductible under the Internal Revenue Service (IRS) code.⁷⁹ The IRS argued that a contribution is not a true "gift" if there is some quid pro quo, and therefore not tax deductible under an executive branch interpretation of the tax statutes.⁸⁰ Relying heavily on *Lee*, the Court held that, although it was questionable as to whether the Scientology Church suffered a burden, "even a substantial burden [on religious practice] would be justified by the 'broad public interest in maintaining a sound tax system' free from 'myriad of exceptions flowing from a wide variety of religious beliefs.'"⁸¹ Again, the overriding governmental interest in uniformity precluded any individualized exemptions from a government law.⁸²

Thus, the compelling interest test set forth in *Sherbert* and *Yoder* was slowly diminished: "Between 1980 and 1990, the law became decidedly less favorable to free exercise. The law . . . beg[a]n to operate in ways that insulated the government from having to satisfy the compelling interest standard, and the standard itself had been subtly weakened in *Lee*"⁸³ It is clear that the Supreme Court

⁷⁴ *Lee*, 455 U.S. at 254-55.

⁷⁵ *Id.* at 255.

⁷⁶ *Id.* at 260.

⁷⁷ *Id.* at 259-60 (stating if religious exemptions were allowed, "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

⁷⁸ *Id.* at 258. The Court noted that "[w]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." *Id.* (citing S. REP. NO. 404, pt. 1 at 116 (1965)).

⁷⁹ *Hernandez v. C.I.R.*, 490 U.S. 680, 684-85 (1989).

⁸⁰ *Id.* at 687-88.

⁸¹ *Id.* at 699-700.

⁸² *Id.* at 700. The Court stated that the tax code "must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.* (citing *United States v. Lee*, 455 U.S. 252, 261 (1982)).

⁸³ See Lupu, *supra* note 62, at 85.

employed both a stronger, fact-specific compelling interest test, like that used in *Sherbert* and *Yoder*, and a weaker, generalized compelling interest test used prior to, and after, *Sherbert* and *Yoder* in *Braunfeld*, *Lee*, *Goldman*, and *Bowen*.⁸⁴

The Supreme Court Abolished the Compelling Interest Test of the Free Exercise Clause

Twenty-seven years after the Supreme Court's decision in *Sherbert*, the high court completely abolished the compelling interest test for claims of exemption under free exercise in *Employment Division, Department of Human Resources of Oregon v. Smith*.⁸⁵ In *Smith*, two members of the Native American Church were fired from a drug rehabilitation facility for using peyote for sacramental purposes as part of their religious ceremonies.⁸⁶ When they applied for unemployment benefits, the state deemed them ineligible because they had been fired for work-related misconduct.⁸⁷ A state law criminalizing possession of peyote prohibited the sacramental peyote use by the two men.⁸⁸ With Justice Scalia writing for the majority, the Court held that the right to religious free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).⁸⁹ Free exercise was still protected from laws that purposefully prohibited it.⁹⁰ Neutral generally applicable laws that substantially burden a religious practice, however, no longer had to be justified by a "compelling governmental interest."⁹¹ The high court justified its position by pointing out that, since *Sherbert*, the Court had not allowed an exemption to a general law of applicability unless suit was brought in conjunction with other constitutional protections.⁹² The Court also stated that its decision was consistent with decisions it made in the past because it generally upheld a government's reason for applying

⁸⁴ See *supra* notes 44-83 and accompanying text.

⁸⁵ *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

⁸⁶ *Id.* at 875-76.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

⁹⁰ *Smith*, 494 U.S. at 877.

⁹¹ *Id.* at 886-88.

⁹² *Id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The Court noted that the issue in *Yoder* was: "Invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school." *Id.* *Smith* also distinguished itself from *Sherbert* and other unemployment cases granting an exemption under a Free Exercise theory by stating that, in those cases, the state law did not prohibit the conduct of those seeking religious exemption. In *Smith*, however, the Oregon statute did prohibit the use of peyote. *Id.* at 876.

a law to those seeking religious exemption.⁹³ The Court explained that, before *Smith*, it never applied a true compelling interest test because applying a true compelling interest test to government laws of general applicability would have a disastrous effect.⁹⁴

Congress Codifies the Compelling Interest Test

In 1993, in response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA).⁹⁵ The congressional findings incorporated into RFRA provide that “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 governmental interests.”⁹⁶ RFRA states that laws that are religiously neutral on their face can be as burdensome on religious exercise as laws designed to interfere with religion.⁹⁷ The act’s operative section states:

- (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).
- (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.⁹⁸

Congress’s purpose for passing RFRA was to restore “the compelling interest test as set forth in *Sherbert v. Verner . . .* and *Wisconsin v. Yoder . . .* and its application

⁹³ *Id.* at 883-84 (citing *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)).

⁹⁴ *Id.* at 888. The Court stated:

If the “compelling interest” test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if ‘compelling interest’ really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy

Id.

⁹⁵ Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1-4 (2000); Religious Freedom Restoration Act, Pub. L. 103-14, 107 Stat. 1488 (1993).

⁹⁶ 42 U.S.C. § 2000bb(a)(5) (2000).

⁹⁷ *Id.* § 2000bb(a)(2).

⁹⁸ *Id.* § 2000bb-1.

in all cases where free exercise is substantially burdened.”⁹⁹ RFRA is set up to “provide a claim or defense to persons whose religious exercise is substantially burdened by the government.”¹⁰⁰

Legislative Intent of RFRA’s Compelling Interest Test

Although the language in RFRA restored the compelling interest test set forth in *Sherbert* and *Yoder*, the legislative history makes it unclear as to whether RFRA is meant to restore the more heightened test set forth by *Sherbert* and *Yoder* or the subsequent Supreme Court interpretations of the compelling interest test which limited and distinguished *Sherbert* and *Yoder*.¹⁰¹ RFRA does not codify the result reached in any prior free exercise decision.¹⁰² The House Committee instructed courts to refer to free exercise cases prior to *Smith*:

It is the Committee’s expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. Furthermore, by enacting this legislation, *the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill.* This bill is not a codification of any prior free exercise decision but *rather the restoration of the legal standard that was applied in those decisions.* Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened; however, *the test generally should be construed more stringently or more leniently than it was prior to Smith.*¹⁰³

⁹⁹ *Id.* § 2000bb(b)(1).

¹⁰⁰ *Id.* § 2000bb(b)(2).

