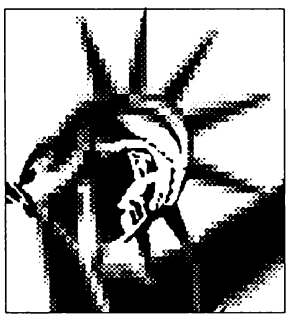

Congress vs. the Court: Rescuing Religious Liberty

Congressman Stephen J. Solarz decries recent decisions by the Supreme Court that he believes jeopardize religious liberty. He spoke before an interfaith audience March 20, 1991.

by Representative Stephen J. Solarz

IT IS A PLEASURE TO BE ABLE TO ADDRESS THIS distinguished gathering of religious leaders today. Interfaith Impact for Justice and Peace is a remarkable demonstration of the power of interreligious dialogue and cooperation. It is indeed an inspiration to see religious Americans acting on the dictates of their faith to build a better America and a more just world.

It is, therefore, a bit disheartening to note that as we meet to discuss the role that religious communities can play in promoting justice, the cause of religious freedom in America has just suffered its most significant setback in years.

On April 17, 1990, a day that will live in constitutional infamy, the U.S. Supreme Court dealt a devastating blow to religious freedom in the United States. In the case of *Oregon Employment Division vs. Smith*, a majority of the justices discarded a decades-old balancing test used by the courts to safeguard the free exercise of religion. Under the old test, the Court would invalidate the laws that had the effect of placing a burden on religion unless the government could demonstrate that the law furthered a "compelling" governmental interest and had used the least-restrictive means to further that interest. This test is the strictest standard of review available.

Instead, the Supreme Court held that laws neutral toward religion, which are generally applicable, would not be ruled invalid if they had the effect of burdening the free exercise of religion.

It is interesting to note that the current Supreme Court majority, whose members were appointed because of their credentials as judicial conservatives, should be responsible for one of the most unvarnished examples of judicial activism in decades. Instead of con-

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serving a workable, long-standing rule, this court has chosen a radical break with established law. As a result, the rights of all Americans are likely to suffer.

The Religious Freedom Restoration Act would correct the Court's unwise and unwarranted action simply by reinstating the compelling interest test that has served our country so well. The legislation would make the test applicable to both federal and state laws and would allow individuals to seek court enforcement of their rights.

This legislation restores the religious rights of all Americans as they were prior to *Smith* without tampering with the Bill of Rights, by recreating the old pre-*Smith* balancing test. It is a measured, prudent response to the work of an activist Supreme Court majority.

The diversity and intensity of support that the Religious Freedom Restoration Act has attracted in Congress from a wide range of religious and civil-rights organizations indicates just how fundamental are the values at stake in this effort. One hundred one members of the House and eight members of the Senate agreed to cosponsor this legislation in the 101st Congress. This group includes members from both sides of the aisle, liberals and conservatives, and members from all parts of the country.

The coalition for the free exercise of religion, which has been formed to support the bill, is "ecumenical" in both the political and religious sense of that term. It is composed of more than 35 organizations representing diverse religious and political viewpoints. In fact, many of the organizations and denominations represented here today have actively supported passage of RFRA.

America cannot afford to lose its first freedom, the freedom not just to believe, but to act according to the dictates of one's religious faith, free from the unwarranted and unjustified restrictions of governmental regulation and interference.

In practice, that threat comes not from laws which are aimed at specific religions, but from the enactment of neutral laws of general applicability that adversely affect specific religious practices, which the Court has placed beyond the reach of the First Amendment.

By refusing to balance free-exercise rights against the interests being advanced by laws of general applicability, the majority in *Smith* has slammed shut the courthouse door on virtually every governmental violation of religious freedom likely to arise in the future.

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These concerns are far from hypothetical. In the 11 months since *Smith* was handed down, the courts and governmental agencies have moved with alarming swiftness to take advantage of this new power conferred by the high court:

- Jews and Hmong tribesmen whose religious objections to autopsies were ignored by medical examiners have had their cases thrown out of court. The Rhode Island court expressed its "deep regret" in its decision withdrawing its judgment in favor of the Hmong, citing *Smith*.
- The Occupational Safety and Health Administration withdrew its long-standing exemption from its ruling requiring hard hats at construction sites for Sikhs, whose religion requires the wearing of turbans, and the Amish, whose religion requires them to avoid manifestations of modernity, citing *Smith*.
- A court in Minnesota upheld a zoning

ordinance which excluded churches from commercial and industrial areas, again citing *Smith.*

Perhaps the most disturbing is Justice Scalia's observation that the loss of liberty likely to be suffered by minority religions as a result of the Court's ruling is an "unavoidable consequence of democratic government." This view demonstrates an appalling lack of regard for this proud American heritage. We have been strengthened rather than weakened as a nation by this remarkable record of accommodation. Yet Justice Scalia derided this outstanding and uniquely American tradition of religious tolerance as a "luxury" we cannot afford, "precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference.'"

