

Of Kirpans, Schools, and the Free Exercise Clause: *Cheema v. Thompson* Cuts Through RFRA's Inadequacies

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Introduction

For ten-year-old Rajinder Cheema, an innocent game of basketball sparked a daunting chain of events far beyond the scope of a typical child's day. One January afternoon, while he was playing basketball with his classmates, one of them noticed that he was wear-

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ing something underneath his clothes.¹ The “something” was in fact a kirpan—a small, ceremonial knife² worn by practicing Sikhs³ around the world. When school officials discovered this fact, they suspended Rajinder from school, which in turn triggered several trips to federal court and substantial media attention. Now, Rajinder must look to a most unexpected place to solve his playground problems—he must refer to the United States Constitution.

When the Framers first conceived the language of the Free Exercise Clause of the First Amendment to the Constitution, they could not have had in mind the Cheema family in the not-yet established state of California. Indeed, it is doubtful that they had any familiarity with the Cheemas’ faith—Sikhism, an ancient religion founded in the northern part of India. Yet the Framers’ constitutional legacy of religious freedom not only touches on the Cheemas, but may actually be very important to them, permitting them to continue practicing a fundamental tenet of their religion.

What are the words that the Framers wrote and ratified, and more importantly, what do they mean? The actual language of the religion clauses of the First Amendment is rather simple. It mandates that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁴ But as with most other clauses in the Constitution, the meaning of these words is quite another story. These two clauses, referred to as the Establishment Clause and the Free Exercise Clause, have since their origin been the regular subject of judicial and academic attention. Attempts to clarify the meaning of the clauses through this jurisprudence have been only partially successful. Complicating matters further, Congress has supplemented the protections in the Constitution with statutory safeguards for religious activity. Today, the federal courts will again be forced to ponder the scope of free exercise protection in *Cheema v. Thompson*, a case pending before the United States District Court for the Eastern District of California.⁵

Known colloquially as the “knives in school” case, *Cheema* will likely have far greater legal significance than this catchy sound-bite

1. Brief for Appellant at 7, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097). This brief was prepared by counsel for the Cheema family in support of its appeal of the district court’s denial of a preliminary injunction.

2. Whether kirpans should be considered knives or merely symbolic and ceremonial objects is at issue in this case. This issue will be addressed *infra* note 217.

3. The tenets of Sikhism are discussed *infra* notes 22-38 and accompanying text.

4. U.S. CONST. amend. I. The Supreme Court held that the Free Exercise Clause and the Establishment Clause apply to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Board of Education*, 330 U.S. 1 (1947), respectively.

5. This case is currently awaiting trial on the merits. For the procedural history of this case, see *infra* notes 59-82 and accompanying text.

might suggest. Not only does the case involve the Free Exercise Clause, but it also implicates important social issues such as local control over public schools and the growing problem of crime within the American education system.

The facts of the case are considerably simpler than the legal issues it presents. Rajinder, Sukhjinder and Jaspreet Cheema are students in the Livingston Union School District.⁶ Following a central tenet of their religion, these baptized Khalsa Sikhs⁷ wore ceremonial knives known as "kirpans" to school.⁸ When the Livingston Union School District asked the students to remove the kirpans while on school property, the students refused, citing religious freedom as their grounds.⁹ The school district promptly suspended them pursuant to a district policy prohibiting weapons on school property.¹⁰

On April 15, 1994, the Cheemas filed an action in federal court,¹¹ claiming that the school district's actions violated the Religious Freedom Restoration Act of 1993 (RFRA).¹² Initially, the Cheemas moved for a preliminary injunction that would have required the school district to allow the Cheema children to attend school wearing kirpans until the resolution of the underlying litigation.¹³ After the case bounced back and forth between trial and appellate courts a few times, a preliminary injunction was finally entered and maintained.¹⁴ The preliminary injunction now in effect attempts to accommodate both the students' desire to carry the kirpans and the school district's need to assure a safe environment.¹⁵ Although the preliminary injunction will obviously not be binding on the district court when it resolves the merits of the case, the opinions generated during the preliminary injunction battle do provide a glimpse as to the case's possible outcome. At the very least, the opinions are helpful in framing the issues involved.

The law under which plaintiffs brought suit, RFRA, was enacted by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*.¹⁶ In *Smith*, the Court reinterpreted and arguably rewrote the constitutional law applicable to government

6. Brief for Appellant at 6, *Cheema* (No. 94-16097).

7. *Id.* at 2.

8. *Id.* at 7.

9. *Id.*

10. The Livingston Union School District "no weapons" policy is in accord with California laws prohibiting weapons on school grounds. See CAL. PENAL CODE § 626.10(a) (West 1995) and CAL. EDUC. CODE § 48915(a) (West 1995).

11. Brief for Appellant at 9, *Cheema* (No. 94-16097).

12. 42 U.S.C. §§ 2000bb-2000bb-4 (1995).

13. *Cheema v. Thompson*, No. F-94-5360, slip. op. (E.D. Cal. May 27, 1994).

14. See discussion *infra* notes 59-82 and accompanying text.

15. *Cheema v. Thompson*, No. F-94-5360, slip. op. at 12-13 (E.D. Cal. May 27, 1994).

16. 494 U.S. 872 (1990).

regulations that infringe on the free exercise of religion.¹⁷ The *Smith* Court decided laws that are facially neutral and generally applicable are not subject to the strict scrutiny standard of review.¹⁸ Because the Oregon statute at issue in *Smith*, which “prohibit[ed] the knowing or intentional possession of a ‘controlled substance’ unless the substance has been prescribed by a medical practitioner,” did not target any specific religion or even religion generally, the Court upheld it under the new more relaxed test.¹⁹ In passing RFRA, Congress specifically restored the standard of scrutiny used in reviewing Free Exercise Clause claims prior to *Smith*.²⁰ As the Ninth Circuit put it, the “[Congress’] intent to overrule *Smith* and reinstate prior federal case law is evident in its finding 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.’”²¹

Cheema v. Thompson raises several vexing questions involving the Free Exercise Clause, RFRA, and general policy concerns surrounding safety in public schools. This Note will examine *Cheema* using both the *Smith* analysis and the strict scrutiny standard required by RFRA. Part I provides a background of Sikhism, the vital role the kirpan plays in this religion, as well as the procedural history of the case. Part II explores the various standards of scrutiny applied to free exercise cases and reviews both the district and circuit courts’ applications of these standards. Part III then analyzes in more detail one aspect of the standard of scrutiny—the school district’s interest in ensuring a safe environment for its students. Part III also questions whether the school district’s current policy is the least restrictive way of promoting that interest. Part IV considers the legal and social implications of *Cheema* on future cases involving the free exercise of religion. Part V then concludes that RFRA as currently drafted is not sufficient to protect the interests of parties pursuing free exercise claims and should be amended. Specifically, this part proposes amendments that afford meaningful protection to free exercise values, while addressing public fears that arise when too many religious groups seek to exempt themselves from otherwise important and generally applicable legal norms and standards. Finally, Part V tests the workability of the proposed amendments by applying them to two recent cases also brought under RFRA.

17. *Id.* at 882.

18. *Id.* at 879-81.

19. *Id.* at 874 (citing OR. REV. STAT. § 475.992(4) (1987)).

20. See 42 U.S.C. §§ 2000bb-2000bb-4. See also *infra* notes 153-160.

21. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *7 (9th Cir. Sept. 2, 1994) (citing 42 U.S.C. § 2000bb-2(a)(5)).

I. Background

A. Sikhism and the Role of the Kirpan

The Sikh religion was founded over 500 years ago by the prophet Guru Naanak Dev.²² The central tenets of the religion have developed over a span of 240 years, fueled by the contribution of ten Masters.²³ There are currently over 18 million Sikhs worldwide, a minority of whom commit "to make the obligations of their faith central to their lives by becoming baptized, or Khalsa Sikhs."²⁴

The word "Sikh" is derived from a Sanskrit word meaning "A pupil; disciple; scholar."²⁵ The last of the ten Sikh Gurus, Gobind Singh, established certain requirements to be followed by devout Sikhs. Both the baptism and the requirements are designed to promote group consciousness, to distinguish the Sikhs from Hindus and Muslims, and finally, to serve as a constant reminder of the religion's tenets.²⁶ The requirements include a vow taken by a Khalsa Sikh that he will never trim or shave his hair, or remove it by any other means from any part of his body, that he will never consume intoxicants or artificial stimulants, that he will never eat meat or eggs, or indulge in lustful activities outside of marriage.²⁷ Khalsa Sikhs are also required by their faith to wear five sacred symbols, or articles of faith and identity, at all times.²⁸ These are known as the "five K's" (panj kakaars), and include the kes (long hair), the kanghaa (comb), the karaa (a steel or iron bracelet), the kachhairaa (specially designed and stitched underwear), and the kirpan (a small sword, worn with a strap of cloth).²⁹ One Sikh scholar has observed that "[i]t is very important that Sikhs should always wear these five essential articles of faith and uniform on their person, without which they cannot be identified as Sikhs."³⁰ Sikhs wear these articles whether they are at work or at school. The articles are worn even during bathing or sleeping. The kirpan—the item at issue in *Cheema*—generally goes unnoticed because it is worn underneath the clothing and is not removed from its sheath except during certain ceremonial events in the Sikh temple.

22. CLINTON H. LOEHLIN, *THE GRANTH OF GURU GOBIND SINGH* 1 (1971).

23. SURINDER SINGH KOHLI, *REAL SIKHISM* 5 (1994). The importance of its first prophet, however, is not to be understated. Guru Naanak Dev's teachings came to be known as Sikhism in due course of time. SANTOKH SINGH, *FUNDAMENTALS OF SIKHISM* 21 (1991).

24. Brief for Appellant at 1, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

25. KOHLI, *supra* note 23, at 15.

26. *Id.*

27. SINGH, *supra* note 23, at 67.

28. *Id.* at 91.

29. *Id.* at 91-97.

30. *Id.* at 97.

A great deal of Sikh literature is devoted to the meaning and importance of the five symbols. The kes, or long hair, is "among the most cherished and distinctive signs of an individual's membership of the Sikh Panth."³¹ It is also a tangible link to the original Gurus who wore their hair in that fashion³² and a sign of respect to God who inexplicably gave the human being the gift of hair.³³ The kangha, or comb, symbolizes order and discipline.³⁴ The karaa or steel band, represents the unbreakable bond between the Sikh and his or her faith.³⁵ The kachhairaa, or special undergarments, prevents the arousal of lustful thoughts.³⁶ Finally, the kirpan is a symbol of self-respect, freedom from oppression and the triumph of spiritual knowledge.³⁷ At least one Sikh historian has noted that "the sword reminds us of our being sovereign, just, and God's soldier; to stand against oppression and to protect the weak and oppressed."³⁸ Abandoning the kirpan would thus have great religious significance, which is why the Cheemas refused to remove it from their persons, even while on school property.

B. The History of *Cheema v. Thompson*

The Cheema family is one of many Sikh families residing in Livingston, California.³⁹ The Livingston Union School District administers the local schools, including the one that the Cheema children attend.⁴⁰ In December 1993, Rajinder, Sukhjinder and Jaspreet Cheema were baptized as Khalsa Sikhs.⁴¹ In preparation for their baptism, the Cheemas participated in an intensive training course to become familiar with the obligations of Khalsa.⁴² In particular, they were admonished not to use the kirpan as a toy or weapon and were advised that it is to be worn in its sheath and removed only for certain religious ceremonies.⁴³ Generally, a kirpan worn by a child has a blade approximately three to four inches long.⁴⁴ Often, the handle is stitched to the cloth strap (or gatra) in which it is carried to ensure

31. J.P. Singh Uberoi, *The Five Symbols of Sikhism*, in SIKHISM 123 (1969).

32. SURINDER SINGH JOHAR, HANDBOOK ON SIKHISM ch. 5 (1977).

33. SINGH, *supra* note 23, at 69-70.

34. JOHAR, *supra* note 32, at 94.

35. *Id.* at 95.

