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Under the Radar: Connecticut's First-in-the-Nation State Religious Freedom Law

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Under the Radar: Connecticut's First-in-the-Nation State Religious Freedom Law

ADRIENNE FULCO

On June 29, 1993, Connecticut became the first state to pass a new law protective of religious freedom, entitled An Act Concerning Religious Freedom, in response to the U.S. Supreme Court's decision in Employment Division v. Smith in 1990. This paper, which traces the legislative history of the law, has three objectives. The first is to identify and analyze the legal and policy concerns that prompted Connecticut legislators to first introduce a religious freedom restoration bill in 1991 and then pass a very similar version of the 1991 bill in 1993. Second, it will scrutinize public hearing and written testimony as well as House and Senate floor debate in order to understand the legal, moral, and policy questions that were foremost in the minds of Connecticut legislators and the witnesses who provided testimony at the time. Finally, it will consider the reasons why a debate about religious freedom that today is politically polarizing not only provoked little controversy at the time but also took place largely outside of public view.

ARTICLE CONTENTS

INTRODUCTION	929
I. LEGISLATIVE HISTORY: H.B. 6699, <i>AN ACT CONCERNING THE RESTORATION OF RELIGIOUS FREEDOM</i> (1991)	931
II. LEGISLATIVE HISTORY: H.B. 5645, <i>AN ACT CONCERNING RELIGIOUS FREEDOM</i> (1993)	942
A. JOINT COMMITTEE OF THE JUDICIARY, PUBLIC HEARING, MARCH 1, 1993	943
B. HOUSE ACTION ON THE BILL	952
C. SENATE ACTION ON THE BILL	954
D. FINAL ACTION ON THE BILL	955
CONCLUSION	955



Under the Radar: The First-in-the-Nation State Religious Freedom Restoration Act

ADRIENNE FULCO *

INTRODUCTION

On June 29, 1993, Connecticut became the first state to pass a law protecting religious freedom,¹ entitled *An Act Concerning Religious Freedom*, in response to the Supreme Court's decision in *Employment Division v. Smith* in 1990.² Although efforts to pass a similar statute were already underway in Congress, the law was not signed by President Bill Clinton until November 16, 1993.³ Somewhat surprisingly, despite the fact that Connecticut was the first state to pass a religious freedom restoration law, a search of several databases reveals that there was no journalistic coverage of the bill before it was passed by the Connecticut General Assembly or when it was signed into law by Governor Lowell P. Weicker, Jr.⁴

Moreover, a similar search of academic and law review databases confirms that a full treatment of the bill's legislative history has not yet been written. Given the salience of the religious freedom debate today, it is appropriate to analyze the legislative history that focuses on the rationale of Connecticut legislators who passed this groundbreaking law, as well the actual legal and political arguments that were made in legislative hearings and debates. More specifically, what were the principal concerns that

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¹ CONN. GEN. STAT. § 52-571b (2018).

² *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

³ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb et seq.).

⁴ A search of both the *Hartford Courant* and Lexis-Nexis databases uncovered no articles on the legislative process or the passage of the law in Connecticut.

⁵ Rhode Island was the only other state to pass a religious freedom law in 1993. 42 R.I. GEN. LAWS § 42-80.1-1 (2017).

motivated members of the General Assembly to enact a religious freedom bill when only one other state undertook similar efforts as early as 1993?⁵ Why did Connecticut legislators, who began considering a religious freedom restoration act as early as 1991, believe that the state needed to act independently of Congress in order to protect religious freedom in the wake of the *Smith* decision? And, what were the essential provisions of the law that ultimately passed? Once these questions have been addressed, it is possible to evaluate the significance of the law and draw conclusions about why neither the legislative debate nor the bill's signing by the governor generated public scrutiny.

This paper has three objectives. First, it is necessary to identify and analyze the legal and policy concerns that prompted Connecticut legislators to first introduce a religious freedom restoration bill in 1991 (H.B. 6699) and then pass a very similar version of the 1991 bill in 1993.⁶ Second, it is necessary to scrutinize public hearing testimony and House and Senate floor debates⁷ in order to understand the legal, moral, and policy questions that were foremost in the minds of Connecticut legislators and the witnesses who provided testimony at the time. Finally, it is necessary to consider the reasons why a debate about religious freedom—that today is politically polarizing—not only provoked little controversy at the time but also took place largely outside of public view.

This author interviewed Connecticut Attorney General George Jepsen to achieve a richer understanding of the context in which the state's legislature heard testimony and debated the complex legal and policy questions surrounding the bill from its inception in 1991 to its passage in 1993.⁸ Attorney General Jepsen was Senate chair of the Joint Committee on the Judiciary in 1993, when the bill was passed and signed into law.⁹ In addition, the author interviewed Professor Perry Dane, a distinguished expert on questions at the intersection of religious freedom and the law

⁶ It should be noted that the Connecticut legislature considered religious freedom bills three times: in 1991, 1992, and 1993. H.B. 6699, 1991 Conn. Gen. Assemb., Reg. Sess. (Conn. 1991); H.B. 5019, 1992 Conn. Gen. Assemb., Feb. Sess. (Conn. 1992); Pub. Act No. 93-252, 1993 Conn. Gen. Assemb., Reg. Sess. (Conn. 1993). The 1992 bill will not be analyzed in this paper because only one hearing was held and there was no other committee action on the bill.

⁷ One public hearing was held on March 1, 1993. *An Act Concerning Religious Freedom: Hearing on H.B. 5645 Before the Joint Comm. on Judiciary*, 1993 Conn. Gen. Assemb., Reg. Sess. (Conn. 1993). The Connecticut House debated the bill on May 13, 1993. CONN. HOUSE SESSION TRANSCRIPT (May 13, 1993). The Connecticut Senate did so on May 27, 1993. CONN. SENATE SESSION TRANSCRIPT (May 27, 1993). The House accepted the Senate amended version of the bill on June 1, 1993. Pub. Act No. 93-252, 1993 Conn. Gen. Assemb., Reg. Sess. (Conn. 1993).

⁸ Telephone Interview with George Jepsen, Connecticut Attorney General (Feb. 5, 2018) [hereinafter Jepsen Interview].

⁹ See CONN. GEN. STAT. § 52-571b (2018); see also CONN. SENATE SESSION TRANSCRIPT (May 27, 1993) (indicating that then-Senator Jepsen, the chairman of the Judiciary Committee, introduced the Connecticut bill in the Senate).

who testified at length before the committee in 1991.¹⁰ Information gleaned from these interviews provides insights into the context in which the discussions and debates took place and is especially valuable given the lack of journalistic coverage of the proceedings.

Overall, a review of the public records confirms that Connecticut lawmakers were deeply concerned about the potential for the *Smith* decision to weaken religious freedom protections, and they were determined to respond with strong legislation to counter its potential effects. Furthermore, the topics discussed touched upon legal and policy matters that would be debated in the United States Congress when a federal law was crafted later in 1993. The probing questions posed by lawmakers at the public hearings and committee debates sought to clarify matters of both constitutional and statutory law. They also worked toward a legislative solution that achieved the proper balance between protection for the freedom of religious believers to follow the commands of their faith and the need for government to enforce laws that at times restrict particular practices.

What emerges from a review of the materials is the remarkable consensus among the legislators and the various witnesses who testified on behalf of religious denominations, advocacy groups, or as experts in the field of law and religion. When I spoke with him, Attorney General Jepsen confirmed that while there was considerable debate in 1991 and 1993 about how best to craft a strong bill in response to the *Smith* decision, with only a few exceptions, the majority of the lawmakers and witnesses agreed that the law was necessary to protect the rights of religious believers and nonbelievers alike.¹¹ In addition, he emphasized that legislators understood *Smith* to be “a paradigm shift” of the kind that required a swift, clear reaction by legislators.¹²

I. LEGISLATIVE HISTORY: H.B. 6699, *AN ACT CONCERNING THE RESTORATION OF RELIGIOUS FREEDOM* (1991)

The first religious freedom law was referred to the Connecticut legislature’s Joint Committee on the Judiciary on January 29, 1991.¹³ Initially, the bill moved quickly through the legislative process: the committee drafted a bill on March 14, 1991 and held a public hearing on March 22, 1991.¹⁴ The bill continued to make its way through the normal

¹⁰ Telephone Interview with Perry Dane, Professor of Law, Rutgers Law School (Feb. 8, 2018). Dane also testified in 1992.

¹¹ Jepsen Interview, *supra* note 8.