In fact, the fundamental purpose of the Bill of Rights is to place beyond the reach of temporary majorities and the passions of the moment our most cherished rights. Surely no right is more highly prized than our first freedom, the right to worship freely.

Our diversity has always been our greatest strength, rather than the inherent weakness Justice Scalia imagines it to be.

The Court's reading of the First Amendment is out of step with the nation and with our commitment to religious liberty. Our nation has historically accommodated religion, even when religious practices have conflicted with important national goals. We have allowed the Amish to withdraw their children from compulsory education. We have allowed the use of wine in religious ceremonies during prohibition. We have allowed deferments from conscription to accommodate religious pacifism even in times of war.

In fact, legislation I sponsored which became law in 1987 allowed Americans serving in the military to wear unobtrusive religious articles while in uniform. This legislation overturned the Supreme Court's decision in *Goldman vs. Weinberger.* In that case, the Court held that the free-exercise clause did not protect the right of an Orthodox Jewish Air Force officer to wear a yarmulke while in uniform.

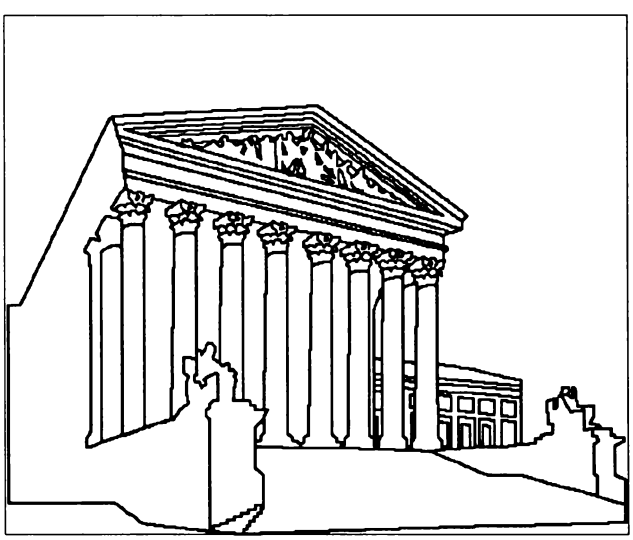
Justice William Brennan, in his historic dissent, argued thoughtfully and passionately that respect for religious diversity is entirely consistent with, and appropriate to, the armed forces of a free and democratic nation.

After the legislation passed, I sent Justice Brennan a note thanking him for his efforts to preserve religious liberty and to let him know of our success in Congress. I also enclosed a camouflage yarmulke as a memento.

I was delighted to receive a letter back from him thanking me for the yarmulke. According to Justice Brennan's account, he tried the yarmulke on in chambers, only to forget he was wearing it. The honorable associate justice caused quite a stir when he left the Court later that day, still wearing the yarmulke.

I mention this legislation to illustrate two important points. First, Congress has legislated to protect religion in the past when the courts have refused to do so.

Second, accommodating religious diversity is perfectly consistent with two of our most important governmental functions: maintaining national security, and preserving a fair and independent judiciary.



Somehow, the United States managed to survive decades of the compelling-interest test and countless instances in which the beliefs and practices of religious minorities were accommodated by the majority.

The compelling-interest standard is not a "luxury" but a necessity. We have succeeded as a democracy not in spite of it, but because of it.

The compelling-interest test has proved a workable standard. While not allowing an absolute exemption for all religious practices at all times from all laws, it does require the government to have a good reason for burdening religion. More than that, it requires the government to show that there is no way to avoid burdening religion. The test strikes the proper balance between the needs of the majority and the rights of the minority.

Religious freedom is the foundation of our way of life. This nation has always provided a haven for refugees from religious persecution. We are Americans because those who came before us voted for freedom with their feet. My family, like many of yours, came here to worship freely. Even today, Jews from the Soviet Union, Buddhists from Southeast Asia, Catholics from Northern Ireland, Bahai's from Iran, and many more, willingly renounce their homelands and risk their lives for the "luxury" of religious freedom.

Respect for diversity, and particularly religious diversity, was one of the fundamental principles that guided the framers of the Constitution. The Constitution's guarantee of religious freedom is as much a practical guide for good government and social stability as it is a moral imperative. By restoring the workable constitutional standard that protected the free exercise of religion in this country for nearly 30 years, the Congress can present a most appropriate gift to the American people when we celebrate the 200th birthday of the Bill of Rights later this year.