36. SINGH, *supra* note 23, at 96-97.

37. JOHAR, *supra* note 32, at 95-96.

38. SINGH, *supra* note 23, at 97.

39. Brief for Appellant at 2, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

40. *Id.*

41. *Id.* at 6 (citing R. at 118, ¶ 3).

42. *Id.*

43. *Id.* at 7 (citing R. at 238-39, ¶¶ 11-13).

44. *Id.* at 7 n.3.

that the kirpan will not fall out or be removed casually.⁴⁵

In January of 1994, the Cheema children returned to school wearing their new kirpans. Soon thereafter, one of Rajinder's classmates noticed Rajinder's kirpan,⁴⁶ and brought it to the attention of a teacher who then questioned Rajinder about it.⁴⁷ Rajinder explained to the teacher that he wore the kirpan for religious purposes.⁴⁸ When his siblings were questioned a short while later, they responded similarly.⁴⁹

Apparently unsatisfied with this response, the school district suspended the Cheema children for violating the California Penal and Education Codes as well as district regulations.⁵⁰ The school district contended that the kirpans were weapons within the meaning of these codes and could not be allowed onto school grounds.⁵¹ Despite the Cheemas' efforts to explain the religious significance of the kirpan, the school district refused to allow the students on campus as long as they were wearing kirpans.⁵²

On March 8, 1994, the district's Board of Trustees considered the issue at a formal meeting,⁵³ and voted to refuse accommodation of the Cheemas.⁵⁴ Allowing kirpans to be worn, the Board stated, would compromise school safety.⁵⁵ On March 22, counsel for the Cheemas made a direct request to the school district, asking it to revoke its policy and allow the Cheema children to return to school.⁵⁶ The Cheemas also requested that, at the very least, the children be allowed to return to school with the kirpans while litigation was pending.⁵⁷

45. *Id.* (citing R. at 123, ¶ 22; R. at 239, ¶ 14). Although some Sikhs find such stitching is religiously offensive, the Cheemas have agreed that such stitching is acceptable. *Id.* at 7 n.3. Thus, the court in *Cheema* need not entertain the issue of whether kirpans would be allowed on school property absent the stitching.

46. *Id.* at 7 (citing R. at 132, ¶ 4).

47. *Id.* (citing R. at 132, ¶¶ 5-6).

48. *Id.*

49. *Id.*

50. See CAL. PENAL CODE § 626.10(a) (West 1995) ("Any person, . . . [with certain exceptions], who brings or possesses any dirk, dagger, ice pick, knife having a blade longer than 2 1/2 inches . . . upon the grounds of, or within any public or private school providing instruction in kindergarten or any of grades 1 to 12, inclusive, is guilty of a public offense, punishable by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison."); see also CAL. EDUC. CODE § 48915(a)(2) (West 1995) (providing the grounds for expulsion: "Possession of any knife, explosive, or other dangerous object of no reasonable use to the pupil at school or at a school activity off school grounds").

51. Brief for Appellant at 7, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

52. *Id.* at 7 (citing R. at 132-33, ¶¶ 5-9; R. at 119-20, ¶¶ 9, 11-13; R. at 137-38, ¶¶ 8-9).

53. *Id.* at 7 (citing R. at 138, ¶ 10).

54. *Id.* at 8 (citing R. at 138-39).

55. *Id.* (citing R. at 181-82).

56. *Id.* (citing R. at 190-92).

57. *Id.* (citing R. at 191).

The school district denied both requests and instead left the Cheemas with the option of either staying in school without the kirpans or staying home.⁵⁸

C. Procedural History

The Cheemas filed suit on April 15, 1994.⁵⁹ They sought a temporary restraining order (TRO) as well as preliminary and permanent injunctions.⁶⁰ In ruling on the motions for preliminary relief, the district court made some important observations. The court acknowledged the sincerity of the plaintiffs' religious belief, and the obligation of the baptized or initiated Khalsa Sikhs to wear the kirpans on their persons.⁶¹ The court also recognized the substantial burden imposed on the Cheemas by the school district's policy.⁶² The district court also found that the Cheema children "[had been] advised that the kirpan is not to be considered a toy or used as a weapon short of a life or death situation."⁶³ But after examining the kirpans, Judge Burrell determined that, notwithstanding the religious significance of the kirpan, its secular character, purpose, and function as a knife could not be ignored.⁶⁴ He concluded that "a knife is a knife,"⁶⁵ going on to note:

In addition to the danger presented by the weapon-like character of the kirpan, the presence of kirpans would disrupt the school environment since the kirpans would mostly be perceived as knives by others in school. Moreover, the district was concerned that the kirpans would have a detrimental impact on many children and staff, particularly if they felt their sense of

58. *Id.*; see R. at 194-95; R. at 204; R. at 311.

59. *Id.* at 9.

60. The action was filed not only on behalf of the three Cheema children who were suspended from school but also on behalf of several adults who were threatened with arrest for wearing their kirpans on school grounds while attending the Board of Trustees meeting on March 8, 1994. *Id.* at 9 n.5. The plaintiffs' motions for a TRO and preliminary injunction, however, were brought only on behalf of the Cheema children since the pressing concern was that of the children who have been deprived of their opportunity to obtain public education. *Id.* The Ninth Circuit reversed the district court's denial of the TRO and preliminary injunction. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994). The underlying action, however, continues on behalf of both the children and the adults.

61. *Cheema v. Thompson*, No. F-94-5360, slip. op. at 2-3, 12-13 (E.D. Cal. May 27, 1994).

62. *Id.* at 12-13.

63. *Id.* at 3.

64. *Id.* at 20.

65. *Id.*

security was undermined.⁶⁶

Finding the school district's policy in accord with the California Constitution, Article 1, Section 28(c), the California Penal Code Section 626.10(a), and the California Education Code Section 48915(a), the district court went on to rule that "a home study program would satisfy the California compulsory education requirements for children."⁶⁷ The relevance of this finding, however, is far from clear, inasmuch as there has never been any suggestion that the Cheemas intend to participate in a home study program.⁶⁸ Based on these findings and rulings, the district court denied plaintiffs' preliminary injunctive relief.⁶⁹

After accepting the district court's factual findings, the Ninth Circuit reversed,⁷⁰ holding that the district court abused its discretion by incorrectly analyzing the underlying issues of the case.⁷¹ But the appellate court stressed that its ruling did "not reach the merits of this case and that the disposition of this appeal . . . [would] affect the rights of the parties only until the district court render[ed] judgment on the merits."⁷² In ruling on the appeal from the denial of plaintiffs' preliminary injunction, the circuit court observed that the correct standard requires that the court take into account the likelihood of harm to the children as well as each side's likelihood of success on its merits.⁷³ Applying the first part of this test, the court found that the Cheema children would suffer irreparable injury if they were prohibited from attending school, and that home schooling would hardly be a substitute for in-class education.⁷⁴ In this connection, the court recognized that in-class education is particularly crucial for children such as the Cheemas, whose contact with other children is necessary to the development of their English skills.⁷⁵

In assessing the likelihood of success on the merits, the Ninth Circuit concluded that the district court had improperly applied the legal standards provided in RFRA.⁷⁶ RFRA places the burden on the state to show that its action restraining the free exercise of religious prac-

66. Brief of Respondent at 15, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097). This brief was written in opposition of the Cheemas' appeal of the district court's denial of the preliminary injunction.

67. *Cheema v. Thompson*, No. F-94-5360, slip. op. at 7 (E.D. Cal. May 27, 1994).

68. See *infra* notes 74-75 and accompanying text.

69. *Cheema v. Thompson*, No. F-94-5360, slip. op. (E. D. Cal. May 27, 1994).

70. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994).

71. *Id.* at *3.

72. *Id.*

73. *Id.* at *4 (citing *Gilder v. PGA Tour Inc.*, 936 F.2d 417, 422 (9th Cir. 1991)).

74. *Id.*

75. *Id.*

76. *Id.* at *3.

tices is "the least restrictive means of furthering [a] compelling governmental interest."⁷⁷ The district court ignored this requirement, and the record is devoid of any evidence that the school district's policy is the least restrictive means possible.⁷⁸ In fact, the Cheemas themselves have offered a less restrictive means: they have agreed to provide their children with shorter kirpans that are sewn into their sheaths.⁷⁹ Because the irreparable harm and likelihood of success analyses cut in plaintiffs' favor, the court of appeals reversed and remanded to the district court.⁸⁰

Guided by the Ninth Circuit's decision, the district court formulated the terms of the preliminary injunction governing the conditions under which the students could return to school.⁸¹ Pursuant to this district court order, the Cheemas returned to school and are anxiously awaiting a decision on the merits of the case. Meanwhile, the school district's attempt to appeal the specific provisions of this order was summarily rejected by the Ninth Circuit.⁸²

II. The Progression of Free Exercise Jurisprudence

In ruling twice on the preliminary injunction sought by the Cheemas, the Ninth Circuit declined—quite properly given the case's

77. 42 U.S.C. § 2000bb-1(b)(2) (1995).

78. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *5 (9th Cir. Sept. 2, 1994).

79. *Id.*

80. *Id.* at *3. The Ninth Circuit specifically noted that the record reflected no evidence of any accommodation, even temporary accommodation, that the district was willing to provide the students until the case could be decided. *Id.* at *10-*11. However, from the court's analysis it is doubtful that the school district's policy could withstand judicial scrutiny with only temporary accommodation. It seems clear from the court's opinion that an absolute prohibition of kirpans on school property is not the least restrictive means for the state to further its interest. Thus, the mention of temporary accommodation by the court seems unnecessary.

81. *Cheema v. Thompson*, No. F-94-5360, slip. op (E.D. Cal. Sept. 9, 1994). The order required that:

(1) the kirpan will be of the type demonstrated to the Board and to the District Court, that is: a dull blade, approximately 3 - 3 1/2 inches in length with a total length of approximately 6 1/2 - 7 inches including its sheath; (2) the kirpan will be sewn tightly to its sheath; (3) the kirpan will be worn on a cloth strap under the children's clothing so that it is not readily visible; (4) a designated official of the District may make reasonable inspections to confirm that the conditions specified about are being adhered to; (5) if any of the conditions specified above are violated, the student's privilege of wearing his or her kirpan may be suspended; and (6) the District will take all reasonable steps to prevent any harassment, intimidation or provocation of the Cheema children by any employee or student in the District and will take appropriate disciplinary action to prevent and redress such action, should it occur.

Id. at 12-13.

82. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

procedural posture—to decide the merits. Instead, it has left this task to the trial court. To assess how the district court should resolve this case on the merits, it is necessary to review the development of the legal standards applied by the United States Supreme Court in Free Exercise Clause cases.

Although Supreme Court decisions surrounding the Free Exercise Clause are relatively scant, basic principles have developed over time. Constitutional scholars have observed that:

[T]he Court has consistently held that the government may not punish religious beliefs. The government may not impose burdens on, or give benefits to, people solely because of their religious beliefs. Because federal, state and local governmental entities have not engaged in many activities that could be described as the punishment of religious beliefs, there are very few Supreme Court decisions explaining the meaning of that constitutional restriction.⁸³

Judicial interpretation of the Free Exercise Clause began with the landmark case of *Reynolds v. United States*.⁸⁴ The petitioners in *Reynolds* challenged the validity of a state statute outlawing polygamy.⁸⁵ In upholding the statute, the Court reasoned that while the First Amendment's protection seems absolute, it is not.⁸⁶ In fact, religious activity must conform to neutral legislative policies that regulate conduct.⁸⁷ Holding that free exercise extends only to religious *beliefs*, the Court blithely deferred to the State and justified its deference by stating that an exemption for the Mormon plaintiffs would render Government futile, and permit "every citizen to become a law unto himself."⁸⁸

The *Reynolds* Court's restrictive understanding of the Free Exercise Clause did not last forever. The Court has since realized that the Free Exercise Clause cannot be reconciled with unfettered deference to governmental acts.⁸⁹ Moreover, the Court recognized that the First Amendment's protection is not limited only to religious beliefs—religious practices are equally important.⁹⁰

The origins of this change in judicial philosophy can be found in *Braunfeld v. Brown*,⁹¹ where Orthodox Jews challenged a state crimi-

83. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1206 (4th ed., West 1991) (1978).