¹² *Id.*

¹³ An Act Concerning the Restoration of Religious Freedom, H.B. 6699, 1991 Conn. Gen. Assemb., Reg. Sess. (Conn. 1991).

¹⁴ *Id.*

legislative process, receiving favorable reports from both the Joint Committee on the Judiciary on April 23, 1991 and the Legislative Commissioner's Office on May 7, 1991.¹⁵

Ultimately, however, the Connecticut House of Representatives recommitted the bill to the Judiciary Committee at the end of the session, on May 29, 1991.¹⁶ When asked why the bill did not pass during the 1991 session, Attorney General Jepsen explained that in 1991 the General Assembly was focused primarily on important budgetary matters. Consequently, towards the end of the session, legislators did not have time to address other issues that were deemed to be less pressing.¹⁷ Time constraints are particularly relevant given the fact that the Connecticut legislature meets in session only once per year, beginning either in January or February and completing its work in June.¹⁸ In addition, the records of the 1993 legislative debate in the House indicate that one member of the legislature believed that Congress was likely to pass a federal religious freedom restoration act and argued that the nation "should speak with one voice" on the matter rather than pass religious freedom bills on a state-by-state basis.¹⁹

As noted above, the bill was drafted by the Committee on the Judiciary on March 14, 1991 and referred to the committee on the next day. The stated purpose of the bill was to "reinstate the compelling interest test for free exercise of religion claims which was eliminated in the United States Supreme Court decision of *Employment Division v. Smith*, 110 S. Ct. 1595 (1990)."²⁰ The bill contains four sections, each detailing a specific response to an aspect of the *Smith* decision that was understood to diminish religious free exercise. The first section, Section (a), provides a broad, robust statement of that protection:

The state and any political subdivision of the state shall not burden a person's right to the free exercise of religion as guaranteed by the first amendment to the United States Constitution and section 3 of article first of the constitution of the state even if the burden results from a rule of general

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Jepsen Interview, *supra* note 8.

¹⁸ See *Connecticut General Assembly*, BALLOTEDIA, https://ballotpedia.org/Connecticut_General_Assembly [<https://perma.cc/9J9T-PGHM>] ("During even-numbered years, the General Assembly is in session from February to May. In odd-numbered years, when the state budget is completed, session lasts from January to June.").

¹⁹ CONN. GEN. ASSEMB., HOUSE PROCEEDINGS 1993, vol. 36, part 25, at 4928.

²⁰ H.B. 6699.

applicability, except as provided in subsection (b) of this section.²¹

Section (b) then directly addresses the standard the state must meet when restricting religious freedom:

The state and any political subdivision of the state may burden a person's free exercise of religion only if it demonstrates that application of the burden to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.²²

This language clearly is aimed at restoring the test that guaranteed religious freedom enunciated in *Sherbert v. Verner*,²³ which governed free exercise jurisprudence until the *Smith* decision in 1990. Under that test, if a government action placed a substantial burden on an individual's religious beliefs, then the government must have acted in the furtherance of a compelling state interest and used the least restrictive means to achieve its objectives.²⁴

The third section of the bill, Section (c), goes on to explain:

A person whose right to the free exercise of religion has been burdened in violation of the provisions of this section may assert a claim or defense and obtain appropriate relief, including relief against the state or any political subdivision of the state, in the superior court.²⁵

Finally, the bill defines the meaning of "person" in the following way: "[P]erson" means a natural person, partnership, corporation, association or society, and "demonstrates" means meets the burdens of going forward with the evidence and of persuasion."²⁶

In sum, H.B. 6699 was an explicit, direct effort to restore religious freedom protections by means of reinstating a test that the Supreme Court had applied for nearly three decades. When interviewed, Attorney General Jepsen explained he assumed a leadership role in crafting the 1991 bill in order to counteract the potential impact of the *Smith* decision and ensure that the religious free exercise rights of Connecticut citizens, especially

²¹ *Id.*

²² *Id.*

²³ 374 U.S. 398 (1963).

²⁴ *Id.* at 406.

²⁵ H.B. 6699.

²⁶ The fact that the legislators included corporations in its 1991 bill is especially interesting in light of current controversies that arose following the U.S. Supreme Court's decision in 2014. *See Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014). This point will be addressed later in this article.

those who were nonbelievers or belonged to minority religious sects, would be fully protected under state law.²⁷

As mentioned above, the hearing for H.B. 6699 took place on March 22, 1991.²⁸ In the transcript, Representative Richard Tulisano,²⁹ co-chair of the Joint Committee on the Judiciary, indicated that there would be three witnesses at the hearing to testify about the religious freedom bill.³⁰ Unfortunately, official speaker registration lists could not be found in the document records at the State Library to confirm the credentials and affiliations of the speakers. The principal witness was Professor Perry Dane, who at the time was an associate professor of law at Yale Law School.³¹ Michael Farris, whose affiliation was not identified in the transcript, also testified;³² he is the founding president of the Home School Legal Defense Association.³³ The third witness was Stephen Mendleson, who identified himself as speaking on behalf of the Legislative Coalition on Psychiatry and Human Rights, as well as two disability rights advocacy groups.³⁴

Dane spoke in support of H.B. 6699 and offered a vigorous defense of why, in his view, a new statute was needed in response to the *Smith* decision in order to fully protect the rights of religious believers whose “faith . . . directs them to obey the government of God as they understand it.”³⁵ He asserted that when religious persons obey the commands of God it “is not just a matter of personal conscience . . . [b]ut religious commands I think properly understood are themselves a form of law.”³⁶ Consequently,

²⁷ Jepsen Interview, *supra* note 8.

²⁸ See text accompanying *supra* note 20.

²⁹ Tulisano, of Rocky Hill, Connecticut, was a Democrat who represented the 29th District from 1975 to 2001 and chaired the House Judiciary Committee from 1987 to 1993. *Richard Don Tulisano*, LEGACY, www.legacy.com/obituaries/hartfordcourant/obituary.aspx?pid=103989235 [https://perma.cc/YB9U-P8Y2] (last visited Feb. 19, 2018); see also Donna Tommelleo, *Richard Tulisano; fought for liberties in Conn. House*, BOSTON GLOBE (Feb. 22, 2008), http://archive.boston.com/bostonglobe/obituaries/articles/2008/02/22/richard_tulisano_fought_for_liberties_in_conn_house/ [https://perma.cc/J7BA-DKFN] (describing Tulisano as “[a] mentor to many lawmakers . . . [who] championed constitutional issues and civil liberties”).

³⁰ *An Act Concerning the Restoration of Religious Freedom: Hearing on H.B. 6699 Before the J. Comm. on the Judiciary*, 1991 Conn. Gen. Assemb., Reg. Sess. 22 (Conn. 1991) [hereinafter *1991 Public Hearing Transcript*].

³¹ *Id.*

³² See *id.* at 28 (indicating that Farris’s identifying information was omitted due to a malfunction of the tape recording system used at the hearing).

³³ *Attorneys*, HOME SCH. LEGAL DEF. ASS’N, <https://hsllda.org/about/staff/attorneys/Farris.asp> [https://perma.cc/F4FA-WVWV] (last visited Feb. 22, 2018). Michael Farris is a constitutional appellate lawyer who has been associated with the organization since 1983, and it appears like he testified at the hearing as a member of the organization. *Id.*; *About HSLDA*, HOME SCH. LEGAL DEF. ASS’N, <https://hsllda.org/about/default.asp> [https://perma.cc/9Y7C-KZ6L] (last visited Feb. 22, 2018).

³⁴ *1991 Public Hearing Transcript*, *supra* note 30, at 123.

³⁵ *Id.* at 22–23 (statement of Perry Dane, Prof., Yale Law School).