¹⁰¹ See Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 217-35 (1994); Berg, *supra* note 65, at 17-21; Paulsen, *supra* note 65, at 283-91 (analyzing the language and legislative history of RFRA to determine which standard Congress intended).

¹⁰² See S. REP. NO. 103-111, at 19 (1993); H. REP. NO. 103-88, at 16 (1993). See also 139 CONG. REC. H2358 (1993) (statement of Rep. Hyde) (statements concerning RFRA: these “concerns have been resolved either through explicit statutory changes or through committee report language”).

¹⁰³ S. REP. NO. 103-111, at 16 (emphasis added). H. REP. NO. 103-88, at 16 (reciting substantially the same language as the Senate Report). *Cf.* H. REP. NO. 103-88, at 19 (stating “[t]o be absolutely clear, the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*.”).

In addition to this language, there are several points in the committee reports that state the Act's purpose "is only to overturn the Supreme Court's decision in Smith."¹⁰⁴ Congress cited to *Sherbert* and *Yoder* and subsequent decisions applying a reduced compelling interest test in the background section of the House and Senate Reports.¹⁰⁵

Congress clearly stated that general laws of applicability are subject to RFRA.¹⁰⁶ But Congress also granted exemptions to particular government activities, stating, "it is clear that strict scrutiny does not apply to government actions involving only management or internal Government affairs or the use of the Government's own property or resources."¹⁰⁷ Thus, RFRA "will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight."¹⁰⁸

¹⁰⁴ S. REP. NO. 103-111, at 36; *cf.* H. REP. NO. 103-88, at 16 (stating that the committee expects "the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling interest"); *cf. Id.* at 3 (Views of Rep. Hyde, Rep. Sensenbrenner, Rep. McCollum, Rep. Coble, Rep. Canady, Rep. Inglis, Rep. Goodlatte): "[RFRA did not reflect] the high water mark as found in *Sherbert v. Verner* and *Wisconsin v. Yoder*, but merely returns the law to the state as it existed prior to Smith").

¹⁰⁵ S. REP. NO. 103-111, at 3-6; *see also* H. REP. NO. 103-88, at 2-3, 10-13. Congress stated: "using strict scrutiny, the Court held that the free exercise interest of the Old Order Amish outweighed the interest of the state compulsory education statute." *Id.* at 13 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). "[S]imilarly the Court has used the compelling governmental interest test and upheld the disputed governmental statute or regulation." *Id.* (citing *United States v. Lee*, 455 U.S. 252 (1982)).

¹⁰⁶ H. REP. NO. 103-88 at 16. The Congressional Report stated:

All governmental actions which have a substantial impact on the practice of religion would be subject to the restrictions in this bill. In this regard, in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion.

Id.

¹⁰⁷ S. REP. NO. 103-111 at 16 (citing *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)). Congress stated: "the Court held that the manner in which the Government manages its internal affairs and uses its own property does not constitute a cognizable 'burden' on anyone's exercise of religion." *Id.* at 19.

¹⁰⁸ 139 CONG. REC. H2358 (1993) (statement of Rep. Hyde). *See also* 139 CONG. REC. H2358 at S14, 351 (1993) (statement of Sen. Kennedy) ("Not every free exercise claim will prevail, just as not every claim prevailed prior to the Smith decision.").

RFRA Applied in the Federal Courts

RFRA originally applied to both state and federal governments.¹⁰⁹ In *City of Boerne v. Flores*, however, the Supreme Court found RFRA unconstitutional as applied to state laws.¹¹⁰ In the wake of *Boerne*, Congress amended RFRA only to apply to the federal government.¹¹¹ Since *Boerne*, some courts have found RFRA unconstitutional as applied to federal law.¹¹² A majority of federal circuit courts, however, still find applying RFRA to federal laws is constitutional.¹¹³

PRINCIPAL CASE

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* the question presented was whether the district court erred in finding that, under RFRA, the Government had not met its burden of demonstrating a compelling interest thereby

¹⁰⁹ See 42 U.S.C. § 2000bb-2(1). RFRA originally applied to any “branch, department agency, instrumentality, and official (or other person acting under color of law) of the United States,” as well as to any “State, or . . . subdivision of a State.” *Id.*

¹¹⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne* the Court reasoned that RFRA exceeded Congress’ power under § 5 of the Fourteenth Amendment to enforce provisions of the Fourteenth Amendment. *Id.* at 532-34. Also, RFRA contradicted principles necessary to maintain separation of powers and federal-state balance. *Id.* at 534-36. RFRA was not based on a history of religious discrimination nor in proportion to supposed remedial or preventative object and constitutes a high level congressional intrusion into states’ traditional prerogatives and general authority to regulate themselves. *Id.* at 531-32.

¹¹¹ See Religious Freedom Restoration Act, Pub.L. 106-274, § 7(a)(1) (2000); 42 U.S.C. § 2000bb-2 (2000).

¹¹² See Edward J.W. Blatnik, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act’s Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410, 1412 (1998) (citing cases in the sixth circuit, seventh circuit, bankruptcy courts and district courts which have rejected claims under RFRA reasoning that such claims are moot as a result of *Boerne*).

¹¹³ See generally *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (holding RFRA constitutional as applied to federal law under Necessary and Proper Clause of the Constitution). See also *O’Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003) (holding RFRA is constitutional as applied to federal law under Necessary and Proper Clause of the Constitution); *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002) (holding RFRA applied to the federal realm is within Congress’ plenary power and thus comported with separation of powers doctrine); *In re Young*, 141 F.3d 854 (8th Cir. 1998), cert. denied, 525 U.S. 811 (1998) (holding Congress had the plenary authority to enact Religious Freedom Restoration Act (RFRA) and make it applicable to the United States bankruptcy laws); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (*Boerne* invalidated RFRA only as applied to state and local governments, not as applied to federal government through Congress’s Article I enforcement powers); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (RFRA constitutionally applies to the federal government).

granting the preliminary injunction to the UDV.¹¹⁴ The United States Supreme Court reviewed the district court's legal rulings de novo and its ultimate decision to issue the preliminary injunction to the UDV for abuse of discretion.¹¹⁵

Justice Roberts, writing the unanimous decision for the Court, noted *Smith* held that the Free Exercise Clause of the First Amendment does not prohibit the government from burdening religious practices through generally applicable laws.¹¹⁶ The Court followed by stating that under RFRA, the federal government may not, as a statutory matter, substantially burden a person's exercise of religion "even if the burden results from a rule of general applicability."¹¹⁷ The only exception recognized by the statute requires the Government to satisfy a compelling interest test, or demonstrate that the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.¹¹⁸

The Government did not challenge the district court's factual findings or the conclusion that the evidence submitted on the issues was evenly balanced.¹¹⁹ Instead the Government maintained that such evidentiary equipoise was an insufficient basis for issuing a preliminary injunction against the enforcement of the Controlled Substances Act.¹²⁰ The Government began by stating that the party seeking pretrial relief bears the burden of demonstrating a likelihood of success on the merits.¹²¹ The Government argued that in granting the preliminary injunction based on a tie in the evidentiary record, the district court lost sight of the burden that UDV would have to bear in order to receive the injunction under RFRA.¹²²

UDV countered that, since the Government conceded its prima facie case under RFRA (application of the CSA would substantially burden a sincere religious exercise of their religion), the Government had the burden of demonstrating that it

¹¹⁴ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1216 (2006).