84. 98 U.S. 145 (1879).

85. *Id.* at 161.

86. *Id.* at 166.

87. *Id.*

88. *Id.* at 167.

89. *See Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972).

90. *See generally Cantwell*, 310 U.S. 296; *Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205.

91. 366 U.S. 599 (1961).

nal statute marking Sunday the official Sabbath Day and requiring that businesses be closed that day.⁹² The challengers were store owners who argued that their religion required Saturday to be Sabbath, and that they were financially disadvantaged if they were unable to operate their stores for both days.⁹³ Despite the Court's sympathy for the challengers' plight, the Court refused to grant them an exemption from the statute.⁹⁴ Instead, the Court opined that, because the economic burdens were incidental, they should not override otherwise valid legislation.⁹⁵

The importance of the *Braunfeld* decision is not in its holding, but in its reasoning. Although the claimants lost, this case represents the first time the Court entertained the notion that facially neutral laws could have disparate effects on religious minorities. The Court specifically recognized that a general law may be invalidated if the state can accomplish its purpose by means which do not impose a burden on religious groups.⁹⁶ The decision in *Braunfeld* articulated the antecedents of the compelling interest test formally developed in cases following it.⁹⁷

Guided by the *Braunfeld* reasoning, the Court in *Sherbert v. Verner*⁹⁸ "effectively expanded the constitutional guarantee of religious freedom well beyond *Reynolds* by assigning a presumption of validity to all religious conduct."⁹⁹ The *Sherbert* Court struck down a South Carolina statute under which a member of the Seventh-Day Adventist Church had been denied unemployment benefits¹⁰⁰ because she refused to work on Saturday, the Sabbath day of her faith.¹⁰¹ After being fired for failing to show up to work on a Saturday, Ms. Sherbert filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.¹⁰² The agency denied her application relying on a provision of the Act that made a claimant ineligible if he or she had failed, without good cause, to accept suitable work when offered.¹⁰³ The United States Supreme Court reversed the decision of the South Carolina Supreme Court, which

92. *Id.* at 600.

93. *Id.* at 601.

94. *Id.* at 609.

95. *Id.* at 606-07.

96. *Id.* at 607.

97. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 940 (1989).

98. 374 U.S. 398 (1963).

99. Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM J.L. & SOC. PROBS. 653, 666 (1995).

100. *Sherbert*, 374 U.S. at 400-02.

101. *Id.* at 399.

102. S.C. Code, Tit. 68, §§ 68-1 to 68-404, cited in *Sherbert*, 374 U.S. at 402 n.3.

103. *Id.*

had sustained the state's statute as applied to Sherbert's case.¹⁰⁴ First, the Court required the religious claimant to show that the state's regulation imposed a substantial burden on the free exercise of her religion.¹⁰⁵ If the claimant made such a showing, the Court applied the strictest level of scrutiny:

If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."¹⁰⁶

The Court further explained that "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"¹⁰⁷ In looking to whether South Carolina's scheme was the least restrictive, the Court distinguished *Braunfield*.¹⁰⁸ It held that unlike *Braunfield*, there was no reason that the State could not grant an exemption from its policy to the claimant—in essence, granting this exemption would not nullify the law as it would have in *Braunfield*.¹⁰⁹ Applying this strict scrutiny test, the *Sherbert* Court struck down the South Carolina scheme.¹¹⁰

The Court had yet another opportunity to extend the rights protected by the Free Exercise Clause in *Wisconsin v. Yoder*.¹¹¹ At issue in *Yoder* was a Wisconsin law that required a child's continued attendance in public or private school until the age of sixteen.¹¹² The Court rejected the State's compulsory school attendance law as it applied to members of the Amish religion, whose children stopped going to school after the eighth grade.¹¹³ The Court held that Wisconsin's interest in universal education must be balanced against individual

104. *Id.* at 402.

105. *Id.* at 403. The requirement that the state's regulation impose a substantial burden has remained constant throughout free exercise jurisprudence. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 210-12 (1972); *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1978). It is also specifically articulated in RFRA. 42 U.S.C. § 2000bb-1 (1995). In *Sherbert*, as with the cases discussed *infra*, notes 111-147 and accompanying text, this was not a point of contention.

106. *Sherbert*, 374 U.S. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

107. *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

108. *Id.* at 408-09.

109. *Id.*

110. *Id.* at 410.

111. 406 U.S. 205 (1972).

112. *Id.* at 207.

113. *Id.*

rights such as the free exercise of religion.¹¹⁴ Although the Court did not specifically analyze the case according to the two-part test traditionally associated with strict scrutiny, it did consider the weightiness of the State's interests and the means used to accomplish these goals.¹¹⁵ The balancing test employed in *Yoder* has been described by some scholars as one that is more "open" than the traditional compelling interest test.¹¹⁶ Notably, the *Yoder* Court did not incorporate the word "compelling" in the test by which it determined the validity of the law.¹¹⁷ Furthermore, the Court never specifically required the State to demonstrate that its policies were the least restrictive means to accomplish the stated end.¹¹⁸ Instead, the Court simply balanced the State's interests with those of the challengers.¹¹⁹ Nevertheless, the Court's informal approach produced the same results as if strict scrutiny had been applied. The *Yoder* Court recognized that:

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country.¹²⁰

Regardless of the specific terminology used to describe this balancing test, the Court clearly required the State to articulate more than a rational basis for its regulation.¹²¹ In applying its flexible test to the facts of *Yoder*, the Court found that the State did have a strong interest in the education of minors.¹²² The Court stated:

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and

114. *Id.* at 214.

115. *Id.* at 213-36.

116. NOWAK & ROTUNDA, *supra* note 83, at 1225.

117. *Yoder*, 406 U.S. at 224-29; NOWAK & ROTUNDA, *supra* note 83 at 1225.

118. *Yoder*, 406 U.S. at 227.

119. *Id.* at 224-27.

120. *Id.* at 225.

121. *Id.* at 227 (requiring a "more particularized showing from the State . . . to justify the severe interference with religious freedom such additional compulsory attendance would entail").

122. *Id.* at 213, 221, 238.

the impediment to those objectives that would flow from recognizing the claimed Amish exemption.¹²³

In addition, as in *Sherbert*, the Court required a showing that the religious beliefs in question were sincere or legitimate.¹²⁴

Some of the Court's opinions since *Yoder* reflect the Court's focus not on the legitimacy of the State's interests, but whether those interests are flatly inconsistent with the recognition of exemptions for religious groups. For example, in *Thomas v. Review Board*,¹²⁵ Mr. Thomas, a Jehovah's Witness, left his job with an employer who was involved directly in producing weapons because such work violated his religious beliefs.¹²⁶ Thomas was subsequently denied unemployment insurance because his voluntary termination was not based upon "[g]ood cause [which was] job-related and objective in character."¹²⁷ In reviewing Thomas' free exercise claim, the Court acknowledged that the state had an important interest in "avoid[ing] . . . widespread unemployment."¹²⁸ However, the Court's inquiry focused on identifying an interest that was much narrower than simply avoiding unemployment. Specifically, the Court noted that recognizing the exemption sought by the Jehovah's Witnesses was not likely to create the actual harm of "widespread unemployment."¹²⁹ Since there was no evidence in the record to indicate that this policy was the least restrictive means to prevent widespread employment, the Court upheld the free exercise claim and required an exemption from the state regulation.¹³⁰

The reasoning in *Yoder* and *Thomas*, however, did not carry the day in subsequent cases.¹³¹ Until 1990, at least *theoretically*, all laws that burdened the free exercise of religion were subject to the highest

123. *Id.* at 221.

124. *Id.* at 214-17. The "sincerity of beliefs" requirement will be discussed *infra* notes 269-281 and accompanying text.

125. 450 U.S. 707 (1978).

126. *Id.* at 709.

127. *Id.* at 712-13.

128. *Id.* at 718.

129. *Id.* at 719.

130. *Id.* at 717-20.

131. Compare *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (finding that a free exercise claim cannot be undermined by the fact that working on Sundays has become a regular habit); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (holding that denial of unemployment benefits is not justified if claimant bases her objections on religious beliefs, despite the fact that these beliefs changed during the course of her employment); *with O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (upholding prison policy which prohibited Muslim prisoners from attending Jumu'ah, a weekly service mandated by Muslim scriptures); *Bowen v. Roy*, 476 U.S. 693 (1986) (finding generally applicable regulations require merely a showing that they are reasonably necessary to achieve a legitimate state interest); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (finding the compelling interest test inappropriate in military context because military officials must be allowed

level of scrutiny.¹³² As a practical matter, however, the Court's decisions were remarkably opaque, producing disparate results in different cases. In *Lyng v. Northwest Indian Cemetery Protective Association*,¹³³ the Court retreated from *Sherbert* and *Yoder*'s broad recognition of free exercise rights. Without regressing to the days of *Reynolds*, the Court followed the middle ground between the broad and narrow interpretations of the Free Exercise Clause. Under the *Lyng* formulation, incidental burdens on religious practices were no longer exempted from a state's legislative power.¹³⁴ Instead, religious conduct would warrant an exemption only if state action coerced an individual into violating religious beliefs or penalized the individual for engaging in religious conduct.¹³⁵ Thus, each plaintiff first had to show that the legislation imposed a significant burden on him or her.¹³⁶ Only after this difficult showing was made would strict scrutiny be applied.¹³⁷ In implementing this new approach, the Supreme Court condoned the government's decision to construct a roadway across public property that had traditionally been a sacred site for Native American groups.¹³⁸

In 1990, the Court accelerated its contraction of free exercise rights sharply with its decision in *Employment Division v. Smith*.¹³⁹ Early on in the opinion, the *Smith* Court "summarized a century of the Court's rulings concerning the [F]ree [E]xercise [C]lause."¹⁴⁰ But the *Smith* Court did much more than simply provide a summary of free exercise jurisprudence. Seizing the opportunity to clarify the ambiguity of *Lyng*, the *Smith* majority shocked the Court-watching world

substantial deference in evaluating whether a particular restriction on religious conduct is justified).

132. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). Commentators regard free exercise jurisprudence to be unclear prior to 1990: "Between 1960 and 1990, Justices of the Supreme Court were sharply divided over the extent to which the [F]ree [E]xercise [C]lause allowed the judiciary to determine whether a law of general applicability, which included no explicitly religious criteria, could be applied to persons whose sincerely held religious beliefs prevented them from complying with the law." NOWAK & ROTUNDA, *supra* note 83, at 1218. This changed with the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to be discussed *infra* notes 139-152 and accompanying text.

133. 485 U.S. 439 (1988).

134. *Id.* at 449.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 441-42.

139. 494 U.S. 872 (1990). Scholars have noted *Smith*'s inconsistency with prior free exercise decisions. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990). McConnell argues that *Smith*'s blatant rejection of prior jurisprudence reflects an intent contrary to that of the Framers of the First Amendment. *Id.*

140. NOWAK & ROTUNDA, *supra* note 83, at 1218.

by holding that generally applicable and facially-neutral laws were no longer subject to strict scrutiny.¹⁴¹

In *Smith*, a private drug rehabilitation organization fired Smith and others because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church.¹⁴² The state of Oregon denied their applications for unemployment compensation under a law disqualifying employees discharged for work-related "misconduct."¹⁴³ In rejecting Smith's free exercise challenge to the denial, the Court held that "the right of 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).'"¹⁴⁴

Justice Scalia's majority opinion further explained that the only contexts in which the Court previously found that the First Amendment barred application of neutral, generally applicable laws to religiously motivated action involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections or the right of parents to correct the education of their children.¹⁴⁵ The *Smith* majority also distinguished the two-step analysis developed in *Sherbert* as being applicable only to statutes dealing exclusively with unemployment compensation.¹⁴⁶ Finally, the Court held that applying a reduced level of scrutiny to neutral, generally applicable laws is consistent with the standards of scrutiny applied in the equal protection realm.¹⁴⁷

141. 494 U.S. at 879. Justice O'Connor objected to the *Smith* majority's characterization of the *Lyng* decision. *Id.* at 891 (O'Connor, J., concurring). She hoped to limit *Lyng* to cases pertaining to government's management of its internal affairs. *Id.* Justice Scalia, writing for the majority, saw this as an unnecessary distinction. *Id.* at 885. Why should government have to tailor its health and safety laws to conform to religious claimants but not have to tailor its management of public lands, or its administration of welfare programs, he queried. *Id.*

142. *Id.* at 872.