³⁶ *Id.* at 22.

religious believers are subject to two sets of commands and their need to obey God “is not just a matter of personal conscience.”³⁷ He acknowledged that at times, religious commands will conflict with laws of the state and that a careful balance must be achieved, a goal, in his view, the bill achieved.³⁸ In addition, he explained that the principle exempting religious believers is rooted in both the Bill of Rights of the U.S. Constitution as well as the Connecticut Declaration of Rights.³⁹ He also noted that the Connecticut General Statutes already include specific exemptions for religious believers, and H.B. 6699 “is the natural extension of these existing statutes. It generalizes the principles that they embody and it extends it to all state laws and all religious beliefs. Subject of course to the state’s ability to show a compelling need.”⁴⁰

Dane then explained why, even with those protections already in place, he believed the legislature should “enact this bill now.”⁴¹ Turning to the Supreme Court’s 1990 decision in *Employment Division v. Smith*,⁴² which weakened the compelling interest test, he pointed out that one basis for the Court’s holding was the idea that the religious-based exemptions should be determined by legislatures rather than courts.⁴³ Therefore, he suggested “respectfully that now is the time to accept that invitation.”⁴⁴ While Dane praised the bill as “wise and sound,” he also identified concerns about specific wording in the legislation that he recommended be changed.⁴⁵ One concern involved redundant language in the bill, which he feared might lead to confusion.⁴⁶ He also stated that he had a “second more general drafting concern . . . about the legislation . . . [because] it nowhere defines what exactly what it means by burdening the person’s right to free exercise of religion.”⁴⁷ As a result, Dane proposed that the legislature include additional language in the text of the bill to define a burden on religious belief.⁴⁸ Alternatively, a second solution would be to write a preamble to make clear “the legislature’s intent to restore the state of the law as far as Connecticut is concerned . . . to where it was before *Smith* came down.”⁴⁹

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 22–23.

⁴⁰ *Id.* at 23.

⁴¹ *Id.*

⁴² See *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that the state could deny unemployment benefits to a person fired for violating a state prohibition on drug use because of drug use that was part of a religious ritual).

⁴³ 1991 *Public Hearing Transcript*, *supra* note 30, at 23 (statement of Perry Dane, Prof., Yale Law School).

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 23.

⁴⁶ *Id.*

⁴⁷ *Id.* at 24.

⁴⁸ *Id.*

⁴⁹ *Id.*

Dane concluded his introductory remarks by reaffirming his support for H.B. 6699 and recommending that the committee do so as well.⁵⁰

As legislators responded to Dane's remarks, Representative Irving J. Stolberg⁵¹ sought clarification about the distinction between "matters of personal conscience and matters of religious organization" that the professor had made in his opening statement.⁵² Stolberg noted that as he understands relevant precedent and case law, "individual conscience that is equivalent to religious beliefs [is] afforded the same protections" as a religious conviction.⁵³ In response, Dane explained that the courts have interpreted religion broadly and protection extends to nontraditional faiths.⁵⁴ Nevertheless, he insisted that "distinguishing between religious belief and personal conscience really goes to the heart of the matter."⁵⁵ More specifically, he said that "the best way to understand religious conviction is that [it] itself is a form of law," and as such it constitutes a unique legal system that must be recognized by the government.⁵⁶

Continuing with his line of questioning, Stolberg pressed for elaboration about Dane's distinction between matters of conscience and religious belief, which he did not accept, and asked for clarification.⁵⁷ In other words, he wanted to know what differentiates "a small sect" from an individual who possesses deeply held beliefs that define his life and practice?⁵⁸ Dane responded that the difference is not a matter of numbers, but rather is "a difference in the sort of motivations that lead people to come to certain conclusions," highlighting the distinction between the individual who "felt commanded" to do something and the one who "had their own deeply felt convictions."⁵⁹ In the professor's view, the individual who is not responding to a command but merely to deeply held convictions would be expected "to put them aside" and obey the law.⁶⁰ When Stolberg asked if Dane's approach would raise equal protection concerns for the many Americans who do not profess allegiance to a particular religion, the professor acknowledged that the Supreme Court has recognized the rights

⁵⁰ *Id.*

⁵¹ Stolberg, a Democratic member of the Joint Committee on the Judiciary, served the 93rd District in New Haven from 1971 to 1993. *Irving J. Stolberg*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/contributor/Irving-J-Stolberg/2864> [<https://perma.cc/7DN4-8BKN>] (last visited March 13, 2018).

⁵² 1991 *Public Hearing Transcript*, *supra* note 30, at 24 (statement of Rep. Irving J. Stolberg, Member, J. Comm. on Judiciary).

⁵³ *Id.*

⁵⁴ *Id.* (statement of Perry Dane, Prof., Yale Law School).

⁵⁵ *Id.* at 24–25.

⁵⁶ *Id.* at 25.

⁵⁷ *Id.* (statement of Rep. Irving J. Stolberg, Member, J. Comm. on Judiciary).

⁵⁸ *Id.*

⁵⁹ *Id.* at 26 (statement of Perry Dane, Prof., Yale Law School).

⁶⁰ *Id.*

of conscientious objectors.⁶¹ Even so, Dane remained committed to his original claim, contending that the actual text of the First Amendment affords special protections for religious believers.⁶²

This thoughtful debate at the outset of the hearing focused on a very important question: To what extent would those who belong to minority religions, or, as Stolberg noted, were guided by deep moral convictions but belonged to no religious denomination, be protected after the *Smith* decision? While Stolberg emphasized that in his view the First Amendment's Free Exercise Clause fully protects both categories of believers fully, he and the professor agreed that the proposed law is necessary precisely because the Court's decision altered decades of constitutional precedent by lowering the standard by which it would judge free exercise claims.⁶³

Next, Representative Robert M. Ward,⁶⁴ a Republican from the 86th District, questioned Dane. He asked the professor to confirm first, that "it is both constitutional and appropriate for the General Assembly [to] consider adopting the compelling interest test," and second, that the *Smith* case would not prevent the state from applying state laws "when they conflict with religious freedoms" so long as the state has a compelling interest.⁶⁵ Dane substantiated Ward's understanding of *Smith*, stressing that in his view, an aspect of the Court's rationale in the case was to say "that this sort of business of granting exemptions was essentially legislative rather than a judicial task."⁶⁶ He also noted that in a line of cases prior to *Smith*, the Court made clear that accommodating religious believers did not constitute an endorsement of religion.⁶⁷ Concluding his questioning of the professor, Ward reiterated that the purpose of the legislation in Connecticut is to "restore . . . the kind of protection of religious freedom that existed prior to the *Smith* case[,] so roughly the last thirty years in this nation."⁶⁸ The exchange makes clear that members of the Joint Committee on the Judiciary clearly understood their task to be the restoration of a regime of religious freedom protections that were in place prior to the *Smith* decision and that allowed for a workable balance between religious exemptions and

⁶¹ *Id.* at 26–27.

⁶² *Id.* at 26.

⁶³ *Id.* at 22, 24.

⁶⁴ Ward, a Republican, served the 86th District in the Connecticut General Assembly from 1985 to 2006. Keith M. Phaneuf, *Retiring Watchdog Robert Ward Lauded for 31 Years Serving CT*, CT MIRROR (Oct. 3, 2016), <http://ctmirror.org/2016/10/03/retiring-watchdog-robert-ward-lauded-for-31-years-serving-ct/> [<https://perma.cc/T6ZJ-YXDB>].

⁶⁵ 1991 *Public Hearing Transcript*, *supra* note 30, at 27–28 (statement of Rep. Robert M. Ward, Member, J. Comm. on Judiciary).

⁶⁶ *Id.* at 28 (statement of Perry Dane, Prof., Yale Law School).

⁶⁷ *Id.*

⁶⁸ *Id.* (statement of Rep. Robert M. Ward, Member, J. Comm. on Judiciary). Dane does not refer to specific cases in his testimony.

the state's obligation to apply its laws in an evenhanded way. The discussion was well informed and indicated that these lawmakers had prepared themselves for the hearing.

The committee next turned to the testimony of Michael Farris, whose affiliation, as noted earlier, was omitted from the transcript due to a recording malfunction.⁶⁹ He was also asked about the degree to which the *Smith* decision had diluted religious freedom protections by replacing the compelling state interest test with the rational basis test, a lower standard of review. Farris stated his disagreement with the Court's lowering of the standard, which he colorfully described as a "rinky-dink reasonable relationship test that gives religious freedom no more right than the right to own a blue car."⁷⁰ Tulisano then followed up to inquire further about the consequences of applying a lower standard of review to evaluate religious freedom claims. He referenced particular religious practices that might potentially no longer be exempt from state law after *Smith*. Farris cited examples such as forcing the Catholic Church to ordain female priests, requiring Black Muslims to ordain whites, or insisting that Jews who have died undergo autopsies.⁷¹

The legislators and Farris went on to discuss a few specific cases involving the regulation of church interiors and related matters. Stolberg encouraged Farris to clarify some of his points on the issue of prisoner rights generally, and in particular, his stated assertion that Muslim prisoners would be "forced to eat pork," when in fact what is at issue, according to Stolberg, is the failure of the prison to offer an alternative choice.⁷² Some of Farris' testimony is convoluted, but his main worry was that *Smith* had drastically diminished the rights of individuals to be exempt from state laws that conflict with their religious beliefs. In addition, he stated that he concurred with some of the changes in language recommended by Dane that would strengthen religious freedom protections in the proposed bill.⁷³

One of the most interesting issues arose at the very end of Farris's testimony during Representative Douglas C. Mintz's questioning.⁷⁴ Mintz had just cosponsored Connecticut's H.B. 7133, *An Act Concerning Discrimination on the Basis of Sexual Orientation*, which was passed by

⁶⁹ *Supra* note 32.