¹¹⁵ *Id.* at 1219 (citing *McCreary County v. A.C.L.U.*, 125 S. Ct. 2722, 2737-38 (2005)).

¹¹⁶ *Id.* at 1216 (citing *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). The Court noted that *Smith* rejected the interpretation of the Free Exercise Clause announced in *Sherbert*, and in doing so held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* (citing *Smith*, 494 U.S. at 883-90).

¹¹⁷ *Id.* at 1216-17 (citing 42 U.S.C. § 2000bb-1(a)).

¹¹⁸ *Id.* at 1217 (citing 42 U.S.C. § 2000bb-1(b)).

¹¹⁹ *Id.* at 1218. See Brief for Petitioners at 8-9, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) (No. 04-1084).

¹²⁰ *Id.*

¹²¹ *O Centro*, 126 S. Ct. at 1219 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)).

¹²² *Id.* at 1219.

had a compelling interest to apply the CSA to the UDV.¹²³ Since the Government bore this burden, and the evidence was in equipoise, the Government must lose at the preliminary injunction stage of the litigation.¹²⁴

The *O Centro* Court rejected the Government's argument that under RFRA evidentiary equipoise is an insufficient basis for issuing a preliminary injunction against application of the CSA.¹²⁵ Because the Government conceded the UDV's prima facie case under RFRA, the evidence the district court found to be in equipoise related to the compelling interests by the Government asserted as part of its affirmative defense.¹²⁶ However, according to the provisions of the statute, the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest.¹²⁷ Since the Court's recent decision in *Ashcroft v. A.C.L.U.* stated the burdens at the preliminary injunction stage track the burdens at trial, the Government bore the burden of showing a compelling governmental interest in applying the CSA to the UDV's religious exercise at the preliminary injunction stage.¹²⁸

The Government's second argument centered on the language of the CSA itself.¹²⁹ The Government focused on the description of the CSA's Schedule I substances as having "a high potential for abuse . . . , no currently accepted use in treatment in the United States . . . , [and] a lack of accepted safety for use . . . under medical supervision."¹³⁰ The Government argued this language itself precluded individualized exemptions like that sought by the UDV.¹³¹ The Government further argued that the regulatory regime established by the CSA was a "closed" system that prohibited all use of controlled substances except as authorized by the

¹²³ Brief for Respondents at 34, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) (No. 04-1048).

¹²⁴ *Id.* at 24 (citing *Dir. Office of Workers Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)) ("[When] the evidence is evenly balanced, the party that bears the burden of persuasion must lose.").

¹²⁵ *O Centro*, 126 S. Ct. at 1219-20.

¹²⁶ *Id.* at 1219.

¹²⁷ *Id.* (citing 42 U.S.C. § 2000bb-2(3) (stating that "demonstrates" means meets the burden of going forward with the evidence and persuasion)).

¹²⁸ *Id.* at 1219-20 (citing *Ashcroft v. A.C.L.U.*, 542 U.S. 656 (2004)). The Government argued that *Ashcroft v. A.C.L.U.* was distinguishable from *O Centro* because it involved content based restrictions on speech. *Id.* The Court reasoned that Congress's express decision to legislate the compelling interest test indicated that RFRA challenges should be adjudicated in the same manner as other applications of the test. *Id.*

¹²⁹ *O Centro*, 126 S. Ct. at 1220.

¹³⁰ *Id.* (citing 21 U.S.C. § 812(b)(1)).

¹³¹ *Id.* at 1220.

Act itself.¹³² Because the CSA was a “closed” system, religious exceptions could not be cabined once recognized and the “public will misread” such exceptions as signaling that the substance at issue is not harmful.¹³³ Based on the Government’s argument, there was no need to assess the particular facts of the UDV’s use or weigh the impact of an exemption for that specific use because the CSA serves a compelling purpose and simply admits no exceptions.¹³⁴

The UDV countered that the uniform application of the CSA is not a compelling interest.¹³⁵ UDV’s argument focused on the proposition that the Native American Church (NAC) has had a longstanding exemption for peyote, also a Schedule I substance under the CSA.¹³⁶ More recently, all members of federally recognized tribes enjoy this exemption under the American Indian Religious Freedom Act Amendments of 1994 (AIRFA).¹³⁷ The UDV argued that the proposition the CSA needed to be uniformly applied to the UDV was undermined because the federal government had been successful in allowing a peyote exemption to Native America tribes.¹³⁸ The UDV stated that, because RFRA required a fact-specific inquiry of the merits of each claim, recognizing a narrow exemption for UDV based on the unique facts of this case would not inevitably lead to the creation of a large number of religious CSA exemptions.¹³⁹ Further, since the Government conceded that application of the CSA to the UDV’s religious exercise met the *prima facie* case under RFRA, the burden shifted to the Government at the preliminary injunction stage of the litigation to show it had a compelling interest in enforcing the CSA and enforcement of the CSA was the least restrictive means of carrying out that compelling interest.¹⁴⁰

The Court foreclosed the Government’s argument that the language of the CSA itself was enough to show a compelling state interest.¹⁴¹ RFRA and its strict scrutiny test required the government to demonstrate that the compelling interest test is satisfied by applying the challenged law “to the person,” the particular

¹³² See Brief for Petitioners, *supra* note 119, at 18 (“The effectiveness of that closed system will necessarily be undercut by judicially crafted exemptions on terms far more generous than the narrow clinical studies that Congress authorized.” (citing *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 492, 499 (2001))).

¹³³ *Id.* at 23.