143. *Id.*

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

145. *Id.* at 881.

146. *Id.* at 883.

147. *Id.* at 886 n.3. In her concurring opinion, Justice O'Connor asserted that all laws burdening religious practices should be subject to compelling-interest scrutiny because "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a constitutional 'nor[m],' not an 'anomaly.'" The majority's response to this assertion was: "Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, . . . and we have held that generally applicable laws unconcerned with regulating

As interesting as the *Smith* majority opinion was the dialogue in *Smith* between Justice O'Connor and Justice Blackmun. In rejecting the majority's adoption of a new standard for free exercise claims, both vehemently asserted that strict scrutiny should remain the constitutional test.¹⁴⁸ In addition, both chastized the majority for mischaracterizing the Court's precedents.¹⁴⁹ However, while both purported to apply the same compelling interest test, each reached a different result. Justice O'Connor found that the State of Oregon had a compelling interest in regulating peyote use by its citizens and that the claimants' conduct would unduly interfere with the successful execution of this interest.¹⁵⁰ In contrast, Justice Blackmun found that, despite the State's compelling interest in prohibiting peyote use, there was no justification for the State's denial of an exemption for the religious claimants.¹⁵¹ Picking up on the reasoning of *Thomas*, Justice Blackmun insisted that "[i]t is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."¹⁵² The distinction between Justice O'Connor's version of the compelling interest test and that of Justice Blackmun's is subtle, but important. Once Justice O'Connor found that the State had identified a general compelling interest that was furthered by the scheme, she looked no further. She made this decision even in light of evidence that other states had provided specific exemptions for religious peyote use similar to those sought by the challengers to Oregon's law. Effectively, her interpretation of this test eradicated the "narrowly tailored" prong. Justice Blackmun, on the other hand, insisted that the State not only identify a compelling interest in the underlying law, but also a separate compelling interest in denying the claimants an exemption. In essence, Justice Blackmun placed the burden on the State to describe why any exemptions were not possible. Because the State failed to articulate a reason, he found in favor of the claimants.

If Congress had adopted Justice O'Connor's version of the compelling interest test in RFRA, the district court's assessment of the likelihood of success on the merits in *Cheema v. Thompson* would have been proper. However, the language and intent of RFRA more closely reflects Justice Blackmun's vision of Free Exercise Clause re-

speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment." *Id.* (citations omitted).

148. *Id.* at 899-900, 908-09.

149. *Id.* at 895-98, 908.

150. *Id.* at 907.

151. *Id.* at 909.

152. *Id.* at 909-10.

quirements than Justice O'Connor's. It is under this reading of RFRA that *Cheema v. Thompson* must be understood.

A. Religious Freedom Restoration Act

As noted above,¹⁵³ Congress responded to *Smith* by enacting the Religious Freedom Restoration Act of 1993 (RFRA).¹⁵⁴ Although Congress did not explicitly overrule *Smith*, it rendered the case virtually meaningless by providing a statutory right to replace the eviscerated constitutional right.¹⁵⁵ Introduced by an unlikely coalition of senators,¹⁵⁶ RFRA garnered overwhelming support in Congress.¹⁵⁷ This strong legislative reaction to *Smith* was not a surprise to some scholars. Professor James E. Ryan has noted, "inattention to how courts have actually been treating the free exercise claimant may explain why the reaction to *Employment Division v. Smith* has been so vehement."¹⁵⁸ RFRA is clear in its purposes:

The purposes of this Act are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, and *Wisconsin v. Yoder* and to guarantee its

153. See discussion *supra* notes 16-21 and accompanying text.

154. 42 U.S.C. §§ 2000bb-2000bb-4 (1995). Congress approved RFRA on November 16, 1993. 1993 U.S.C.C.A.N. 1892.

155. 42 U.S.C. § 2000bb. RFRA addresses *Smith's* role in free exercise jurisprudence in its first section, entitled "Findings." *Id.* The Act specifies that "in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," and "the compelling interest test is a workable test for striking balances between religious liberty and competing prior governmental interests." *Id.* RFRA's failure to explicitly overrule *Smith* maintains its relevance in interpreting the Free Exercise Clause. Presumably, if a free exercise case were not brought under RFRA, the *Smith* standard would be applied. Furthermore, if RFRA were revoked or declared unconstitutional, *Smith* would again control this area of the law. The Ninth Circuit commented on *Smith's* relation to RFRA in *United States v. Bauer*, 75 F.3d 1366, 1374 (1996), noting that "While implicitly criticizing *Smith* the statute does not present itself as an interpretation of the Constitution overruling *Smith*; rather it consists of a command that must be followed as a matter of federal law."

156. Senators Edward Kennedy and Orrin Hatch introduced the Act to the 103d Congress on March 11, 1993. S. REP. NO. 111, 103d Cong., 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893.

157. Congressional support included members of both political parties with vastly varying ideologies. The number of co-sponsors indicates its unusually strong appeal in the Senate: Senators Akaka, Bennett, Bond, Boxer, Bradley, Breaux, Brown, Bumpers, Campbell, Coats, Cohen, Danforth, Daschle, DeConcini, Dodd, Dorgan, Durenberger, Exon, Feingold, Feinstein, Glenn, Graham, Gregg, Harkin, Hatfield, Inouye, Jeffords, Kas-sebaum, Kempthorne, Kerrey, Kerry, Kohl, Lautenberg, Levin, Lieberman, Lugar, Mack, McConnell, Metzenbaum, Mikulski, Moseley-Braun, Moynihan, Murray, Nickles, Packwood, Pell, Pryor, Reid, Riegle, Rockefeller, Sarbanes, Sasser, Specer, Wellstone, and Wofford. 1993 U.S.C.C.A.N. 1892, 1893.

158. James E. Ryan, *Smith and the Religious Freedom and Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1408 (1992) (footnote omitted).

application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.¹⁵⁹

Section 2000bb-1 of RFRA sets forth the compelling interest test:

(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.¹⁶⁰

Reaction to RFRA has varied. Like *Smith* itself,¹⁶¹ RFRA has produced a host of legal scholarship. Some have argued that the Act is outside the realm of Congress' constitutional authority; in essence, the Act is premised on power which Congress simply lacks.¹⁶² Others have argued that the Act reinstates ambiguous case law and thus inadequately addresses the concerns that find expression in the Free Exercise Clause.¹⁶³ Others have critiqued RFRA by accusing Congress of ignoring the declining confidence in the *Sherbert* test readily apparent

159. 42 U.S.C. § 2000bb(b) (citations omitted).

160. 42 U.S.C. § 2000bb-1.

161. For diverging viewpoints regarding *Smith*, compare Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 609 (1991) (arguing that *Smith* was incorrectly decided) with Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 122 (1993) (while not endorsing *Smith*, arguing that it merely clarified free exercise law).

162. See, e.g., Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the RFRA*, 48 VAND. L. REV. 1539, 1539-1633 (1995). Others have defended its constitutional validity. See, e.g., Note, *The Religious Freedom and Restoration Act of 1993: Restoring Religious Freedom After the Destruction of the Free Exercise Clause*, 20 DAYTON L. REV. 383, 416-22 (1994). The Fifth Circuit rejected a challenge to RFRA's constitutionality in *Flores v. Boerne*, 73 F.3d 1352 (1996).

163. Saison, *supra* note 99, at 672-86. Saison contends that, "RFRA therefore represents a movement backward. Any solution to the problems surrounding the compelling interest test must account for the emergence of the *Smith* doctrine, and strive to forestall its reemergence. Merely reversing the decision and restoring pre-*Smith* case law only perpetuates the problem." *Id.* at 685. Saison traces the ambiguous reasoning of pre-*Smith* free exercise jurisprudence and concludes that the compelling interest test is insufficient to address the problems within this area of constitutional law. See *id.* at 672-74, 683-86. She argues that this ambiguity results in entirely too much judicial discretion. *Id.* at 656. Instead, Saison suggests that the Free Exercise Clause needs the categorical balancing approach adopted by free speech jurisprudence. *Id.* at 686-90.

in pre-*Smith* case law.¹⁶⁴ Professor James Ryan has argued that it is the role of the legislature, and not the courts, to preserve religious liberty.¹⁶⁵

On the other hand, other scholars have praised Congress for reinstating the compelling interest test in the free exercise domain. These scholars have recognized the importance of judicially mandated exemptions,¹⁶⁶ argued that an exemption approach best reflects the Framers' intent,¹⁶⁷ opined that the *Sherbert* and *Yoder* test is the most appropriate balance between the rights of government and religious claimants,¹⁶⁸ and suggested that, without this protection, minority religious groups would be hurt the most.¹⁶⁹

164. Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court Centrism*, 1993 B.Y.U. L. REV. 259, 271-72 (1993).

165. Ryan, *supra* note 158.

166. See David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995).

167. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437-46 (1990). According to McConnell, exemptions were critical to the rise of early evangelical groups in the late 1700s. With regard to granting exemptions, these groups, such as the Baptists and Quakers, were the subject of the Framers' intent. *Id.* at 1446. James Madison is among the most notable Framers who argued for judicial exemptions for religious purposes: "We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 WRITINGS OF JAMES MADISON 183, 185, quoted in Steinberg, *supra* note 166, at 266 n.122. But see MICHAEL J. MALBIN, *RELIGION AND POLITICS* 37 (1978). Malbin argues that the Framers' intent reflects a desire to permit legislative exemptions, but not judicial exemptions. *Id.* at 39.

168. Professor Douglas Laycock testified to the suitability of the compelling interest test to congressional intent:

The stringency of the compelling interest test makes sense in light of its origins: it is a judicially implied exception to the constitutional text. The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be 'no law' prohibiting free exercise. The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. RFRA makes the exception explicit rather than implicit, but the standard for satisfying the exception should not change.

Religious Freedom and Restoration Act: Hearings Before the Senate Comm. on the Judiciary, 102d Cong., 2d Sess. 81-82 (1992) (citations omitted).

169. Professor Kathleen Sullivan warns that the danger of not granting judicial exemptions will be felt most severely by unpopular minority groups who are held hostage by the whims of a political majority. Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992). Other scholars echo her sentiment. Professor David Steinberg notes "[s]mall, unfamiliar, and unpopular religions face far more uncertain treatment from the political branches of government. Legislators unfamiliar with a religious group may pass laws that conflict with the group's tenets. Moreover, a small and insular religious group may lack the political influence necessary to obtain a statutory exemption." Steinberg, *supra* note 166, at 253-54 (citations omitted).

Notwithstanding the controversy surrounding RFRA's worth, it remains valid law today. The proponents of the statute have successfully given religious groups one tool to obtain exemptions to practice their beliefs. For this reason, the statute is far from meaningless. However, the critics of the Act should not be ignored. They have pointed out some of the Act's flaws that need to be addressed. Most notably, they have recognized that by reinstating the case law prior to *Smith*, the Act has merely restored the ambiguity prevailing in the cases during this period. Thus, any suggestions for improving RFRA should be welcomed.¹⁷⁰ In the meantime, however, *Cheema v. Thompson* will be decided based on RFRA's current language.

III. Applying RFRA's Strict Scrutiny Standard to *Cheema v. Thompson*

As noted above, the district court denied the Cheemas' request for a preliminary injunction, grounding its decision on an assessment of the likelihood of success of the plaintiffs' claim under RFRA.¹⁷¹ Reversing the district court's ruling, the Ninth Circuit declared that a proper understanding of RFRA required the opposite outcome.¹⁷²

RFRA places the burden of proof on the State to show that its policies are in furtherance of a compelling state interest, and that the means employed are the least restrictive ones possible.¹⁷³ A closer look at the school district's interest in *Cheema v. Thompson* indicates that, although its interest in public safety is compelling, the current policy it employs is not the least restrictive means possible.