⁷⁰ 1991 *Public Hearing Transcript*, *supra* note 30, at 28 (statement of Michael Farris).

⁷¹ *Id.*

⁷² *Id.* (statement of Rep. Irving J. Stolberg, Member, J. Comm. on Judiciary).

⁷³ *Id.* (statement of Michael Farris).

⁷⁴ Mintz was a Democratic representative from Norwalk who served in the House from 1986 to 1992, and later as a Superior Court judge in Stamford and Norwalk. Francis X. Fay Jr., *Student Went from Scoring Goals to Dispensing Justice*, THE HOUR (Nov. 14, 2009 7:00 PM), <https://www.thehour.com/norwalk/article/Student-went-from-scoring-goals-to-dispensing-8250245.php> [<https://perma.cc/8XMN-XZCX>].

both houses of the legislature in April and signed into law on May 1, 1991.⁷⁵ He specifically asked Farris to discuss the impact of the religious freedom bill on this other significant pending legislation.⁷⁶ Interestingly, Farris did not answer the question directly, but pointed to two cases that had come to his attention, one of which concerned excluding homosexuals from a health club and the other requiring that a homosexual minister of music be hired by a church.⁷⁷ Farris had a simple response that recognized a distinction borne out in future case law. He predicted that if the proposed Connecticut antidiscrimination law and the religious freedom laws were to be passed at the same time, “the health club would lose and the church would win.”⁷⁸ According to Farris, while the health club would not be able to bar homosexuals from its facility, the church would retain its authority to choose its ministers in accordance with its religious principles. The questioning ended at this point, and there was no further discussion of the potential conflict of rights. Garnering little attention at the time, this conflict has since become one of the major points of controversy in the current debate about religious freedom, as evidenced by several cases currently being litigated in the courts at both the state and federal levels.⁷⁹

It is important to note that Farris is CEO of the Alliance Defending Freedom,⁸⁰ an advocacy group representing Jack Phillips, the owner of the Masterpiece Cakeshop in a case decided by the Supreme Court on June 4, 2018.⁸¹ The central question in the case, “[w]hether applying Colorado’s public accommodations law to compel [the petitioner] to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment, was not decided by the Court.”⁸² Rather, in its narrow ruling, the justices determined that the state’s “treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”⁸³ The Court concluded that members of the Colorado Civil Rights Commission had made denigrating remarks about Phillips’ religious beliefs during his hearing, thereby failing

⁷⁵ CONN. GEN. STAT. §§ 41a-81a et seq.

⁷⁶ 1991 *Public Hearing Transcript*, *supra* note 30, at 32 (statement of Rep. Douglas C. Mintz, Member, J. Comm. on Judiciary).

⁷⁷ *Id.* (statement of Michael Farris).

⁷⁸ *Id.*

⁷⁹ See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (explaining two dueling interests over the application of religious freedom).

⁸⁰ *Biography: Michael P. Farris*, ALLIANCE DEFENDING FREEDOM, <https://adfflegal.org/detailspages/biography-details/939ichael-p.-farris> [<https://perma.cc/W6NE-YGWD>] (last visited Apr. 21, 2018).

⁸¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

⁸² Questions Presented, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111 (U.S. argued Dec. 5, 2017).

⁸³ *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

to treat him fairly.⁸⁴ Moreover, Phillips returned to Colorado federal court again in August of 2018, alleging religious discrimination after refusing to bake a cake for a transgender woman.⁸⁵

In addition, Farris's organization also represented the National Institute of Family and Life Advocates in a case decided on June 26, 2018, in which it asked the Court to rule "[w]hether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the states through the Fourteenth Amendment."⁸⁶ In a 5-4 decision, the Court held that the disclosure requirements were likely to violate the First Amendment.⁸⁷ While neither case addresses religious freedom directly, many of the amicus briefs in support argue that religious freedom is in fact at stake in both cases.⁸⁸ We will return to these cases at a later point.

The final witness for H.B. 6699 was Stephen Mendleson who spoke on behalf the Legislative Coalition on Psychiatry and Human Rights. Dr. Mendleson also served on the Board of Directors of the Connecticut Citizens with Disabilities and the State Protection and Advocacy Office.⁸⁹ He stated that he was appearing both to oppose another bill under consideration, *An Act Concerning Cruelty to Persons*, and to support the religious freedom bill.⁹⁰ Appearing as a substitute for another member of the Legislative Coalition on Psychiatry and Human Rights, Dr. Mendleson read from his colleague's prepared testimony. He said that while the Coalition was pleased with the language of the bill, the organization believed that the bill might "be broadened to . . . ensure that no one would be forced to participate in . . . practices [that] violate[] his or her religious convictions."⁹¹ He went on to explain that this matter is important because the tenets of psychiatry can come into conflict with doctrines of religious faith, as in the case of the use of electroshock therapy or prescription drugs, which are understood by some to be antithetical to religious teaching about medical treatment.⁹²

⁸⁴ *Id.* at 1732.

⁸⁵ Complaint, *Masterpiece Cakeshop v. Elenis* (D. Colo. 2018) (No. 1:18-cv-02074), <http://www.adfmedia.org/files/MasterpieceCakeshopComplaint.pdf> [https://perma.cc/HQY6-JENP].

⁸⁶ Questions Presented, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. argued Mar. 20, 2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

⁸⁷ *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2378.

⁸⁸ *E.g.*, Brief for Nat'l Jewish Comm'n on Law & Pub. Affairs filed on behalf of Orthodox Jewish Organizations as Amici Curiae Supporting Petitioner, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. filed Sept. 7, 2017); Brief for U.S. Conference of Catholic Bishops, et al. as Amici Curiae Supporting Petitioner, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. filed Jan. 18, 2018).

⁸⁹ 1991 *Public Hearing Transcript*, *supra* note 30, at 123.

⁹⁰ *Id.* (statement of Stephen Mendleson, Legislative Coalition on Psychiatry and Human Rights).

⁹¹ *Id.* at 124.

⁹² *Id.* at 124–25.

Given his position as a disability rights activist, his testimony was designed to represent the views of those who seek to carve out broad exemptions for religious believers who want to assert a right to refuse medical treatment. There was no further discussion of the matters he highlighted, and the hearing adjourned immediately following his testimony.⁹³

Although the Catholic Church did not send a witness to testify at these hearings, the Connecticut Catholic Conference (CCC) submitted important written testimony in the form of a letter to the members of the Judiciary Committee on March 27, 1991. This letter provides a well-defined sense of the CCC's position on the pending bill. William J. Wholean, author of the letter, stated that "the subject of the bill presents some very complicated problems requiring extensive study," and the CCC is concerned that the bill "may do more harm than good."⁹⁴ Wholean also claimed that there is "no evidence that the Court will not engage in a process of self-correction" in the wake of the *Smith* decision.⁹⁵ Furthermore, the CCC emphasized that by providing "a statutory remedy to adjudicate free exercise claims . . . this bill, if enacted, could effectively freeze the *Smith* case as the last constitutional interpretation of the free exercise clause."⁹⁶ Finally, the CCC recommended that Connecticut should wait for Congress to act first before passing its own religious freedom law.⁹⁷ In closing, Wholean said: "We respectfully suggest the Judiciary Committee wait and watch Congressional activity . . . and the next round of Supreme Court decisions to determine whether *Smith* will have a broad, invidious effect on religious freedom or will be subjected to self-correction by the Court."⁹⁸

As Wholean's letter to the Judiciary Committee established, the CCC was particularly concerned about the unintended consequences of state laws creating statutory remedies to resolve religious freedom claims before both the Court and Congress were able to act at the national level. Preferring to proceed cautiously, the CCC did not offer support for a bill in 1991 that its leadership feared might upset the delicate balance between free exercise and state authority that prevailed prior to the *Smith* decision.

Since H.B. 6699 did not reach the point of floor debate in 1991, the hearing provides the only public account of the issues that concerned Connecticut legislators at the time. It is evident from the March 22 hearing that legislators and witnesses alike testified that after the *Smith* decision a new state law to protect religious freedom was needed and that there was

⁹³ *Id.* at 125.