¹³⁴ *O Centro*, 126 S. Ct. at 1220. See Brief for Petitioners, *supra* note 119 at 19-21 (arguing that if it gives an exception to one group, it would receive a “myriad” of other claims to religious exemptions under CSA).

¹³⁵ See Brief for Respondents, *supra* note 6, at 40-45.

¹³⁶ *Id.* at 4 (citing 21 C.F.R. § 1307.31 (2005)).

¹³⁷ *Id.* (citing 42 U.S.C. § 1996a(b)(1) (2000)).

¹³⁸ *Id.* at 40-45.

¹³⁹ *Id.* at 44.

¹⁴⁰ Brief for Respondents, *supra* note 6, at 47-49.

¹⁴¹ *O Centro*, 126 S. Ct. at 1220.

claimant, whose sincere exercise of religion is being substantially burdened.¹⁴² RFRA adopted the compelling interest test set forth by *Sherbert* and *Yoder*.¹⁴³ *O Centro* stated, “The Court, in those cases, looked beyond the broadly formulated interests justifying the general applicability of government laws and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.”¹⁴⁴ Because *Sherbert* and *Yoder* demanded a case-by-case, fact-specific inquiry, the Government’s recital of the language from Schedule I of the CSA could not “carry the day.”¹⁴⁵

O Centro then turned its analysis to applying a fact-specific compelling interest test under RFRA.¹⁴⁶ The Court acknowledged the dangers of the DMT found in hoasca, but stated there was no indication that Congress considered the substance’s sacramental use when classifying DMT in Schedule I.¹⁴⁷ To support this position, the Supreme Court noted that the CSA contains a provision authorizing the Attorney General to waive registration requirements for “manufacturers,

¹⁴² *Id.* at 1220 (citing 42 U.S.C. § 2000bb-1(b)).

¹⁴³ *Id.* at 1220-21.

¹⁴⁴ *Id.* The Court cited the specific facts of *Yoder* and *Sherbert*:

In *Yoder*,[. . .]we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a “paramount” interest in education, but held that “despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote. . . and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*.” 406 U.S., at 213, 221, 92 S.Ct. 1526. The Court explained that the State needed “to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the *Amish*.” *Id.*, at 236, 92 S.Ct. 1526. In *Sherbert*, the Court upheld a particular claim to a religious exemption from a state law denying unemployment benefits to those who would not work on Saturdays, but explained that it was not announcing a constitutional right to unemployment benefits “for all persons whose religious convictions are the cause of their unemployment.” 374 U.S., at 410, 83 S.Ct. 1790.

O Centro, 126 S. Ct. at 1220-21.

¹⁴⁵ *Id.* at 1221.

¹⁴⁶ *See id.* 1221-25.

¹⁴⁷ *O Centro*, 126 S. Ct. at 1221. The Court considered the Government’s argument that the placement of DMT in Schedule I of the CSA automatically made enforcement of the CSA a compelling interest unavailing: “[C]ongress’ determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.” *Id.*

distributors or dispensers” if he finds it consistent with public health and safety.¹⁴⁸ The Court stated the fact that “the Act itself contemplates that exempting certain people from its requirements would be ‘consistent with the public health and safety’ and this provision indicates that congressional findings with respect to Schedule I substances should not carry determinative weight, for RFRA purposes, that the Government would ascribe them.”¹⁴⁹

Generally invoking the language of Schedule I was also unavailing because of the thirty-five-year regulatory exemption that the Native American Church has enjoyed for the use of another Schedule I drug, peyote.¹⁵⁰ The Court compared DMT to mescaline peyote and found that the Schedule I provisions considering the alleged harmful effects associated with its use applied in equal measure to both substances, yet the Executive and Legislative branches gave Native Americans an exemption from the CSA for religious uses.¹⁵¹ The high court reasoned if such an exception was granted to hundreds of thousands of Native Americans for the religious use of peyote, it would be difficult to justify the denial of a similar exception for 130 American members of the UDV for their religious hoasca use.¹⁵² The Government countered that the existence of a congressional exemption for peyote does not indicate that the CSA is vulnerable to judicially made exceptions.¹⁵³ The Court made clear, however, that RFRA plainly contemplates that courts should recognize exceptions and it is the Court’s obligation to consider whether exceptions are required under RFRA.¹⁵⁴

The peyote exception completely undermined the Government’s contention that the CSA establishes a closed regulatory scheme that admits no exceptions under RFRA.¹⁵⁵ Exceptions to the CSA, judicially created under RFRA, would not necessarily undercut the CSA’s effectiveness because there is no evidence the peyote exception has undercut the government’s ability to enforce the CSA.¹⁵⁶

¹⁴⁸ *Id.* at 1221 (citing 21 U.S.C. § 822(d)).

¹⁴⁹ *Id.* at 1221.

¹⁵⁰ *Id.* at 1222 (citing 21 C.F.R. § 1307.31 (2005)). The Court also noted that in 1994 this exemption was extended to all members of every recognized Indian Tribe. *O Centro*, 126 S. Ct. at 1222 (citing 42 U.S.C. § 1996a(b)(1)).

¹⁵¹ *Id.* at 1222.

¹⁵² *Id.* (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (quoting *Florida Star v. B.J.* F. 491 U.S. 524, 541-542 (1989)) (Scalia, J., concurring in part and concurring in judgment) (“It is established in our strict scrutiny jurisprudence that [] a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”)).

¹⁵³ *O Centro*, 126 S. Ct. at 1222.

¹⁵⁴ *Id.* (citing 42 U.S.C. § 2000bb-1(c) (“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.”)).

¹⁵⁵ *Id.* at 1222.

¹⁵⁶ *Id.* at 1223.

The Government's argument that the need for uniformity in application of the CSA justified a substantial burden on the religious free exercise of the UDV was not supported by other pre-*Smith* cases that dealt with the issue of uniformity as a compelling governmental interest.¹⁵⁷ The Court reasoned that the slippery slope argument, if the Government offered an exception to one group, it would have to offer an exception to every group, is unavailing because RFRA mandates consideration of exceptions to rules of general applicability.¹⁵⁸ The Court upheld the feasibility of a case-by-case consideration of religious exemptions to general laws of applicability under this test.¹⁵⁹ In the end, the Court followed Congress's

¹⁵⁷ *Id.* The Court stated that:

In *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), . . . the Court rejected a claimed exception to the obligation to pay Social Security taxes, noting that "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs." *Id.*, at 258, 260, 102 S.Ct. 1051 . . . [citation omitted] . . . In *Braunfield v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), the Court decided a claimed exception to Sunday closing laws, in part because allowing such exceptions "might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day." *Id.*, at 608-609, 81 S.Ct. 1144. The whole point of a "uniform day of rest for all workers" would have been defeated by exceptions. [citations omitted]. These cases show that the Government can demonstrate a compelling interest in uniform application of the particular program by offering evidence that granting the request religious accommodations would seriously compromise its ability to administer the program.