A. The State's Compelling Interests

The district court found that the education of children was a compelling governmental interest,¹⁷⁴ and the Ninth Circuit upheld this determination.¹⁷⁵ Both courts rooted their conclusion in long-standing precedent.¹⁷⁶ In *Wisconsin v. Yoder*, the Court recognized that "there is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at

170. Proposals for improving RFRA will be introduced in Part V, *infra* notes 261-308 and accompanying text.

171. *Cheema v. Thompson*, No. F-94-5360, slip. op. (E.D. Cal. May 27, 1994).

172. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *3 (9th Cir. Sept. 2, 1994).

173. 42 U.S.C. §§ 2000bb-1(b)(1)-(2).

174. *Cheema v. Thompson*, No. F-94-5360, slip. op. at 14-16 (E.D. Cal. May 27, 1994).

175. The opinion states, "The district has a compelling interest in protecting the safety of its students." *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *8 (9th Cir. Sept. 2, 1994).

176. *Id.*

the very apex of the function of the State."¹⁷⁷ Similarly, in *Sherbert v. Verner*, the Court recognized the protection of public safety to be a compelling interest.¹⁷⁸ Safety in public schools has long been recognized by the political branches of California as an interest of the highest order. Moreover, the Livingston School District has a separate obligation under the California Constitution to ensure its schools are "safe, secure and peaceful."¹⁷⁹

Beyond the actual threat to the safety of its students, the school district argued that avoiding the impact on other children from the mere presence of kirpans at school should itself suffice as a compelling interest.¹⁸⁰ Specifically, the school district argued that as important as whether or not the kirpans were actually a threat to safety is the possibility that the kirpans might be *perceived* as a threat by other students or might be resented by non-religious students who would like to but are unable to carry knives.¹⁸¹ This perception itself—whether or not rational—might create a disruptive environment justifying the broad "no weapons" policy. In reviewing the district court's ruling on the preliminary injunction, the Ninth Circuit found this interest wanting,¹⁸² observing that the district court's finding that other children might be frightened by the kirpans, or might think it unfair that only some children have knives, was purely speculative.¹⁸³

The Ninth Circuit's decision on the perception issue is consistent with a long line of cases involving civil rights and public health.¹⁸⁴ In their brief, counsel for the students cited *Buchanan v. Warley*,¹⁸⁵ in which the United States Supreme Court struck down an ordinance prohibiting African-Americans from settling in Caucasian neighborhoods in Louisville, Kentucky.¹⁸⁶ The city claimed that its ordinance

177. 406 U.S. 205, 213.

178. 374 U.S. 398, 403 (1963) (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Jacobson v. Massachusetts*, 197 U.S. 11 (1904); *Prince v. Massachusetts*, 321 U.S. 158 (1943); *Cleveland v. United States*, 329 U.S. 14 (1946)).

179. CAL. CONST. art. I, § 28(c).

180. In a memorandum to the Board of Trustees, staff advised the Board against allowing a "free exercise" exception to the "no weapons" policy on the ground that "we have a compelling interest to provide our two thousand plus students with an environment which is perceived to be safe and free of disturbances and distractions to the educational process." Brief for Appellant at 16 n.14, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

181. Brief of Respondent at 15-20, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

182. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *8 (9th Cir. Sept. 2, 1994).

183. *Id.* at *8 n.2.

184. Brief for Appellant at 27-28, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

185. 245 U.S. 60 (1917).

186. *Id.*

was intended to “promote the public peace by preventing race conflicts.”¹⁸⁷ The Court rejected that argument, stating “desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws . . . which deny rights created or protected by the Federal Constitution.”¹⁸⁸ Additionally, as the Cheemas pointed out, courts have consistently refused to allow school districts to exclude AIDS-afflicted children from attending classes, despite a rampant and undeniable fear in the communities of possible spread of the disease.¹⁸⁹

Particularly relevant to the legitimacy of the State’s perception argument is *Western Presbyterian Church v. Board of Zoning Adjustment*.¹⁹⁰ In that case, a district court held that RFRA prevents a zoning board from restricting the location of a church’s soup kitchen because of “unfounded, or irrational fears of certain residents.”¹⁹¹ When we apply this case to *Cheema*, the key question becomes whether the perceived fears in the Livingston schools are “unfounded or irrational.” The Ninth Circuit found that the “[school] district has provided no evidence that any of its students are afraid of or upset by kirpans.”¹⁹² The record is thus devoid of any support offered by the school district that it has conducted any study to assess the perceived fears by other students that it alleges.¹⁹³ In the second appeal, that involving the terms of the preliminary injunction, the Ninth Circuit specifically commented on the lack of evidence presented by the school district.¹⁹⁴ Judge Hall wrote, “[i]f the school district dislikes the injunction, it should use its opportunity to litigate this dispute on the merits to present the district court with adequate evidence from which a fully informed decision can be made.”¹⁹⁵

To counter these arguments, the school district argued that it should have broad discretion in enacting policies that further the legit-

187. *Id.* at 81.

188. *Id.*

189. Brief for Appellant at 28, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097) (citing *Ray v. School Dist.*, 666 F. Supp. 1524 (M.D. Fla. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986); *Doe v. Dolton Elementary Sch. Dist.*, 694 F. Supp. 440 (N.D. Ill. 1988)).

190. 849 F. Supp. 77 (D.D.C. 1994).

191. *Id.* at 79.

192. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *9 (9th Cir. Sept. 2, 1994).

193. Conducting such a factual or statistical inquiry would be difficult without alarming students, which is exactly what the school district is trying to avoid. Nevertheless, there is no evidence in the record that the district has made any effort to show that there is any sort of a perceived threat among the students themselves. It has merely asserted that this perceived threat is a compelling interest without showing that this perception of a threat even exists.

194. *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995).

195. *Id.* at 886.

imate goals of an educational system. Specifically, it pointed to free speech doctrine by analogy, relying in particular on *Bethel School District v. Fraser*¹⁹⁶ and *Hazelwood School District v. Kuhlmeier*.¹⁹⁷

The issue of a school district's ability to curb the expressive activity of its students was first addressed in *Tinker v. Des Moines Independent Community School District*.¹⁹⁸ In *Tinker*, the Court held that a student who wished to exercise his free speech rights by wearing a black armband could not be prevented from doing so, despite the fact that his speech might have some disruptive effect on the educational atmosphere. The Court emphatically stated that "students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁹⁹

In *Fraser*, the Court held that a school district could, consistent with the First Amendment, discipline a student for using lewd and indecent speech in public discourse.²⁰⁰ The *Fraser* Court distinguished a state's power to regulate adult speech from its power over children at public school.²⁰¹ It declared that a student rights are not "automatically coextensive with the rights of adults in other settings."²⁰²

In *Hazelwood*, former high school student staff members of a school's newspaper alleged that their school district violated the First Amendment by deleting portions of a particular issue of the paper. In holding that the district did not violate the First Amendment, the Court began by reviewing its prior decisions. The Court contrasted its holding in *Tinker* with its holding in *Fraser* and found that *Hazelwood* resembled *Fraser* more closely than *Tinker*. Important to the *Hazelwood* Court's holding was the school district's role as a publisher of the newspaper, which raised the possibility that people might attribute the views espoused in it to the school.²⁰³ The Court reasoned that, while the First Amendment may require a school to tolerate particular student speech, it does not necessarily require a school affirmatively to promote particular student speech.²⁰⁴

The school district in *Cheema* argues that this line of free speech cases underscores the broad discretion districts enjoy in furthering their educational goals. This discretion, the district goes on, counsels in favor of finding the district's asserted interests to be compelling. The district court in *Cheema*, looking to *Fraser* and *Hazelwood*, seized

196. 478 U.S. 675 (1986).

197. 484 U.S. 260 (1988).

198. 393 U.S. 503 (1969).

199. *Id.* at 506.

200. *Fraser*, 478 U.S. at 680.

201. *Id.* at 682.

202. *Id.*

203. *Hazelwood*, 484 U.S. at 270-72.

204. *Id.* at 270-71.

upon this reasoning in reaching its decision.²⁰⁵ It held that in determining whether the school had a compelling interest in pursuing its policies, courts must be mindful that school officials should have the authority to regulate and control the school environment in a manner consistent with the school's educational mission.²⁰⁶

Although the Ninth Circuit neglected to directly address this issue in either of their majority opinions,²⁰⁷ the district court's reliance on *Hazelwood* and *Fraser* was surely misguided. First, both *Fraser* and *Hazelwood* can be easily distinguished. The *Fraser* Court's decision turned on the fact that the speech involved was lewd and indecent and aimed at a captive audience of minors.²⁰⁸ Indeed, the Court there distinguished *Tinker* by recognizing that the sexual content of the speech given to a captive audience rendered it inherently disruptive.²⁰⁹ In contrast, the actions of the Cheemas are not lewd and are in no other way inherently disruptive, particularly in light of the fact that the kirpans, as worn, are not readily visible.²¹⁰ In *Hazelwood*, the Court focused on the role of the school as a publisher, and declared that First Amendment rights do not require the school district to promote a particular type of speech. In the case at hand, permitting the Cheemas to wear kirpans in no way requires the school to endorse or promote a particular religion or religious act.²¹¹

Furthermore, while these cases are somewhat analogous to *Cheema*, they have no precedential value in free exercise jurisprudence. The line of cases interpreting the meaning of the Free Exercise Clause is distinct from free speech jurisprudence, and there is no reason to believe that the two should overlap. In fact, if Congress had wanted RFRA to reflect the reasoning applied in free speech cases, it would have explicitly done so. Instead, in the Act itself, Congress referred only to prior free exercise cases.²¹²

205. *Cheema v. Thompson*, No. F-94-5360, slip. op. at 15 (E.D. Cal. May 27, 1994).

206. *Id.*

207. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994); *Cheema v. Thompson*, 67 F.3d 883 (1995). In his dissent, Judge Wiggins took note of *Fraser* and *Hazelwood*'s applicability to the case at hand. He reminded the majority that, "[I]n the interest of safe school environments, students enjoy fewer rights than adults, or even than children outside of classrooms." *Cheema*, 67 F.3d at 892 (citation omitted).

208. *Fraser*, 478 U.S. at 680.

209. *Id.* at 680-81.

210. If the school district's argument that perception of fear among the students is accepted, then arguably, this might be deemed inherently disruptive. However, the tenuous character of this argument counsels against such a finding. *See supra* notes 180-195 and accompanying text.

211. In all likelihood, such school endorsement would amount to a violation of the Establishment Clause.

212. 42 U.S.C. § 2000bb(b)(1).

To summarize, in *Cheema v. Thompson*, the Livingston Union School District has argued two separate compelling interests. The first is a threat to public safety. The Court has consistently held this to be compelling.²¹³ The second, the perception of a threat, is an interest significantly more tenuous. Absent further evidence of the existence of such a threat, it is unlikely that this interest will be, or should be, considered compelling.²¹⁴ But even assuming that either, or both, interests were compelling, RFRA's analysis does not stop there.

B. Least Restrictive Means

The second part of the RFRA standard requires that, even when a state enacts a regulation infringing the free exercise of religion in furtherance of a compelling interest, the means employed must be the least restrictive possible.²¹⁵ The means employed by the Livingston Union School District was a broad policy prohibiting all weapons.²¹⁶ A knife is included in the definition of a weapon.²¹⁷ Proving that this policy is the least restrictive one under RFRA is the most difficult part of the school district's task in *Cheema*.

The Ninth Circuit found that the school district had not accomplished that task; it held that the blanket provision enacted by the district was not the least restrictive means of effectuating the goal of school safety.²¹⁸ The court noted that the school district "has put in the record no evidence whatsoever of any attempt to accommodate the Cheemas' religious practices."²¹⁹ After the case was remanded to the district court to formulate the specific terms of the injunction, the district court found a less restrictive way to accommodate both the state's interests and the Cheemas, and incorporated this less restric-

213. See *supra* notes 174-179 and accompanying text.

214. See discussion *supra* notes 178-195 and accompanying text.

215. 42 U.S.C. § 2000bb-1(b)(2).

216. The California Penal Code makes it a crime to carry a knife with a blade longer than 2.5 inches on school property. CAL. PENAL CODE § 626.10(a). The school district policy is in accord with this state provision.