⁹⁴ *An Act Concerning the Restoration of Religious Freedom: Hearing on H.B. 6699 Before the J. Comm. on the Judiciary*, 1991 Conn. Gen. Assemb., Reg. Sess. (Conn. 1991) (written testimony presented to the judiciary committee of William J. Wholean, Exec. Dir., Conn. Catholic Conf.).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

broad consensus that the draft of the bill before them fulfilled their legislative objectives. As mentioned earlier, a similar bill was discussed in 1992, but little progress was made.⁹⁹ The legislation was taken up again in 1993, which is the next chapter of the story.

II. LEGISLATIVE HISTORY: H.B. 5645, *AN ACT CONCERNING RELIGIOUS FREEDOM* (1993)

The legislative history of H.B. 5645, the new religious freedom bill introduced in 1993, begins in January and culminates in the signing of the bill into law in late June.¹⁰⁰ The bill proceeded normally in the General Assembly and public records are available for the following: the March 1 public hearing of the Joint Committee on the Judiciary, the May 13 House debate, the Senate debate and amendment process, and the June 1 discussion and passage of the bill as amended by the Senate.¹⁰¹ In addition, the Connecticut Office of Legislative Research provided analysis of both the original bill and the amended version. It should be noted that the title of the 1993 bill is *An Act Concerning Religious Freedom*, and the word “restoration” is no longer included.¹⁰² The Connecticut General Assembly website states that the purpose of the bill is: “To enhance the constitutional right of freedom of religion and reiterate the compelling interest test for free exercise of religion claims under the state constitution.”¹⁰³ In the public records, there is no explanation of why the word “restoration” was dropped, but it is worth noting that the stated purpose of the 1991 bill had been: “To reinstate the compelling interest test for free exercise of religion claims which was eliminated in the United States Supreme Court decision of *Employment Division v. Smith*, 110 S. Ct. 1595 (1990).”¹⁰⁴

Consequently, it appears that the purpose of the new legislation was broadened to serve two distinct goals. The first was to “enhance the constitutional right of freedom of religion,”¹⁰⁵ and the second was to reinforce the compelling interest test with respect to state-law-based free exercise claims.¹⁰⁶ The analysis issued by the Office of Legislative Research explains that “the bill specifies the test that state courts must use in deciding cases in which individuals claim that the state has infringed on

⁹⁹ H.B. 5019, 1992 Conn. Gen. Assemb., Feb. Sess. (Conn. 1992).

¹⁰⁰ CONN. GEN. STAT. § 52-571b (2018).

¹⁰¹ *Id.*

¹⁰² Pub. Act No. 93-252, 1993 Conn. Gen. Assemb., Reg. Sess. (Conn. 1993).

¹⁰³ *Id.*

¹⁰⁴ H.B. 6699, 1991 Conn. Gen. Assemb., Reg. Sess. (Conn. 1991).

¹⁰⁵ *An Act Concerning Religious Freedom*, CONNECTICUT GENERAL ASSEMBLY, <https://www.cga.ct.gov/ps93/cbs/H/HB-5645.htm> [<https://perma.cc/LB7C-BAF6>] (last visited Mar. 6, 2018).

¹⁰⁶ *Id.*

their constitutional free-exercise-of-religion rights . . . [and] specifically authorizes people to go to court to enforce this right.”¹⁰⁷ Thus, the 1993 bill is more explicitly aimed at both guaranteeing the right of freedom of religion and restoring a rigorous test by which to judge individual claims. This Part will now examine the public hearing and legislative debates to identify and analyze issues that most concerned all participants in the process.

A. *Joint Committee of the Judiciary, Public Hearing, March 1, 1993*

The official speaker registration list for the March 1 public hearing includes only two witnesses for H.B. 5645. They are John King, then an attorney with the law firm of Updike, Kelly & Spellacy in Hartford, who spoke on behalf of the CCC in opposition to the bill, and Robert Leikind, who testified in his capacity as director of the Connecticut Anti-Defamation League in support of the bill.¹⁰⁸

1. *Testimony of John King, for the Connecticut Catholic Conference*

Senator George Jepsen, chair of the Joint Committee on the Judiciary, asked King to speak first. King began by saying that the CCC had not only been opposed to the two previous iterations of the bill currently before the committee (H.B. 6699, 1991 and H.B. 5019, 1992), but the organization remained opposed to the newest version of the bill.¹⁰⁹ While today it may seem counterintuitive that the CCC would be opposed to a bill protecting religious freedom, the position articulated by King is consistent with the Catholic Church’s opposition to the bill at the federal level.¹¹⁰ Father Robert Drinan, a Democratic congressman from Massachusetts,¹¹¹ and Jennifer I. Huttman authored a legislative history of the bill.¹¹² In their article, they argue that the bill did not advance in 1991 (the 101st Congress) or 1992 (the 102nd Congress) “primarily [due] to the opposition to the bill by the United States Catholic Conference [(USCC)], as well as

¹⁰⁷ CONN. OFFICE OF LEGISLATIVE RESEARCH, *Bill Analysis of H.B. 5645: An Act Concerning Religious Freedom* (Oct. 1, 1993), <https://www.cga.ct.gov/ps93/ba/1993HB-05645-R00-BA.htm> [<https://perma.cc/7LKG-SJD4>].

¹⁰⁸ *An Act Concerning Religious Freedom: Hearing on H.B. 5645 Before the J. Comm. on the Judiciary*, 1993 Conn. Gen. Assemb., Reg. Sess. (Conn. 1993) (list of public speakers) [hereinafter *1993 Public Hearing Transcript*].

¹⁰⁹ *Id.* (statement of John King, Att’y, Conn. Catholic Conf.).

¹¹⁰ Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 534 (1994).

¹¹¹ Father Drinan served from 1971 to 1981 and was the first and only Catholic priest elected to Congress. Andrew Glass, *Father Drinan Dies at 86: Only Catholic Priest Elected to Congress Backed Abortion Rights*, POLITICO (Jan. 29, 2007, 9:54 AM), <https://www.politico.com/story/2007/01/father-drinan-dies-at-86-only-catholic-priest-elected-to-congress-backed-abortion-rights-002502> [<https://perma.cc/Q6SB-G83L>].

¹¹² Drinan & Huffman, *supra* note 110, at 531.

various pro-life groups—most especially the National Right to Life Committee”.¹¹³ The authors further contended that the “Catholic Conference feared the bill might be used to argue that legislation restricting abortions infringed on a woman’s religious beliefs.”¹¹⁴ In fact, the Catholic Church only lent its support to the federal bill on March 13, 1993, nearly two weeks after King testified before the Joint Committee on the Judiciary.¹¹⁵ Given the evolving position of the USCC at the national level, King’s opposition to the bill in Connecticut is entirely consistent with Father Drinan’s account of Catholic opposition to the congressional bill in the early stages of the legislative process. It is noteworthy that King never mentions the issue of abortion in his testimony, especially since the matter later became a major obstacle to passing legislation at the national level.¹¹⁶

King identified several principal reasons for the CCC’s opposition to H.B. 5645. First, he stated that the CCC is not aware of any “instances of infringement of religious freedom in the State of Connecticut to justify what would in effect be overturning the recent decisions of the United States Supreme Court” in the area of First Amendment jurisprudence.¹¹⁷ This reasoning appears to conflict with the Catholic Church’s typical response to Supreme Court opinions with which it disagrees—most notably in this context, its response to the *Roe v. Wade*¹¹⁸ decision in 1973 and subsequent cases dealing with abortion.¹¹⁹ King went on to provide a brief summary of the *Smith* case, noting that the application of the compelling interest test by the state courts in Oregon culminated in “bizarre results,” that could have allowed a person by virtue of his beliefs to become “a law unto himself.”¹²⁰ This concern about protecting practices

¹¹³ *Id.* at 534.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 538.

¹¹⁶ *See id.* at 534 (“However, despite [the] backing of many diverse supporters, the RFRA was never reported out of committee in either the 101st Congress, or the 102nd Congress, where it was reintroduced. This was due primarily to the opposition to the bill by the United States Catholic Conference, as well as various pro-life groups—most especially the National Right to Life Committee. The U.S. Catholic Conference feared the bill might be used to argue that legislation restricting abortions infringed on a woman’s religious beliefs.”).

¹¹⁷ 1993 *Public Hearing Transcript*, *supra* note 108 (statement of John King, Att’y, Conn. Catholic Conf.).