Id. at 1223.

¹⁵⁸ *O Centro*, 126 S. Ct. at 1223. The Court stated that "Congress determined that the legislated test 'is a workable test for striking balances between religious liberty and competing prior governmental interest.'" *Id.* (citing 42 U.S.C. § 2000bb(a)(5)).

¹⁵⁹ *Id.* at 1223-24. The Court gave other instances where the high court applied the compelling interest test. *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)). The Court also found the district court had erred in determining that the 1971 Convention on Psychotropic Substances did not apply to the CSA. *Id.* at 1224-25. In interpreting the convention, the high court held that, since the convention covered a "preparation" which included "any solution or mixture" and hoasca was a "solution or mixture" in the sense that it is made by the simple process of brewing plants in water, and therefore clearly covered under the convention. *Id.* (citing 32 U.S.T., at 546, Art. 1(f)(i); *id.*, at 551, Art. 3.). Although hoasca is covered by the convention, the Court denied the Government's argument that applying the CSA to the UDV's religious exercise, in accordance with the Convention, was a compelling governmental interest. *Id.* at 1225. The Court reasoned this was because the Government failed to submit any evidence addressing the international consequences of granting an exemption for the UDV's use of hoasca. *Id.*

determination that under RFRA, courts should strike sensible balances, using a compelling interest test that requires the government to address the particular practice at issue.¹⁶⁰ In applying the stronger, fact specific compelling interest test and the weaker, more generalized compelling interest test, the Supreme Court concluded that the courts below did not err in determining, at the preliminary injunction stage, the Government failed to demonstrate a compelling interest in barring the UDV's sacramental use of hoasca.¹⁶¹

ANALYSIS

This analysis will demonstrate how the Court's simultaneous approval of a heightened and weakened compelling interest standard is irreconcilable. *O Centro* gives conflicting reasoning to justify its holding denying the government's proffered compelling interest of uniformity of enforcement of the CSA. Furthermore, *O Centro* gives us a nebulous and conflicted interpretation of which compelling interest test to use in the future under RFRA.

Despite the apparent ambiguity regarding how leniently or strictly to apply the compelling interest test, RFRA's "findings" section states Congress's view that "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."¹⁶² It is contradictory for RFRA to apply both the stronger version of the compelling interest test set out by *Sherbert* and *Yoder*, yet also apply the weaker compelling interest test of cases such as *Lee*, *Braunfield*, and *Hernandez*.¹⁶³ To add to the uncertainty, it did not appear that some RFRA supporters had much faith in the compelling interest test to protect free exercise claimants, despite RFRA's language pointing to *Sherbert* and *Yoder*.¹⁶⁴ Indeed, the

¹⁶⁰ *Id.* at 1224-25.

¹⁶¹ *Id.*

¹⁶² Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(5) (2000).

¹⁶³ See Paulsen, *supra* note 65, at 289. Professor Paulsen states a possible explanation:

While the evidence is that Congress did not wish to get mired down in arguing the merits of each particular case, there is no evidence that they deliberately intended to embrace contradiction. Rather, the evidence is that they consciously chose not to validate the state of free exercise law as it existed the day before *Smith* was decided but instead to embrace the *Sherbert-Yoder* test without simultaneously validating all of that test's (mis-) applications by the courts.

Id. (citations omitted).

¹⁶⁴ H. REP. NO. 103-88 at 4 (Views of Rep. Hyde, Rep. Sensenbrenner, Rep. McCollum, Rep. Coble, Rep. Canady, Rep. Inglis, Rep. Goodlatte). Inquiring "will the RFRA work?" Reps. Hyde, Sensenbrenner, McCollum, Coble, Canady, Inglis and Goodlatte stated:

Supreme Court in pre-*Smith* free exercise cases exerted broad discretion in finding that government laws comprised a compelling interest.¹⁶⁵

Congress clearly recognized the struggle to define the compelling interest test under RFRA would mirror the struggle the Supreme Court had in defining compelling interest prior to RFRA's enactment.¹⁶⁶ Perhaps the ambiguousness of RFRA's compelling interest standard reflects the political compromise involved in formation of a broad coalition of support for RFRA.¹⁶⁷ More optimistic explanations of RFRA's ambiguousness also exist:

In justification of the need for this legislation, proponents have provided the Committee with long lists of cases in which free exercise claims have failed since *Smith* was decided. Unfortunately, however, even prior to *Smith*, it is well known that the "compelling state interest" test had proven an unsatisfactory means of providing protection for individuals trying to exercise their religion in the face of government regulations. Restoration of the pre-*Smith* standard, although politically practical, will likely prove, over time, to be an insufficient remedy. It would have been preferable, given the unique opportunity presented by this legislation, to find a solution that would give solid protection to religious claimants against unnecessary government intrusion.

Id.

¹⁶⁵ See Eric Alan Shumsky, *The Religious Freedom Restoration Act: Postmortem of a Failed Statute*, 102 W. VA. L. REV. 81, 113 (1999). Professor Shumsky points to the broad discretion that courts enjoyed defining a compelling governmental interest in upholding a law prior to RFRA:

Simply put, "Courts possess enormous discretion over how broadly or narrowly government interests are defined In the absence of any theoretical guide, judges have used their control over generality to strike down government policies that they just as easily could have upheld." Conversely, in the absence of proper limits, courts might define an interest broadly, thereby ensuring its success. In the context of religious free exercise, broad definition has been the norm.

Id. (quoting Roger Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 447-49 (1998)).

¹⁶⁶ H. REP. NO. 103-88 at 6 (Views of Rep. Hyde, Rep. Sensenbrenner, Rep. McCollum, Rep. Coble, Rep. Canady, Rep. Inglis, Rep. Goodlatte) stating:

In reality, the Act [RFRA] will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight. It will perpetuate, by statute both the benefits and frustrations faced by religious claimants prior to the Supreme Court's decision in *Smith*. Although we have this remaining concern, we support enactment of the legislation.