217. The Cheemas contend that the mere characterization of the kirpan as a knife misstates the issue at hand. According to the students, the kirpan is not a knife but a ceremonial object, not to be used as a weapon, but as a religious symbol: "[t]he fact that [the kirpan] could be misused to attempt to inflict harm does not alter that circumstance, or change the nature of a kirpan [which is a sacred symbol]." Brief for Appellant at 22, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097) (emphasis omitted). Counsel for the students also point out that other objects, such as scissors, baseball bats, or acid in a chemistry lab, when viewed apart from their primary functions, may also be considered weapons, yet the school district's policy does not prohibit the use of these items on school grounds. *Id.* at 24.

218. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *11 (9th Cir. Sept. 2, 1994).

219. *Id.* at *10.

tive means in its order to the school district.²²⁰ The school district's appeal of this order proved to be futile for the same reasons the Ninth Circuit initially ruled against the school district. The Ninth Circuit's second opinion spelled out the basic problem with the school district's case:

We concluded, as did the district court, that the school district had a compelling interest in campus safety. We even agreed that the kirpan ban served that interest, despite the almost total lack of evidentiary support in the record. But we simply could not conclude that nothing short of a wholesale ban would adequately protect student safety. The problem was a total failure of proof; the school district refused to produce any evidence whatever to demonstrate the lack of a less restrictive alternative.²²¹

The court further admonished the school district for taking the position, before both the district court and the panel, that it had no obligation to offer a less restrictive means,²²² characterizing it as "quite mistaken."²²³

Instead of providing a less restrictive means of accomplishing their stated policies, the school district has suggested a "compromise" to the situation. Rather than permit actual kirpans to be worn, the district suggested that the students wear a kirpan medallion.²²⁴ This suggestion was rejected by the Cheemas as not comporting with the mandates of their religion.²²⁵ As a result, the Ninth Circuit found it not to be a viable compromise.²²⁶ Later, in the school district's appeal, the appellate court ignored this proposal altogether. The school district's offer for such a compromise demonstrates its lack of understanding of the issue at hand. Instead of accommodating the Cheemas' religious practices, they asked the Cheemas to modify a fundamental tenet of their religion. In return, there was never any attempt to alter its own policy to make it less restrictive on the mandates of Sikhism. Beyond this suggestion, the district failed to provide any other alternative, whether acceptable or not.

The school district's seeming reluctance to accommodate the Cheemas' exercise of their religion is directly contrary to the decision of other contiguous school districts. The factual record shows that both "the Yuba and Live Oak School Districts allow kirpans, but only

220. *Cheema v. Thompson*, No. F-94-5360, slip. op. at 12-13 (E.D. Cal. Sept. 9, 1994).

221. *Cheema*, 67 F.3d at 885 (citations and emphasis omitted).

222. *Id.*

223. *Id.*

224. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *10 n.3 (9th Cir. Sept. 2, 1994).

225. *Id.*

226. *Id.*

if they are riveted to their sheaths.”²²⁷ The Selma School District’s approach has been to allow them as long as the kirpans’ tips and edges are rounded.²²⁸ The Ninth Circuit made special note of these facts:

This time the school district could not rely on our common sense to save it. Indeed, common sense cut against the school district. The simple fact—documented in the record—was that other school districts with a Khalsa Sikh population had managed to accommodate kirpans without sacrificing student safety. For example, the record included the policies of two California school districts, which allowed kirpans so long as the blades were dulled, no more than 2 1/2 inches, and securely riveted to their sheaths. The natural question was why the same compromise would not work here. The school district gave us no answer.²²⁹

These alternatives indicate that there are less restrictive means to further the school district’s compelling interest. Furthermore, the Cheemas themselves proposed another alternative: they agreed to wear shorter kirpans sewn into the sheaths in such a manner that even an adult could not remove them absent taking apart each stitch individually. As to this apparent compromise, the Ninth Circuit observed that “[t]he district has failed to show why these less restrictive alternatives are insufficient.”²³⁰

The Livingston School District’s response was two-fold. First, it argued that RFRA requires only that the State have the burden of providing the least restrictive means at trial, not at the preliminary injunction stage.²³¹ Second, even if the kirpans are worn in their sheaths as the plaintiffs offered, removing them will merely be difficult, not impossible.²³²

The Ninth Circuit rejected the school district’s first argument.²³³ The court noted that on a motion for preliminary injunction, the court is to consider the likelihood of success on the merits.²³⁴ The success of the merits of this case is significantly related to the allocation of the burden of proof at trial. Furthermore, RFRA explicitly states that once a person’s religion has been substantially burdened by the government, it is up to the government to provide a compelling justification and the least restrictive means possible.²³⁵ The importance of the

227. *Id.* at *11 n.4.

228. *Id.*

229. *Cheema v. Thompson*, 67 F.3d at 885 n.3.

230. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *11 n.4 (9th Cir. Sept. 2, 1994).

231. Brief of Respondent at 19, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

232. *Id.* at 16-17.

233. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *4-5.

234. *Id.* at *3-*4. *See also* *Glider v. PGA Tour Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

235. 42 U.S.C. 2000bb-1(a)-(b).

burden of proof renders consideration of the "least restrictive means" prong of RFRA critical in assessing a motion for preliminary injunction.

As to the second argument, although the school district posits that removal of the kirpans from their sheaths for violent use is possible, it failed to provide an example of such an occurrence in the record.²³⁶ Mere speculation has never been sufficient justification for the denial of a First Amendment right.²³⁷ So, although the use of a kirpan by students for violent ends is possible, there is no evidence to suggest that it is likely.

The school district's best argument seems to be that the presence of kirpans causes fear among students and that such a fear can be allayed only with an absolute prohibition of kirpans. However, this argument is premised on the notion that the prevention of fear among students is a compelling interest of the state.²³⁸ If eradicating the presence of kirpans on school property is itself a compelling interest, then it is doubtful that there are any less restrictive means to further such a purpose. If, however, it is not a compelling interest, as the Ninth Circuit seems to indicate,²³⁹ then the school district's absolute ban on the kirpans is certainly not the least restrictive alternative.

Cheema v. Thompson demonstrates how the important second prong of RFRA has the potential to be watered down. In its initial denial of the Cheemas' motion for preliminary injunction, the district court ignored that requirement altogether.²⁴⁰ Once the district court

236. The lack of evidence to support the use of kirpans for violent purposes is discussed, *infra* at note 258.

237. The school district has failed to provide evidence of any injury yet to be sustained. The school district responds by arguing that their policy is a preventative measure. Brief of Respondent at 14-25, *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, (9th Cir. Sept. 2, 1994). This demonstrates exactly how the school district has missed the point. Under *Smith*, the school district could have pointed to its preventative intent and rested its case because this policy is a neutral, generally applicable law. However, RFRA alters the school district's duties. Under RFRA, when infringing on the plaintiff's rights guaranteed by the First Amendment, the state must show more than that its policies are simply preventative. The state must show that these policies are in furtherance of a compelling interest and are the least restrictive. See 42 U.S.C. § 2000bb-1(b).

238. This is likely to be an unsuccessful argument, as discussed *supra* at notes 180-191 and accompanying text. The Ninth Circuit found this argument to be unpersuasive, especially in light of the fact that the district provided no evidence that students were in fact fearful of the presence of kirpans. *Cheema v. Thompson*, No. 94-16097, 1994 U.S. App. LEXIS 24160, at *8-*9 (9th Cir. Sept. 2, 1994).

239. See *supra* notes 180-195 and accompanying text.

240. *Cheema*, 67 F.3d at 885. The Ninth Circuit was not shy about spelling out the district court's misgivings. In its opinion, it stated that "[t]he district court . . . simply declared that the absolute ban was necessary to protect the school district's compelling interest in, among other things, student safety. The district court's failure to consider RFRA's 'no less restrictive alternative' requirement left us no choice but to reverse." *Id.*

found that there was a compelling interest in school safety, it looked no further.²⁴¹ It simply denied the motion and validated the absolute prohibition on the kirpans. Ignoring the narrow tailoring requirement will unduly sacrifice the religious rights of minority adherents to the will of the majority. This is precisely what RFRA and the First Amendment²⁴² are designed to avoid.

IV. The Social and Legal Repercussions of *Cheema v. Thompson* on Future Free Exercise Claims

The school district's appellate brief asks "who will console the parents and siblings of the first child who is injured as a result of the presence of the kirpan knives on school grounds?"²⁴³ This question strikes at the heart of this case. The idea of children being the targets of potential violence arouses a sense of grave concern for all parents. These fears are not unwarranted.

The statistics of school violence are shocking. "Eighty-two percent of school district officials recently reported that student violence had increased over the last five years."²⁴⁴ A recent study noted that 39.9 percent of male Virginia high school students carried a weapon to school during a one month period.²⁴⁵ Between July 1, 1992, and May 26, 1994, seventy-four intentional deaths occurred on school campuses in Virginia alone.²⁴⁶ Another study conducted in Memphis, Tennessee indicated that knives were the weapon of choice for eighth and eleventh graders.²⁴⁷ Specifically, 10.9 percent of the eighth graders surveyed and 14.4 percent of the eleventh graders surveyed carried

241. The fact that it initially failed to grant the Cheemas' motion demonstrates that the district court misunderstood both the second prong of RFRA's standard and the fact that the ultimate burden of proof of the regulation is on the state, not on the challengers.

242. Justice O'Connor elegantly expressed this idea in her concurring opinion in *Smith*: "[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups." *Employment Div. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

243. Brief of Respondent at 6, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097).

244. David S. Gehrig, Note, *The Gun-Free School Zones Act: The Shootout Over Legislative Findings, the Commerce Clause, and Federalism*, 22 HASTINGS CONST. L.Q. 179, 180 (1994) (citing Amicus Brief for the National School Safety Center at 4, *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993) and NAT'L SCHOOL BOARDS ASSOC., *VIOLENCE IN THE SCHOOLS: HOW AMERICA'S SCHOOL BOARDS ARE SAFEGUARDING OUR CHILDREN* (1993)).

245. *Id.* (citing VIRGINIA DEP'T OF EDUC., 1992 YOUTH RISK BEHAVIOR SURVEY REPORT 8).

246. *Id.*

247. Cornell Christion, *Most City School Students Feel Safe, but Anxiety Rises with Class, Study Says*, THE COMMERCIAL APPEAL (Memphis), Sept. 18, 1994, at 1A.

knives to school.²⁴⁸ In a 1992 report by the American School Health Association, the national average of incidents of fighting among eighth graders had skyrocketed to 44.3 percent.²⁴⁹ In San Diego, "the number of chains, razor blades, knives, sharpened screwdrivers, and the like taken from local school kids totaled 133" during the 1991-92 school year.²⁵⁰ Even the Supreme Court has taken notice of the problem of school violence. More than a decade ago, in *New Jersey v. T.L.O.*,²⁵¹ the Court noted that "school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."²⁵²

Cheema v. Thompson has been the focus of much public outcry, generally in support of the school district policy. One commentator, in criticizing both the Ninth Circuit and RFRA, inquired:

Must a school district have adult escorts for Sikh schoolchildren to insure kirpans are neither used nor become provocative? Must there be at least one sanguinary encounter with its 4-inch blade before a prohibition can be justified? If the RFRA denounces school authorities for assuming without expensive empirical studies that knives accessible to children are an omnipresent danger and that a 4-inch blade concentrates the student mind wonderfully on nonscholastic self-defense, isn't the law "a ass, a idiot," to quote from Mr. Bumble in "Oliver Twist"?²⁵³

Some parents of children within the Livingston Union School District are also opposed to the Ninth Circuit's decision. A group of parents has publicly stated that "[a]ll children have the right to be in a safe learning environment and to feel safe in the classrooms, on the school buses and playgrounds without any threat, intimidation or harm Allowing children to wear weapons to school is only condoning, enforcing and contributing to more violence."²⁵⁴ Even Judge Hall, who concurred in the Ninth Circuit's initial opinion on the preliminary injunction and later wrote the opinion affirming the district court's order following remand, expressed some doubt about the Cheemas' case. Fearing the frightening realities of school violence, Judge Hall "expressed concerns that districts in less rural venues

248. *Id.*

249. *Id.*

250. Jeanne F. Brooks, *It's Back to the Books—and the Guns: Weapons a Fact of Life at Today's Schools*, SAN DIEGO UNION-TRIB., Sept. 3, 1993, at A1.