¹¹⁸ 410 U.S. 113, *reh. denied*, 410 U.S. 959 (1973).

¹¹⁹ *See, e.g.*, Charles J. Reid, Jr., *The American Catholic Church and Roe v. Wade*, HUFF POST (Jan. 24, 2013), https://www.huffingtonpost.com/charles-j-reid-jr/the-american-catholic-church-and-ro-v-wade_b_2538453.html [<https://perma.cc/K3PN-N8VL>] (“Many American Catholics took exception to this decision and have engaged in four decades of political action to *reverse* this outcome.” (emphasis added)).

¹²⁰ 1993 *Public Hearing Transcript*, *supra* note 108 (statement of John King, Att’y, Conn. Catholic Conf.).

that fell outside of traditional norms was raised again in the hearing, as well as in the legislative debate later in the process.

Next, the CCC's advocate expressed a worry that the Church's tax-exempt status could be in jeopardy should Connecticut pass the religious freedom bill. He suggested that if the state adopted the compelling interest test, an individual might have been able to assert that "granting the tax-exempt status to a church violates one's free exercise of religion," thereby creating conflict and potential litigation over competing religious claims.¹²¹ He then reiterated his belief that Connecticut should follow the lead of the U.S. Supreme Court and adopt the same rational basis standard enunciated in *Smith* for reviewing an individual's right to free exercise of religion.¹²²

Senator Jepsen countered this argument by noting that it is a simple matter to guarantee free exercise in the easy cases and it is "only in the hard cases where you get down to doing something that's unpopular or out of the mainstream that these amendments really count."¹²³ More specifically, the committee chair said, it is "only when you are willing to step out and protect the relatively non-conformist behavior [will] these constitutional rights really have teeth and really have meaning"¹²⁴ Directly addressing the proper standard of review, the Senator asked King to explain how the nonconformist can be protected if the test does not require the state to demonstrate a compelling interest.¹²⁵ King did not articulate a clear answer to the question but instead asserted that the rational basis standard is more appropriate.¹²⁶ He provided the example of the need to enforce laws of general applicability, such as the payment of Social Security taxes, in order to avoid "truly bizarre results," which in earlier Supreme Court cases "didn't protect religious beliefs, but rather protected . . . bizarre conduct that was not essential to those religious beliefs."¹²⁷ In particular, King was concerned that the application of the compelling interest test by the Supreme Court has been subject to "swings on [the] bench" that make it "unworkable and unneeded."¹²⁸ In other words, he maintained that the adoption of the more stringent test would

¹²¹ *Id.*

¹²² *See id.* ("[W]e believe that in the State of Connecticut it doesn't make any sense to reject the reasoning of the United States Supreme Court and apply a different standard under the Connecticut Constitution.").

¹²³ *Id.* at 77 (statement of Sen. George Jepsen, Co-Chairman, J. Comm. on Judiciary).

¹²⁴ *Id.*

¹²⁵ *Id.* at 77–78.

¹²⁶ *Id.* at 78 (statement of John King, Att'y, Conn. Catholic Conf.).

¹²⁷ *Id.* at 78.

¹²⁸ *Id.* at 78–79.

likely weaken the state's ability to police "bizarre conduct," thereby creating problems for the courts.¹²⁹

Continuing with his line of questioning, Senator Jepsen immediately pressed King on the matter of "bizarre conduct" while acknowledging that the shifting composition of the Supreme Court affects its free exercise jurisprudence. Responding directly to the witness, he said, "just accept and note that what you refer to as bizarre behavior is exactly the point I'm talking about. If it's non-conformist, if it's out of the ordinary . . . [and] out of the mainstream, we label it bizarre and then find a basis to disallow it."¹³⁰ In the Senator's view, protection of religious freedom means that "sometimes you've got to let the bizarre exist."¹³¹ In my interview with now-Attorney General Jepsen, he emphasized that what motivated him to propose the new religious freedom law in 1991 and pursue it to passage in 1993 was his conviction that the *Smith* decision jeopardized rights of religious minorities, nonbelievers, and nonconformists, and the state needed to pass a law to protect them.¹³² The Senator's exchange with King provides confirmation of the stated first objective of the legislation he ultimately helped craft, which embraces a broad guarantee of religious freedom that extends to religious worshipers and nonbelievers alike.¹³³

Tulisano, the second co-chair of the Joint Judiciary Committee, joined Jepsen in questioning King about his defense of the rational basis test. They challenged the adequacy of the rational basis test by offering various examples of common religious practices, such as serving wine to minors in religious services, that would be imperiled under the less stringent test.¹³⁴ King did not present a full counterargument and replied, "the Connecticut Catholic Conference, as a general proposition . . . is much more comfortable with the rational basis test than it is with the compelling interest [test]."¹³⁵ Jepsen, on the other hand, concluded that unlike the weaker rational basis test, only a compelling interest test is adequate to protect the rights at stake because the more rigorous standard would require the state to "carve out a legislative exemption for this kind of event to meet that test."¹³⁶

What is particularly striking about this line of questioning is the fact that the legislators were persuasively advocating for a *more* vigorous

¹²⁹ *Id.*

¹³⁰ *Id.* at 79 (statement of Sen. George Jepsen, Co-Chairman, J. Comm. on Judiciary).

¹³¹ *Id.*

¹³² Jepsen Interview, *supra* note 8.

¹³³ 1993 *Public Hearing Transcript*, *supra* note 108, at 75, 77–78 (statement of Sen. George Jepsen, Co-Chairman, J. Comm. on Judiciary).

¹³⁴ *Id.* at 79–80 (statements of Sen. George Jepsen & Rep. Richard Tulisano, Co-Chairmen, J. Comm. on Judiciary).

¹³⁵ *Id.* at 81 (statement of John King, Att'y, Conn. Catholic Conf.).

¹³⁶ *Id.* (statement of Sen. George Jepsen, Co-Chairman, J. Comm. on Judiciary).

protection of free exercise than the attorney for the Catholic Church. Senator Martin Looney¹³⁷ raised the issue directly and said, “it just seems to me a little bit peculiar that the Catholic Conference would be supporting a position that would allow the state to intervene more readily in matters of religious expression.”¹³⁸ Looney pursued the matter, probing to understand why the Catholic Church was opposed to a standard that even its own attorney acknowledged affords a better guarantee of free exercise.¹³⁹ In a lengthy and somewhat rambling reply, King again deferred to the judgment of the Supreme Court on the standard and reiterated his fear that raising the standard would spawn new litigation, drawing the courts into disputes he believes it should avoid.¹⁴⁰ Despite the legislators’ efforts to evoke a clear response from the Church’s lawyer, his explanations for opposing the law tend to obfuscate rather than illuminate a coherent position or set of arguments. Compared with the first witness and the lawmakers, he seemed to be remarkably unwilling to engage the important issues.

When King was questioned by Representative Michael Jarjura,¹⁴¹ a lawmaker less skeptical of the Church’s position, the contours of the underlying concerns about the bill became clearer. He began by revealing an essential theme of King’s testimony, namely that the bill would protect religious freedom too broadly.¹⁴² He stated, from “listening to the testimony today . . . from listening to you . . . this bill would basically legitimize fringe religions.”¹⁴³ The Church’s attorney replied, “[w]ell, I think if you look at the payote [sic] instance, that . . . is correct.”¹⁴⁴ Jarjura, a conservative Democrat, was concerned that religious practices like the use of peyote, at issue in the *Smith* case, would again be protected under

¹³⁷ Looney, a Democrat from the 11th District, has been serving in the Senate since 1992. *About Senator Looney*, CONN. S. DEMOCRATS, <http://www.senatedems.ct.gov/looney-about> [<https://perma.cc/HLR6-YEGF>] (last visited Feb. 19, 2018).

¹³⁸ *1993 Public Hearing Transcript*, *supra* note 108, at 81 (statement of Sen. Martin Looney, Member, J. Comm. on Judiciary).

¹³⁹ *See id.* (referring to Looney’s line of questioning regarding the Catholic Church’s position on free exercise protections).

¹⁴⁰ *Id.* at 81–82 (statement of John King, Att’y, Conn. Catholic Conf.).