Id.

¹⁶⁷ See Laycock & Thomas, *supra* note 101, at 218-19. Professors Laycock and Thomas state:

But it [RFRA's generality] was not merely a political necessity; it was also an act of high principle. The Act is only a statute, not a constitutional amendment, but it is a statute designed to perform a constitutional function. It is designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted. As a replacement for the Free Exercise Clause, the Act had to be as universal as the Free Exercise Clause. It had to protect all religions equally against all assertions of regulatory interests. The only way to draft such a protection was in the manner of the Free Exercise Clause itself—as a general principle of universal application.¹⁶⁸

Regardless of Congress' reasons for the ambiguousness of RFRA's compelling interest test, RFRA contemplates that "the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest."¹⁶⁹ *O Centro* is the first instance where the Supreme Court potentially had the opportunity to clarify which version of the compelling interest standard should be used under RFRA.¹⁷⁰

Congress might have provided more guidance about the standard, but it could not supplement the standard with legislative resolutions of specific cases. There were both principled and political reasons for legislating only a general standard. Legislating generally made it possible for a broad coalition of Senators, Representatives, and organizations to support the bill. The bill was enacted unanimously in the House and nearly so in the Senate, yet the vote would not have been similarly unanimous on many applications of the bill. Most of those who would find a compelling interest in protecting fetuses would probably not find a compelling interest in requiring hospitals to perform abortions. Most of those who would find a compelling interest in distributing condoms to students would probably not find a compelling interest in distributing military recruiting literature to students The cynical explanation for RFRA's generality is that enacting only a general standard was a political necessity.

Id. (citations omitted).

¹⁶⁸ *Id.* at 219 (citations omitted).

¹⁶⁹ S. REP. NO. 103-111 at 16.

¹⁷⁰ *O Centro*, 126 S. Ct. 1211, 1224-25.

O Centro Gives a Nebulous Definition of the Compelling Interest Test under RFRA

The Court in *O Centro* rejected the Government's argument that uniformity of application of the CSA constituted a compelling interest.¹⁷¹ The Government's uniformity argument relied on the notion that the CSA could not be properly administered without its uniform application.¹⁷² The Government's argument that allowing an exemption to the UDV would require all similar exemptions was slippery slope because this argument "echoed the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make an exception for everyone, so no exceptions."¹⁷³ Writing for the unanimous Court, Justice Roberts reasoned the Government in *O Centro* did not offer evidence demonstrating that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest recognized in *Lee*, *Hernandez*, and *Braunfield*.¹⁷⁴ The Court characterized *Lee*, *Hernandez*, and *Braunfield* as cases where "the government . . . demonstrate[d] a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."¹⁷⁵

But using *Lee*, *Hernandez*, and *Braunfield* to reinforce the proposition that fact-specific evidence is needed to demonstrate a compelling interest in uniformity of application of a law creates ambiguity because none of those cases used the kind of fact-specific analysis found in *O Centro*.¹⁷⁶ In *Braunfield*, the Court relied on hypothetical situations that "might" or "probably" present themselves if it granted the requested exemption from the Sunday closing law.¹⁷⁷ In *Braunfield*, the Government did not offer fact-specific evidence that the requested

¹⁷¹ *Id.* at 1224.

¹⁷² *Id.* at 1222-23. *Cf.* Brief for Petitioners, *supra* note 119, at 16-26.

¹⁷³ *Id.* at 1223.

¹⁷⁴ *Id.*

¹⁷⁵ *O Centro*, 126 S. Ct. at 1123.

¹⁷⁶ *Id.* at 1223. *See* *United States v. Lee*, 455 U.S. 252 (1982); *Hernandez v. C.I.R.*, 490 U.S. 680 (1989); *Braunfield v. Brown*, 366 U.S. 599 (1961).

¹⁷⁷ *See Braunfield*, 366 U.S. at 608-09. In discussing hypothetical situations that could arise if the requested exemption was granted, the Court speculated:

To allow only people who rest on a day other than Sunday to keep their business open on that day *might* well provide these people with an economic advantage over their competitors who must remain closed on that day; this *might* cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there *could well be* the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on

exemption would actually cause these harms.¹⁷⁸ In *Lee*, the Court found that the Government had a compelling interest in denying the Amish an exemption from the Social Security tax because, in general, unless it was uniformly applied, the Social Security tax would be difficult to administer with religious exemptions.¹⁷⁹ Again, the asserted compelling interest in *Lee* was hypothetical, not applied to the particular case of the Amish.¹⁸⁰ In reality, the requested Amish exemption in *Lee* was nearly identical to an already existing exemption that Congress gave to self-employed Amish.¹⁸¹ Indeed, the Court in *Lee* engaged in formulating a compelling interest test at a high level of abstraction, rather than a fact-specific inquiry into the effect the Amish exemption would have on the Social Security system.¹⁸² *Hernandez* used a line of analysis substantially identical to *Lee*, citing

what had formerly been their least profitable day. This *might* make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs Finally, in order to keep the disruption of the day at a minimum, exempted employees would *probably* have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State *might* feel to be opposed to in its general policy prohibiting religious discrimination in hiring.

Id. (emphasis added).

¹⁷⁸ *Id.*

¹⁷⁹ *Lee*, 455 U.S. at 259-60.

¹⁸⁰ *Id.* at 260. In discussing hypothetical situations where religious claimants would seek exemption from the Social Security tax in the future, the Court stated:

If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals *would have* a similarly valid claim to be exempt from paying the percentage of the income tax. The tax system *could* not function *if* denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs.

Id. (emphasis added).

¹⁸¹ *Id.* (citing 26 U.S.C. § 1402(g)). *Cf. id.* at 262. In his concurrence, Justice Stevens noted that:

As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case. As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits.

Id. (Stevens, J. concurring).