251. 469 U.S. 325 (1985).

252. *Id.* at 339.

253. Bruce Fein, *Religious Freedom's Cutting Edge*, WASH. TIMES, Sept. 14, 1994, at A16.

254. Vicki Wright, et al., *No kirpans in Schools*, FRESNO BEE, June 14, 1994, at B6.

might be undermined in their efforts to enforce their own policies.”²⁵⁵ Judge Charles Wiggins, who dissented in both the Ninth Circuit decisions, echoed Hall’s sentiment: “While a ‘rational Sikh child’ might not unsheathe his kirpan . . . the real concern is that an ‘abnormal’ child might use the knife to do harm. ‘That is the menace that the legislation is aimed at.’”²⁵⁶ In addition to bucking public sentiment, allowing Sikh students to carry kirpans to school will pose a serious problem of enforcement. It will be difficult for school districts to patrol students and determine which students possess kirpans in furtherance of a religious beliefs and which students do not.

The social repercussions of *Cheema* also include the prospect of other challengers requesting additional exemptions for more dangerous weapons. Essentially, *Cheema* might open the floodgates of litigation. What will stop a religious cult from claiming that its religion mandates that its members must carry handguns on school grounds? Or less drastic but more realistic, what will stop more devout Sikhs than the Cheemas from claiming that the kirpans sewn into their sheaths do not satisfy Sikhism’s requirements? Effective legal standards (both legislatively enacted, and judicially created) should address these issues clearly and succinctly when they arise.²⁵⁷

Yet the argument supported by such fears is undermined by the fact that there have been no reported incidents of the kirpan being used for violent purposes on school grounds. In the end, the evidence regarding incidents of violent kirpan use away from school grounds is conflicting.²⁵⁸ Furthermore, public fear has never been the sole justifi-

255. Hannah Nordhaus, *Religious Freedom at Issue as 9th Circuit Debates Kirpan Case*, THE RECORDER, Aug. 12, 1994, at 2.

256. *Id.*

257. The creation of clearer standards than designated by RFRA will be addressed in Part V, *infra* notes 267-295 and accompanying text. To combat the fear that granting exemptions for religious claimants may open the floodgates of litigation, there will need to be additional checks to ensure that frivolous, secular claims are denied. The Court has, in the past, rejected a state’s argument that the cumulative effect of claims similar to the petitioners’ justifies denying a free exercise exemption. See *Frazer v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 835 (1989). See also LUPU, *supra* note 97 at 947. (“Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.”). This issue will also be addressed in Part V, *infra* notes 261-295 and accompanying text.

258. Because there is a dearth of evidence regarding violent kirpan use in the United States, both parties look to evidence in Canada. However, evaluation of this evidence also fosters debate. The Cheemas claim that there “is no record of an association between kirpans and violence, and there is no record of kirpans being used inappropriately.” Brief for Appellant at 10, *Cheema v. Thompson*, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (No. 94-16097) (citing R. at 266). The school district, in contrast, submits that there have been instances of violent kirpan use in Canada. In their brief, they allege that:

cation for judicial decisionmaking, nor should it be.²⁵⁹ A judgment against the Cheemas may also produce grave social consequences. For example, allowing the school district to restrict the free exercise of their religion is directly contrary to the First Amendment, *Smith* notwithstanding. The plain meaning of the Free Exercise Clause, not to mention its spirit, protects the Cheemas' desire to engage in the religious practices of their choice. A judgment for the school district would epitomize a society increasingly less tolerant of religious differences and unwilling to accommodate or learn about these differences, even where the Constitution seems to require such accommodation.

Thus, no matter what its outcome, *Cheema v. Thompson* will have great social ramifications. Consequently, it must be argued, analyzed, and decided with solid legal reasoning. In the end, a decision in *Cheema* as legal precedent may go well beyond the immediate effect on the Livingston Union School District or Cheema family.

Complicating matters further is the fact that this case is one of the first tests of RFRA.²⁶⁰ If the Cheemas succeed on the merits of this case, it will open up greater opportunity for religious groups to challenge governmental policies burdening the free exercise of religion. As a practical matter, anyone who feels that a governmental policy interferes with his or her ability to freely exercise his or her religious beliefs will ask the government to explain why its compelling interest would not be served if he or she is granted an exemption from the regulation. To avoid such challenges, states may enact more specific policies, including a greater array of exemptions. Essentially, a Cheema victory will require the government to articulate a compelling interest in *denying exemptions* to their policies to certain religious groups, and further, to narrowly tailor these policies so that they employ the least restrictive means to further this compelling interest.

On the other hand, if the court awards judgment to the Livingston Union School District, governmental entities will be able to enact broad, facially neutral policies as long as they can articulate an underlying compelling interest. In essence, RFRA's second prong, requiring the "least restrictive means," will be read out of the statute. Without a strong second prong, few exemptions from such policies need to be granted. This watered down reading of RFRA would be

There have been in the Metropolitan Toronto area, three reported incidents of violent kirpan use. One involved a plea of guilty to attempted murder after a stabbing with a kirpan. In one street fight, a man was stabbed in the back with a kirpan. On [sic] one case, a kirpan was drawn for defensive purposes.

Brief of Respondent at 12, *Cheema* (No. 94-16097) (citing R. at 21).

259. See discussion *supra* notes 184-191 and accompanying text.

260. Hannah Nordhaus, *Are They Missing the Point?; The Sikh Community Says a School's Refusal to Let Their Children Carry Religious Knives Violates the First Amendment*, THE RECORDER, Aug. 11, 1994, at 1.

inconsistent with congressional intent. Thus, to prevent such a result, RFRA should be amended to address the concerns raised in *Cheema v. Thompson*.

V. Amending RFRA to Further Its Purposes

Amending RFRA requires that we address three relevant questions. First, why was it enacted? Second, how should it be amended? And finally, how will amending it better serve its purposes?

A. The Purpose of RFRA

When Congress enacted RFRA, it sought to explicitly reinstate the compelling interest standard found in cases prior to *Smith*.²⁶¹ However, its text and legislative history indicate that it was designed to do more than merely require the states to articulate a compelling interest. The House of Representatives Report states: "Seemingly reasonable regulations based upon speculation, exaggerated fears of thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest."²⁶² Specifically, Congress meant to ensure that the second prong (the "least restrictive means" requirement) was as important as the first prong.²⁶³

Furthermore, in restoring the compelling interest test established in *Sherbert* and *Yoder*, Congress recognized that the test used in those two cases was significantly stronger than the test the Court applied in other free exercise cases.²⁶⁴ *Sherbert* and *Yoder* represent the zenith of free exercise jurisprudence, where religious plaintiffs who sought to have their individual claims balanced against government interests actually prevailed.²⁶⁵ Notwithstanding the symbolic value of referring to *Sherbert* and *Yoder*, some of the drafters of the statute expressed reservation at RFRA's specific language. They found that the language did not adequately reflect their desire to provide strong protections for free exercise claimants. For example, Senator Hyde, writing additional comments to the House Report on RFRA noted the inadequacy of RFRA as enacted: "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 gov-

261. 42 U.S.C. 2000bb(b)(1).

262. H. R. REP. NO. 88, 103d Cong., 1st Sess. 8 (1993).

263. *Id.*

264. *Id.* at 15.

265. *Id.*

ernment intrusion.”²⁶⁶ It appears from this statement that Senator Hyde understood the inconsistent nature of free exercise jurisprudence in the pre-*Smith* era. Yet he offered no suggestions to remedy the problems he anticipated. What we are left with, then, is a clear congressional desire to vigorously protect religious autonomy, and statutory language whose ambiguity may undermine that objective.

B. The Proposed Amendments

The expansive protection desired by Senator Hyde is not possible without specific exemptions for particular religious practices, a solution which is both expensive and impractical if Congress were to try to set out the details in the Act. However, Congress’ desire for such concrete protection can be implemented by courts and local governments. These entities may do this by allowing exemptions to stated policies.²⁶⁷ Either the local governments could carve out exemptions to their own legislation, or in the alternative, courts could formulate judicial exemptions to state legislation. Although judicial and legislative exemptions are entirely separate matters and raise different constitutional implications, their effect on religious claimants is similar. Thus, for the purposes of RFRA, they will be addressed together.

The foregoing suggests that section 2000bb-1(b) of RFRA should be explicit in stating that “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person, *or denying an exemption for that particular person* is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental

266. *Id.* at 16.

267. In response to *Cheema*, California Senate President Pro Tempore Bill Lockyer introduced a bill which would create an exemption for Sikh students carrying kirpans to school. Calif. S.B. 89, 1993-94 Reg. Sess. § 626.10(g) (1993). Following amendments in the Assembly on June 14, 1994, July 7, 1994, and August 23, 1994, the language of the bill provided for a specific legislative exemption for those similarly situated to the Cheemas. Specifically, in subsection (g), the provisions of the bill sought to amend the CAL. PENAL CODE § 626.10 to read: “Subdivisions (A) and (B) [referring to the prohibition of weapons on school grounds] shall not apply to the carrying of any knife or dagger that is an integral part of a recognized religious practice. In order for this subdivision to apply to a minor at a school referred to under subdivision (A), a parent or guardian of a minor shall give notice to the appropriate school authority that the minor meets the criteria under this subdivision. However, an emancipated minor may give his or her own notice.” *Id.* The bill continued by imposing a caveat to this amendment: “The exemption provided by this subdivision shall not be construed to prevent a school district from imposing additional reasonable conditions or standards pertaining to the lawful possession of a dirk or dagger when that possession is an integral part of a recognized religious practice.” *Id.* Governor Pete Wilson vetoed this bill on September 30, 1994. Greg Lucas, *Wilson Veto For Knives At School; Children Wear Daggers as Part of Sikh Faith*, S.F. CHRON., Oct. 1, 1994, at A19.

interest.”²⁶⁸

Furthermore, RFRA must address the concern that granting such exemptions will result in abuse by those who will claim religious purposes to mask secular desires to carry weapons. To allay these fears, RFRA should require that the religious practice be part of a *sincerely held religious belief*.²⁶⁹

The requirement that free exercise claimants show sincerity of their beliefs is not new to free exercise jurisprudence. In fact, courts already require claimants to show a level of sincerity associated with the religious practice and belief in question.²⁷⁰ The Supreme Court has denied purely secular beliefs the protection of the Free Exercise Clause.²⁷¹

Sincerity and validity are, of course, separate matters.²⁷² In *Thomas v. Review Board*,²⁷³ the Court announced, “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”²⁷⁴ Furthermore, the Court has held that newly adopted religious beliefs are fully protected.²⁷⁵

Sincerity inquiries are, to be sure, not without their dangers: Even though the courts apply an expansive approach to defining “religion” in free exercise cases, . . . claimants cannot have unlimited recourse to free exercise exemptions; if they did, the concept of required accommodation could become a limitless excuse for people to avoid all unwanted legal obligations. At the same time, however, an intrusive government inquiry into the nature of the claimant’s beliefs would in itself threaten the values of religious liberty.²⁷⁶

268. The text in italics reflects the proposed amendment to RFRA’s current language. Although the language of RFRA closely resembles traditional “strict” or “heightened” scrutiny as applied in other areas of constitutional interpretation, these amendments will have no effect on the other areas. Any discussion of parallel amendments to the compelling interest test as applied in other contexts is beyond the scope of this Note.

269. The specific language incorporating this additional requirement may be worded as follows: “Religious claimants challenging Government actions must demonstrate that their practice is part of a sincerely held religious belief.”

270. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1242 (2d ed. 1988).

271. See *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (“if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.”).

272. TRIBE, *supra* note 270, at 1243 (citing *Thomas v. Review Bd.*, 450 U.S. 707, 711 n.3, 715-16 (1981)).

273. 450 U.S. 707 (1978).

274. *Id.* at 714.