¹⁴¹ Jarjura, a Democrat at the time, served Waterbury’s 74th district from 1992 to 2002. Andrew Brophy, *Flatto Faces Three in Bid for State Comptroller*, FAIRFIELD PATCH (May 19, 2010), <https://patch.com/connecticut/fairfield/flatto-faces-three-in-bid-for-state-comptroller> [<https://perma.cc/2DHK-HGJF>]. He became a Republican in 2011 in order to run for governor of the state. John Murray, *Q&A with Waterbury’s Republican Party Mayoral Candidate, Incumbent Mike Jarjura*, WATERBURY OBSERVER (Oct. 15, 2011), <http://www.waterburyobserver.org/wod7/node/2699> [<https://perma.cc/AMG7-2WBR>].

¹⁴² *1993 Public Hearing Transcript*, *supra* note 108, at 75 (statement of Rep. Michael Jarjura, Member, J. Comm. on Judiciary).

¹⁴³ *Id.* at 82.

¹³⁹ *Id.* (statement of John King, Att’y, Conn. Catholic Conf.).

¹⁴⁴ *Id.* (statement of John King, Att’y, Conn. Catholic Conf).

the new law. He then asked King about whether marijuana use, bigamy, and polygamy would be protected under the higher standard of the compelling state interest. King responded in the affirmative, supporting Jarjura's interpretation of the dangers the new law posed.¹⁴⁵

Toward the end of King's testimony, lawmakers raised specific examples of religious practices that had caused controversy, such as the use of candles in public ceremonies,¹⁴⁶ and then turned back to the central question that seemed to confuse them about the position of the Church.¹⁴⁷ Tulisano asked why the Church was now opposed to a bill that it had once hoped to pass at the national level.¹⁴⁸ King's response was vague and contradictory, since he maintained that the U.S. Catholic Conference was not in full agreement with the *Smith* decision, even while it opposed the approach taken by Connecticut lawmakers.¹⁴⁹ Reacting with a degree of frustration, Tulisano then asked: "Well, what response are they in support of?"¹⁵⁰ The Church's attorney claimed that he did not have the answer to the question but that he would make an attempt to find out.¹⁵¹ This is an extraordinary admission on the part of the attorney speaking at a religious freedom hearing on behalf of the Catholic Church. While it is likely that there may have been little coordination between the CCC and the national USCC on the matter, it is also possible that Connecticut's first-in-the-nation religious freedom restoration act was not on the national radar screen, especially since the entire legislative process took place outside of public view.

It is important to note that the CCC did not submit its own separate written testimony concerning the 1993 bill. Rather, Mark E. Chopko, general counsel for the USCC, forwarded materials to Father Thomas Barry of the CCC in response to a request. The forwarded documents included a draft of the 1993 federal religious freedom bill before Congress at the time, as well as copies of the USCC's federal Senate testimony and a document outlining suggested legislative remedies. In his brief note, Chopko contended: "[T]he introduction of the federal legislation...argues against the need for a state legislative resolution."¹⁵² It is particularly noteworthy that in the document analyzing legislative remedies in response

¹⁴⁵ *Id.* It should be noted that Jarjura is the only legislator who spoke at the hearing who was well disposed to the testimony offered on behalf of the Church. *See id.* (statement of Rep. Michael Jarjura, Member, J. Comm. on Judiciary).

¹⁴⁶ *Id.* at 83 (statement of Rep. Robert Ward, Member, J. Comm. on Judiciary).

¹⁴⁷ *Id.* at 84 (statement of Rep. Richard Tulisano, Co-Chairman, J. Comm. on Judiciary).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (statement of John King, Att'y, Conn. Catholic Conf.).

¹⁵⁰ *Id.* (statement of Rep. Richard Tulisano, Co-Chairman, J. Comm. on Judiciary).

¹⁵¹ *Id.* (statement of John King, Att'y, Conn. Catholic Conf.).

¹⁵² Letter from Mark E. Chopko, Gen. Counsel, U.S. Catholic Conference, to Fr. Thomas Berry, Conn. Catholic Conference (Mar. 5, 1993) (on file with the Connecticut State Library).

to the *Smith* decision, the USCC focuses on two matters: abortion and third-party lawsuits.¹⁵³ This document makes it apparent that the USCC was deeply troubled by its understanding of how a federal religious freedom law might provide women with a new free exercise claim against state laws that restrict their access to abortion.¹⁵⁴ For example, authors of the document warn that a new federal law “would invite claimants to seek relief against any abortion statutes that are restrictive or regulate their access to abortion, and would allow litigation under an untested statute the requires the new statutory standard to be applied in every case.”¹⁵⁵

While Attorney King did not mention the abortion issue in his testimony, he discussed third-party taxpayer lawsuits, as discussed above.¹⁵⁶ The USCC presented its position on the matter in a direct way. The USCC was apprehensive that the proposed federal religious freedom law would potentially limit the ability of religious organizations to become involved in public programs or to receive tax exemptions.¹⁵⁷ The authors of the document urged Congress to include language in the proposed law that would preserve the ability of religious organizations to participate in public programs.¹⁵⁸

In conclusion, it is difficult to make a definitive determination about the lack of coordination between King and the CCC, based upon the records that are publicly available. Since Connecticut was the first state in the nation to propose and then pass a religious freedom bill, it is likely that the framers of Church strategy on the matter had not yet developed a position with respect to the states. In addition, the lack of news coverage meant that the debate in Connecticut took place below the radar.

2. *Testimony of Robert Leikind, for the Connecticut Anti-Defamation League*

The second and final witness to offer testimony at the hearing was Robert Leikind, Director of the Connecticut Office of the Anti-Defamation League,¹⁵⁹ who, as mentioned above, spoke in support of the H.B. 5645. Leikind began by saying that “[t]he Anti-Defamation League believes this legislation is necessary in light of the Supreme Court’s decision in [*Smith*]

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Memorandum from Mark E. Chopko & John A. Liekweg, A Commentary on Legislative Remedies to *Employment Division v. Smith* (May 24, 1991) (on file with the Connecticut State Library).

¹⁵⁶ 1993 *Public Hearing Transcript*, *supra* note 108 (statement of John King, Att’y, Conn. Catholic Conference).

¹⁵⁷ Memorandum from Mark E. Chopko & John A. Liekweg, *supra* note 151.

¹⁵⁸ *Id.*

¹⁵⁹ 1993 *Public Hearing Transcript*, *supra* note 108, at 128 (statement of Richard Leikind, Director, Conn. Anti-Defamation League).

and we urge its prompt adoption.”¹⁶⁰ He then presented a clear, well-structured argument that recognized free exercise of religion as “a core value of the nation,” and explained why he thought the bill under discussion must be passed in order to protect the citizens of Connecticut.¹⁶¹ Summarizing the negative consequences of the *Smith* decision that he believed diminished the guarantee of religious free exercise, Leikind expressed his principal concern that “[i]n the aftermath of *Smith*, unfortunately, an individual can [no] longer rely on the free exercise clause to exempt a religious practice unless the law expressly targets [that] practice.”¹⁶² Moreover, the director of the Anti-Defamation League explained that each individual religious group might have to seek exemptions for its religious practices, and noted that “small and unpopular religious groups” may be unable to muster the necessary support from legislators.¹⁶³

His unease seems to be at odds with the testimony of the first witness, who expressed the opposite concern, namely that “bizarre” practices *might be* protected under the language of the new bill.¹⁶⁴ Stating unequivocally that there was “a need for corrective action to overcome the effect of *Smith*,” he then explained why the Anti-Defamation League joined other organizations, including the National Association of Evangelicals, the Christian Legal Society, and the ACLU, to support similar legislation at the national level.¹⁶⁵

Leikind concluded his opening remarks by urging the legislature to pass H.B. 5645 to “ensure that we in Connecticut will not be entirely dependent upon the passage of the Federal Religious Freedom Restoration Act.”¹⁶⁶ Legislators questioned him briefly, asking whether he knew of any actual examples of the *Smith* case having had a negative impact on religious free exercise, and he identified one case involving a Jewish deceased man who was required to undergo an autopsy despite his family’s refusal on religious grounds.¹⁶⁷ In fact, the case referred to by Leikind concerned a deceased Hmong man living in Rhode Island, whose family objected to an autopsy that the state nevertheless performed.¹⁶⁸

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 128–29 (documenting Leikind’s argument about the various threats to the religious liberty of Connecticut citizens after *Smith*).

¹⁶² *Id.* at 129.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 77–79 (statement of John King, Att’y, Conn. Catholic Conf.).

¹⁶⁵ *Id.* at 129–30 (statement of Richard Leikind, Director, Conn. Anti-Defamation League).

¹⁶⁶ *Id.* at 130.