¹⁸² See Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 81-2 (1996). Analyzing the approach the Court took in *Lee*, Professors Gressman and Carmella explain that *Lee* engaged in a non-fact-specific "definitional balancing":

to *Lee* for its general reasons why the tax exemption should not be given to the Scientology Church.¹⁸³ Paradoxically, the Government in *O Centro* offered the same type of general evidence, that allowing exemptions from the CSA would hypothetically create problems, as it did in *Braunfield*, *Lee*, and *Hernandez*.¹⁸⁴ Yet the Government's argument that it had a compelling interest in uniform application of the CSA was not enough to deny a religious exemption.¹⁸⁵

The Court attempted to justify this discrepancy by characterizing *Lee*, *Hernandez*, and *Braunfield* as cases that "did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead scrutinized the asserted need and explained why the denied exemptions

Definitional balancing acts like a compromise between the categorical approach and ad hoc balancing. The particularity of both the religious claim and the government's interest—the focus of ad hoc balancing—is gone. Instead, the Court evaluates the claimed liberty against social interests at a high level of generality (and consequent abstractness) in order to produce a rule directly applicable in future cases without the need to balance. Definitional balancing thus yields classes of protected and unprotected activity . . . The Court's definitional balancing in *United States v. Lee* did not produce a general rule quite so hospitable to religious claimants . . . Had the Court engaged in an ad hoc balance, it would have been hard to deny the claim [in *Lee*], as it was structurally similar to *Yoder*: there was a clear burden on free exercise, a showing of a compelling interest of the state in maintaining a social security system for the elderly, but no showing that the social security system would in any way be endangered by providing this exemption for these Amish employers. In fact, an exemption already existed for self-employed Amish, and this lawsuit simply sought to rationalize the government's treatment of all-Amish businesses. But the Court chose a definitional balance that announced a rule far beyond the Amish community. While a burden on their religion was established, so was an "overriding governmental interest" in preservation not of the social security system, *but of a uniform federal taxation scheme free of judicial exemptions*. The government's interest was defined at a very high level of abstraction, the hallmark of definitional balancing. For the Court to carve out an exemption would mean that the floodgates would open: the entire structure of federal taxation would be vulnerable to any religious objections to payment of any tax.

Id. (emphasis added) (citations omitted).

¹⁸³ *Hernandez*, 490 U.S. at 699-700.

¹⁸⁴ See Brief for Petitioners, *supra* note 119, at 16-24 (the Government stating, inter alia, that any exemption would have to be given to similarly situated adherents, market for hoasca could become prevalent, administrative problems in closely regulating the use of hoasca, medical exemptions to CSA would proliferate).

¹⁸⁵ *O Centro*, 126 at 1223-24 (stating "the Government has not offered evidence demonstrating that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest in *Lee*, *Hernandez*, and *Braunfield*").

could not be accommodated.”¹⁸⁶ This analysis is unavailing simply because *Braunfield*, *Lee*, and *Hernandez* embraced the notion that a general interest in uniformity justified a substantial burden on religious exercise.¹⁸⁷ Further, in these cases the Court acknowledged that application of the laws in question burdened the claimant’s religious exercise or that the law was compelling regardless of a substantial burden on religion.¹⁸⁸ Thus, *O Centro*’s incorporation of *Braunfield*, *Lee*, and *Hernandez* is problematic because it is difficult to square the Court’s analysis of the latter three cases with *O Centro* and RFRA’s legislative history.¹⁸⁹

The Government’s argument that the language of the CSA precludes an exemption because the CSA is a “closed system” relied on the assumption that there would be no way to allow for some religious exemptions and not others as soon as an exemption is recognized for the UDV.¹⁹⁰ *O Centro* stated that a law which allows exemptions cannot be cited to show compelling interests in disallowing exemptions to that same law since the CSA already provided for exemptions authorized by the Attorney General and peyote had a longstanding exemption under Schedule I.¹⁹¹ This principal is problematic because pre-*Smith* case law, including pre-*Smith* case law cited in *O Centro*’s analysis, involved laws that granted exemptions to other religious practitioners but denied religious exemptions to the claimants.¹⁹²

¹⁸⁶ *Id.* at 1223.

¹⁸⁷ See *supra* notes 175-85.

¹⁸⁸ See *Braunfield v. Brown*, 366 U.S. 599, 605-606 (acknowledging the “Sunday Closing Law” would result in financial sacrifice or an “indirect economic burden” for Jewish practitioners); *Lee*, 455 U.S. at 257 (accepting the appellee’s contention that both payment and receipt of social security benefits interferes with their free exercise rights); *Hernandez*, 490 U.S. at 699-700 (stating that even a substantial burden would be justified by the “broad public interest in maintaining a sound tax system” free of “myriad exceptions flowing from a wide variety of religious beliefs.”); cf. *Braunfield*, 366 U.S. at 616 (Stewart, J., dissenting) (“Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival . . . [i]t is a choice which I think no State can constitutionally demand.”).

¹⁸⁹ H. REP. NO. 103-88 at 18 (stating: “Pursuant to the Religious Freedom Restoration Act . . . seemingly reasonable regulations based upon speculation, exaggerated fears or thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest.”).

¹⁹⁰ *Id.* at 1220. Cf. Brief for Petitioners, *supra* note 119, at 16-22.

¹⁹¹ *Id.* at 1222 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, (1993) (quoting *Florida Star v. B.J.* F. 491 U.S. 524, 541-42 (1989)) (Scalia, J., concurring in part and concurring in judgment) (“It is established in our strict scrutiny jurisprudence that [] a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”).

¹⁹² See *Gillette v. United States*, 401 U.S. 437, 447-55 (1971) (finding conscientious objector’s statute created an exemption from the draft; government’s reasons for draft still considered a compelling interest); *Goldman v. Weinberger*, 475 U.S. 503, 504-507 (1986) (noting Jewish soldier wore his traditional religious yarmulke for several years

In *Hernandez*, the Court found a compelling interest in the general uniformity of the IRS code despite countless exemptions given to other religious groups.¹⁹³ In *Lee*, the exemption from the Social Security tax granted by the government applied only to self-employed individuals, not Amish who are employers themselves.¹⁹⁴ Despite a very similar exemption from the Social Security tax, the court found that the Government had a compelling interest in the uniform application of the tax.¹⁹⁵ Applying *Sherbert* and *Yoder* fact-specific analysis as interpreted by *O Centro* to the facts in *Lee*, the Government in *Lee* would have been required to show that applying the tax provision to the Old Amish Order represents the least restrictive means of advancing a compelling governmental interest in uniformity of the tax code.¹⁹⁶ Under the *O Centro* analysis, it would seem that since the Social Security tax code (or other law) allows some exemptions, the government

before he was stopped from wearing it and finding government reasons for the policy forbidding him to wear it were still considered compelling); *United States v. Lee*, 455 U.S. 252, 254-55 (1982) (finding a similar exemption from the Social Security tax existed; government's reasons for uniform application of the tax still considered compelling); *Hernandez v. C.I.R.*, 490 U.S. 680, 684-86 (1989) (finding tax code allowed exemptions for certain charitable contributions; government's interest in uniform application of the tax code still held to be compelling).