275. TRIBE, *supra* note 270, at 1243 (citing *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987)).

276. *Id.* at 1243-44 (citations omitted).

Simply stated, the Court has held that, although a court can evaluate whether the claimant's beliefs are sincerely held, it may not determine whether they are valid.²⁷⁷ For example, in *Wisconsin v. Yoder*, the Court scrutinized the tenets of Amish culture to determine whether the reluctance of the Amish to educate their children beyond the eighth grade was truly a part of their religious beliefs.²⁷⁸ Similarly, in *Sherbert v. Verner*, the Court recognized that the claimant's refusal to work on the Saturday sabbath stemmed from a cardinal principle of her religious faith.²⁷⁹ In *United States v. Ballard*,²⁸⁰ Justice Douglas wrote:

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if these doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.²⁸¹

The proposed amendments would do nothing to strengthen the compelling interest test either on a theoretical level or as Congress intended. They would, however, result in a more consistent application of this powerful test, thereby enhancing the test as a practical matter. Consequently, the amendments are simply designed to assure that the unpredictable pattern of pre-*Smith* case law is not repeated.

C. Why Amend RFRA?

What would these amendments accomplish? First, RFRA would more faithfully implement Congress' desire to provide expansive protection for free exercise rights. Furthermore, the amendments would make it easier for courts to balance the interests of the government and the claimants, because courts would have a specific mandate from Congress that the government must provide a compelling interest not only for enacting the policy itself, *but also for not granting an exemption from the policy*.²⁸² Critics have argued that RFRA's flaws include the reinstatement of a test that creates arbitrary results.²⁸³ This argu-

277. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

278. 406 U.S. at 222-29, 235-36.

279. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

280. 322 U.S. 78 (1944).

281. *Id.* at 86-87.

282. This is essentially the argument advocated by the Cheemas. Stephen Bomse, attorney for the plaintiffs states, "The issue is not whether the school board had a compelling interest in preventing violence in schools, . . . but whether they have a compelling interest in denying an exemption to a handful of Sikh students." Nordhaus, *supra* note 260, at 1.

283. Saison, *supra* note 99, at 672-74.

ment is not meritless. However, the wavering nature of the decisions preceeding *Smith* resulted not from the misgivings about the compelling interest test itself, but in its inconsistent application. These amendments would better ensure that this mistake is not repeated and that the test is properly and consistently applied.

Furthermore, the amendments improve legislative deliberation regarding exemptions. Although the legislature may create exemptions to its own policies at any time after its enactment,²⁸⁴ *Cheema v. Thompson* illustrates that lawmakers should consider creating exemptions at the time of the law's creation. And if the government is aware that it must present a compelling interest where it denies an exemption to governmental policies, the legislative policy itself will be better thought out. This will occur because the creators of the policies will expect parties to seek exemptions and will formulate the language of their policies accordingly. Moreover, once burdens on religious sects are brought to the attention of lawmakers, pursuant to Congress' mandate in RFRA, these exemptions will more readily be granted by the legislature. And finally, even if such an exemption is not legislatively created, explicit authority through specific provisions in RFRA for the courts to do so would encourage courts to be more rights protective.

But making exemptions readily available is not the only purpose these new amendments would serve. Adding an explicit requirement of religious sincerity to RFRA would reinforce the existing jurisprudence in the area and would require claimants to show more than that a law may infringe on their freedoms. In fact, the claimant must prove, as an element of a *prima facie* case, that the beliefs and practices are sincere and religiously motivated. Explicit language in RFRA as to this burden would discourage claimants attempting to use religious convictions to accomplish secular goals. Essentially, it would reduce abuse of the free exercise principles in challenges of facially neutral laws. In addition, this safeguard of proof required by the claimant would appease public reluctance to grant judicially carved exemptions to facially neutral statutes.²⁸⁵ For example, claimants of a cult who advocate that their religion dictates carrying guns to school would initially have to prove that the carrying of a gun is a religiously motivated act and part of a sincerely held religious belief.

In the end, the burden of proof would operate as follows: claimants must prove that their beliefs or practices are sincerely held religious beliefs or practices, and show that the law as enacted

284. Such an attempt was made by the California legislature in Senate Bill 89. Calif. S.B. 89, 1993-94 Reg. Sess. § 626.10(g) (1993). See *supra* note 267.

285. See *supra* note 257 and accompanying text, for discussion regarding public fears of abuse of religious rights to accomplish secular goals.

substantially hinders the free exercise of their religion,²⁸⁶ the burden would then shift to the state to demonstrate that there is a compelling interest for the regulation and for denying an exemption for the particular plaintiffs. This is what would be meant by the requirement that there are no less restrictive alternatives to accomplish the compelling goal. If, at that time, the plaintiff or the court *sua sponte*, finds other less restrictive means,²⁸⁷ then the burden would again shift back to the government to prove why these less restrictive means would not sufficiently further the compelling governmental interest.

Although these possible amendments to RFRA may not substantially change the content or the intent of the Act, they will clarify its burdens, and, consequently, encourage consistent judicial decision-making. Explicitly allowing judges to create exemptions from laws, where the government has failed to articulate a compelling interest in denying the exemption, would result in strengthening the "least restrictive means" prong of RFRA's test and would more clearly allocate the burdens of proof required of both parties. Overall, this would foster judicial expediency. Finally, requiring claimants to prove that their beliefs or practices are sincerely held would serve as a safeguard against claims by those who seek to use the shield of the Free Exercise Clause to advance secular goals. This requirement would thus give greater legitimacy to RFRA in the view of those who fear that such an extension of free exercise rights might inundate courts with frivolous challenges to valid statutes.

D. Applying RFRA's New Amendments

As a practical matter, the suggested changes in RFRA will not affect a substantial number of cases. After all, if RFRA were applied as it was supposed to be, the amendments would be unnecessary. On the other hand, clarification of how the compelling interest test should be applied will lead to some difference in results. A cursory review of how the amended RFRA would apply to two recent cases will illustrate the ways the amendments may affect free exercise claims.

*Estep v. Dent*²⁸⁸ is a case where the district court properly applied the current language of RFRA, thus rendering the proposed amendments superfluous. In *Estep*, a prisoner moved for a preliminary injunction in an action under 42 U.S.C. § 1983 and RFRA, alleging that prison officials had violated his First and Eighth Amendment rights by

286. This factor is already a part of RFRA. See 42 U.S.C. § 2000bb-1(a).

287. In cases such as *Cheema v. Thompson*, evidence of other similarly situated governmental entities employing these less restrictive means would suffice as evidence that there are indeed less restrictive means. In *Cheema*, the Yuba, Live Oak, and Selma school districts permitted kirpans to be brought to school with certain restrictions. See *supra* text accompanying notes 227-229.

288. 914 F. Supp. 1462, 1996 U.S. Dist. LEXIS 2054 (W.D. Ky. Jan. 19, 1996).

(1) failing to provide outdoor exercise for him while he was housed at a three cellhouse; (2) failing to provide out of cell exercise for him with protective custody inmates only; and finally (3) cutting his earlocks in violation of his religious beliefs while the matter was pending.²⁸⁹ After addressing the Eighth Amendment claims, the district court found that the Orthodox Hasidic Jew challenger's claim could be sustained under RFRA.²⁹⁰ In justifying cutting of the claimant's earlocks, the government articulated three interests: (1) preventing prisoners from hiding contraband in their hair, (2) promoting hygiene standards, and (3) allowing for immediate identification of inmates. The court found that although these interests could be deemed compelling, there was no evidence that this was the least restrictive means for accomplishing that goal.²⁹¹ Although the court did not expressly say so, the court granted the prisoner's motion, not because the State's interests asserted were not compelling, but because the state could not articulate a *compelling reason for denying him an exemption*.²⁹² The court found dispositive the fact that the prison had waited three months to cut the challenger's hair and held that this fact undercut the government's argument that the interest was truly compelling.²⁹³ In addition, the court noted that the small amount of hair involved was not sufficient to pose a risk that the challenger would carry contraband.²⁹⁴ Finally, the court found that the prison could take photographs of the petitioner to alleviate the safety risk.²⁹⁵ The correct, albeit confusing application, of RFRA by the district court in *Estep* illustrates how in certain cases, the proposed amendments may be unnecessary.

United States v. Bauer,²⁹⁶ however, presents a situation that demonstrates the worth of the proposed amendments. In *Bauer*, a group of Rastafarians raised a free exercise defense to numerous criminal charges, including conspiracy, money laundering, illegal use of telecommunication services, and others relating to the use and distribution of marijuana.²⁹⁷ The defendants claimed that their use of marijuana was emphasized in their religion and should be exempt from the State's criminal laws as applied to them.²⁹⁸ The government moved to preclude the appellants from presenting evidence of their possession

289. *Id.* at *4.

290. *Id.* at *8-*17.

291. *Id.* at *15-*16.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. 75 F.3d 1366 (1996).

297. *Id.* at 1370.

298. *Id.* at 1373.

or use of marijuana for religious purposes as a legal defense.²⁹⁹ The district court granted the motion, relying on the reasoning of *Smith*.³⁰⁰

During the course of the proceeding, the claimants realized that RFRA was about to be enacted by Congress and brought this fact to the attention of the court.³⁰¹ Consequently, they filed motions seeking the court to instruct the jury to use the balancing test of *Sherbert* and *Yoder*.³⁰² The district court denied their motions.³⁰³ It held that the government had an overriding interest in regulating marijuana which justified general applicability of the law.³⁰⁴ In dicta, however, the court held that even if RFRA were applied, the result on the motion in limine would not have changed.³⁰⁵

Upon appeal, the Ninth Circuit reversed the district court.³⁰⁶ It based its reversal on the application of RFRA to the facts of the case and criticized the lower court's actions. The Ninth Circuit noted, "The district court treated the existence of marijuana laws as dispositive of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana."³⁰⁷ Although the Ninth Circuit recognized that RFRA did not preclude the possibility that the least restrictive means for furthering the government's compelling interest might be a universal enforcement of the marijuana laws, it held that the district court was remiss in not having gone through the analysis.³⁰⁸

If RFRA contained the explicit language provided by the proposed amendments, it is unlikely that the district court would have reasoned the way it did. In addition to justifying the marijuana laws, the government would have been required to identify a compelling interest for failing to grant the defendants an exemption. In so doing, the court would have realized that the state's actions were not the least restrictive way to accomplish this result. Even if the court concluded differently, at the very least, the government would have had to provide a stronger reason for justifying its actions. Although neither *Estep* nor *Bauer* predict exactly the possible effects on RFRA after the proposed amendments are taken into account, they do demonstrate that the beneficial effects to some free exercise cases brought under the statute justify enacting the amendments.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 1375-76.

307. *Id.* at 1375.

308. *Id.*

Conclusion

Justice O'Connor once observed that "it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine."³⁰⁹ When these interests conflict, it is for the courts to find a compromise.

As with most constitutional cases, *Cheema v. Thompson* requires the balancing of two sets of interests: those of the state and those of the individuals. Yet, the inherent difficulty of the case lies in the fact that the interests being balanced are important and conflicting, to which there really is no perfect compromise. While the startling statistics of violence in America's schools continue to grow, remedies for this social ill cannot and should not undermine a fundamental premise of our Constitution—the right to the free exercise of religion. In the end, it will be for courts to determine which compromise is the one most legally justifiable. And Congress, through RFRA, took upon the responsibility to assist courts in this determination.

Unfortunately, Congress was not entirely clear in directing the courts. Absent clarity, judicial decisions under RFRA have wandered astray, in some cases, failing to protect free exercise claimants as intended by Congress. Thus, RFRA should be amended to provide the necessary guidance. By adding a requirement of "sincerity of religious beliefs," and modifying the compelling interest requirement to indicate that the state must also have a compelling interest in denying an exemption from a law for free exercise claimants, RFRA will better serve its statutory purposes.

Perhaps these amendments will not solve every new issue or question involving the free exercise of religion. Perhaps a single statute can never completely dictate solutions to social problems. Amending RFRA will, however, assist the court in finding a compromise between the Livingston Union School District and the Cheemas. And more importantly, it will guide future courts to find more compromises to cases arising under free exercise principles.

309. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