¹⁹³ *Hernandez*, 490 U.S. at 701 (noting that a similar exemption was given for Jewish High Holy Day services “[p]ew rents, building fund assessments, and periodic dues paid to a church . . . are all methods of making contributions to the church, and such payments are deductible as charitable contributions within the limitations set out in section 170 of the Code”). *Cf.* Paulsen, *supra* note 65, at 268. Professor Paulsen stated:

The government, relying on *Lee*, took the position that the soundness of the tax system depends on the government's ability to apply the tax law in a uniform and evenhanded fashion. But evidence was clear that the government did not take this position with respect to analogous practices—including analogous religious practices—such as “pew rents” or sales of tickets for Jewish High Holy Day services. The IRS had a formal written policy stating that those contributions were deductible. Yet the “quid pro quo” feature of these contributions is indistinguishable from the arrangement in *Hernandez* . . . Inconsistency of the policy should have belied the assertion of a compelling interest in “maintaining a sound tax system,” free from “myriad exceptions.” Indeed, *Hernandez* seems to be a blatant case of discrimination among religions.

Id. (citations omitted).

¹⁹⁴ *Lee*, 455 U.S. at 256.

¹⁹⁵ *Id.* at 258-60.

¹⁹⁶ See Michelle O' Connor, *The Religious Freedom Restoration Act: Exactly What Rights Does It “Restore” in the Federal Tax Context?*, 36 ARIZ. ST. L.J. 321, 376-78 (2004). Professor O'Connor explained:

Construing RFRA as requiring the courts to apply the *Sherbert/Yoder* balancing test in the tax context would require the government to

could not refer to the importance of uniformly maintaining the Social Security tax code (or other law) as a compelling interest as it did in *Lee*, *Hernandez*, and *Braunfield*.¹⁹⁷ Therein lies the paradox: *O Centro* states that uniform application of laws cannot be considered compelling if exemptions to the laws are already allowed, yet *Lee*, *Hernandez*, and many other pre-*Smith* cases codified by RFRA consider uniformity of application compelling despite their exemptions.¹⁹⁸

O Centro's citation of the compelling interest tests of *Sherbert*, *Yoder*, *Lee*, and *Hernandez* provides little guidance as to which compelling interest standard Courts will utilize under RFRA in the future.¹⁹⁹ Indeed, granting religious exemptions to some claimants under a stronger compelling interest standard and denying other religious exemptions under a weaker compelling interest standard would lead to

introduce evidence and to prove that a tax provision represents the least-restrictive means of advancing a compelling governmental interest. Where the government fails to do so, the precepts of *Sherbert* and *Yoder* dictate that it should lose. Because pre-*Smith* precedent in the tax context never required the government to make such a showing (and indeed the government never lost a tax case based on its failure to do so), such a construction of the RFRA test would result in a more “stringent” application of the pre-*Smith* compelling-interest test.

Id. at 377 (citations omitted).

¹⁹⁷ See James Glenn Hardwood, *Religiously-Based Social Security Exemptions: Who Is Eligible, How Did They Develop, and Are the Exemptions Consistent With the Religion Clauses and the Religious Freedom Restoration Act (RFRA)?*, 17 AKRON TAX J. 1, 17-21 (2002). Professor Hardwood stated:

In order for the law, which substantially burdens one's Free Exercise, to pass constitutional muster, it must be the least restrictive means of accomplishing a compelling governmental interest. If the compelling governmental interest is the maintenance of the social security system with provision for individuals to opt out, then the existing exemptions provide evidence that either the current law is not the least restrictive means of achieving those ends or those ends are not a compelling interest. If the compelling governmental interest is the maintenance of the social security system, then the least restrictive means of achieving the interest would be for the system to be compulsory to all. However, if the government provides exemptions for some that object to the participation, then the government concedes that providing an exemption does not frustrate the compelling governmental interest.

Id. at 19-20 (citations omitted).

¹⁹⁸ See *supra* notes 190-197 and accompanying text.

¹⁹⁹ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1223-24 (2006).

patently unfair results.²⁰⁰ Since *O Centro's* analysis applies two conflicting versions of the compelling interest test, it seems *O Centro's* decision does little to clarify the ambiguities created by RFRA's legislative history and intent.²⁰¹

CONCLUSION

Reasoning the Government had not demonstrated a compelling interest for enforcement of the CSA, the Supreme Court affirmed the grant of a preliminary injunction allowing the UDV to continue to practice its religion by consuming hoasca. The history of free exercise jurisprudence reveals that the Supreme Court used conflicting interpretations of the compelling interest standard prior to *Smith*. At times they would use a stronger, more fact specific compelling interest standard found in *Sherbert* and *Yoder*. Prior to and after these decisions however the Supreme Court relaxed the compelling interest standard, using a weakened, generalized version of it to deny free exercise exemptions to many religious claimants. Since RFRA's authors simultaneously approved of both standards, RFRA left it up to courts to decide which standard to use. Paradoxically, *O Centro* advocates a fact-specific inquiry under the compelling interest test similar to that used in *Sherbert* and *Yoder*, yet appeals to pre-*Smith* decisions that perform less-exacting inquiries into the government's reasons for a compelling interest. Therefore, *O Centro* provides an ambiguous answer for what compelling interest test will be applied under RFRA in the future. Given RFRA's ambiguous legislative history, the Court seemed to have done its job by interpreting an ambiguous compelling interest test ambiguously.

²⁰⁰ See Shumsky, *supra* note 165, at 114-15 (1999). Professor Shumsky notes the inequity of the courts simultaneously applying two different standards of the compelling interest test of RFRA in federal courts:

[B]y failing to use the same level of generality on both sides of the balance, courts violate an essential premise of the method [compelling interest standard]. If, in fact, a single scale describes the intersection of individual liberty and government interests, the factors must be measured in the same units. To do otherwise is akin to comparing the weight of an apple in ounces to the weight of an orange in grams. The comparison is possible, but a conversion table would be necessary to understand the result. It is jurisprudentially unfair to manipulate the generality of government and individual interests, amplifying the importance of the government curtailment of religion while using the same technique to mute the interests of the individual religious claimant. Whatever outcome might be desired as a normative matter, this uncalibrated scale is sure to skew the result.

Id. (citations omitted).

²⁰¹ See *supra* notes 93-104 and accompanying text.