¹⁶⁷ *Id.*

¹⁶⁸ *Yang v. Sturner*, 750 F. Supp. 558, 559–60 (D.R.I. 1990).

Jarjura reentered the discussion, returning to the problem of defining “legitimate religious conduct.”¹⁶⁹ Leikind rejected the representative’s premise and said it was not appropriate to inquire about “what is legitimate religious conduct and what is not,” and that the focus instead must be on whether or not the state has a compelling interest in restricting a particular practice.¹⁷⁰ In his view, the compelling interest test elegantly balanced the interest of the state in protecting health and welfare with the right of the individual to practice his or her religion.¹⁷¹ Jarjura then asked if Leikind could point to results in Connecticut that have diminished religious free exercise in the wake of the decision, but Leikind asserted that his concerns about the impact of the *Smith* case went to a more fundamental problem: the weakening of a “fundamental right that is a pillar of what society is built on.”¹⁷² He reminded the lawmakers of the large coalition of civil liberties and religious groups that supported his position on the bill.¹⁷³ Astonishingly, at the end of his exchange with the witness, Jarjura admitted that he had not yet read the *Smith* decision but intended to do so.¹⁷⁴ This is a conspicuous admission on the part of a legislator who took such an active role in the questioning of witnesses in the hearing. It must be noted that Jarjura was himself opposed to the legislation before the Joint Committee on the Judiciary, of which he was a member. The committee members discussed a few more technical questions, and then the hearing on H.B. 5645 concluded.

After reviewing these exchanges with witnesses, it is apparent that the members of the Judiciary Committee were, for the most part, knowledgeable about the complicated legal and policy issues and controversies surrounding the proposed religious freedom bill. They often asked penetrating questions of their witnesses in order to ensure that H.B. 5645 would accomplish the dual objectives they identified as the purpose of the law: (1) to robustly guarantee religious freedom, and (2) to mandate the use of the compelling interest test in adjudicating free exercise claims under the state constitution. The degree to which the supporters of the bill pressed King to explain the Catholic Church’s opposition to their genuine effort to enhance religious freedom is perhaps the most notable aspect of the hearing. While at the hearing there were few references to issues that now dominate the religious freedom debate, such as abortion, the testimony confirms that the focus of the bill’s supporters was to ensure that

¹⁶⁹ 1993 *Public Hearing Transcript*, *supra* note 108, at 131 (statement of Rep. Michael Jarjura, Member, J. Comm. on Judiciary).

¹⁷⁰ *Id.* (statement of Richard Leikind, Director, Conn. Anti-Defamation League).

¹⁷¹ *Id.*

¹⁷² *Id.* at 132.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (statement of Rep. Michael Jarjura, Member, J. Comm. on Judiciary).

religious believers, nonconformists, and nonbelievers would continue to receive strong state guarantees to act in accordance with their deeply held beliefs.

B. *House Action on the Bill*

On May 13, 1993, the Connecticut House passed H.B. 5645.¹⁷⁵ The Honorable Chair of the Judiciary Committee, Tulisano, responded to Speaker John Ritter, who led the debate, by declaring at the outset that it is “one of the most important bills to come before the General Assembly” during the calendar year, making clear that “under the Connecticut Constitution, the State will be held to the highest degree possible, when it attempts to regulate the activity of any religion in our State under the Connecticut Constitution.”¹⁷⁶ He mentioned that the 1991 version of the bill was not passed because at the time lawmakers were assured a similar bill would be passed at the national level.¹⁷⁷ He reassured his colleagues that the current bill “enhances religious freedom and puts Connecticut once again in the forefront of supporting . . . free exercise.”¹⁷⁸ Several members, including Ward, spoke to support the bill and to recognize that Connecticut would be “the first state in the nation” to reinstate the compelling interest test.¹⁷⁹ Ward also clarified that the bill would have no impact on the tax exempt status of religious organizations and that it addresses only free exercise claims, a concern that had been raised during the March 1 hearing.¹⁸⁰ Representative Ellen Scalettar¹⁸¹ spoke in favor of the bill, presenting a list of all of the national organizations that supported the bill making its way through Congress at the national level, including the Presbyterian Church U.S.A., the Baptists Joint Committee on Public Affairs, the American Jewish Committee, the National Association of Evangelicals, and many others.¹⁸² Notably absent from the list is the U.S. Conference of Catholic Bishops.¹⁸³

¹⁷⁵ *Bill Status: H.B. 5645, Session Year 1993*, CONNECTICUT GENERAL ASSEMBLY, https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=1993&bill_num=5645 [https://perma.cc/XZY2-449C] (last visited Apr. 23, 2018).

¹⁷⁶ CONN. GEN. ASSEMB., HOUSE PROCEEDINGS, vol. 36, pt. 14, at 4921–22 (1993).

¹⁷⁷ *Id.* at 1155, 4926.

¹⁷⁸ *Id.* at 4923.

¹⁷⁹ *Id.* at 4923–24.

¹⁸⁰ *Id.* at 4925.

¹⁸¹ Scalettar represented the 114th House district and served from 1993 to 1999. Jason Bagley, *Bio: Ellen Scalettar, Democratic Candidate for Woodbridge First Selectman*, BETHWOOD PATCH (Apr. 26, 2013, 2:00 AM), <https://patch.com/connecticut/bethwood/bio-ellen-scalettar-democratic-candidate-for-woodbrid322c917f43> [https://perma.cc/ATS8-94YZ].

¹⁸² The additional organizations included: People for the American Way, the American Civil Liberties Union, the Christian Legal Society, the Anti-Defamation League, the General Conference of Seventh Day Adventists, the Unitarian-Universalist Assembly, the American Jewish Congress, the

Jarjura spoke next, admitting that he was the only member of the House who opposed the bill. He first reiterated the concerns he expressed at the March 1 hearing, focusing once again on “fringe religions” and “bizarre conduct.”¹⁸⁴ The representative also argued that it would be better to wait for the federal government to take action because he believed the nation should speak with one voice on the matter.¹⁸⁵

Other members raised concerns about the ability of the state to intervene on behalf of children whose parents may want to refuse medical treatment on religious grounds or to provide for the guardianship of children.¹⁸⁶ Tulisano stated that the compelling interest standard protected children in the past and would continue to do so.¹⁸⁷ Additional questions were posed regarding the impact of the new law on the use of wine in religious services,¹⁸⁸ labor-employer negotiations,¹⁸⁹ drug laws,¹⁹⁰ parade restrictions and permits,¹⁹¹ time, place, and manner restrictions,¹⁹² and private-employer relations.¹⁹³ In each instance, a supporter of the bill responded with reassurances and explained why the new bill does not present problems in each of the areas mentioned. As the debate moved toward its end, Representative Dale W. Radcliffe¹⁹⁴ again expressed the fear, shared by Jarjura, that the new law would protect bizarre conduct.¹⁹⁵ Tulisano responded by simply stating that it is hard to define “bizarre” conduct which is, in the final analysis, subjective.¹⁹⁶ The debate concluded uneventfully, culminating in an overwhelming victory for supporters of the bill: 147 members voted in favor of the bill, 1 voted no, and 3 were absent or did not vote.¹⁹⁷ Given the ardor of the supporters of the bill and their sense that Connecticut had taken a significant step by passing a law

Lutheran Church, and the Missouri Synod. CONN. GEN. ASSEMBLY, HOUSE PROCEEDINGS, H-663, vol. 36, pt. 14, at 4921–22, 4926 (1993).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 4927.

¹⁸⁵ *Id.* at 4927–28.

¹⁸⁶ *Id.* at 4929–30.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 4931–32.

¹⁸⁹ *Id.* at 4933.

¹⁹⁰ *Id.* at 4935.

¹⁹¹ *Id.* at 4936–37.

¹⁹² *Id.* at 4938.

¹⁹³ *Id.* at 4939.

¹⁹⁴ Radcliff was from the 23rd district and served in the House from 1988 to 96. Matthew Daly, *Hard-liner Chosen for Superior Court*, HARTFORD COURANT (Sept. 17, 1996), http://articles.courant.com/1996-09-17/news/9609170197_1_superior-court-judge-house-floor [<https://perma.cc/H5QU-2XWJ>].

¹⁹⁵ CONN. GEN. ASSEMB., HOUSE PROCEEDINGS 1993, vol. 36, part 14, at 4941 (1993).

¹⁹⁶ *Id.* at 4942.

¹⁹⁷ *Id.* at 4944.

broadly protecting religious freedom, it is remarkable that the public remained unaware of such an important piece of legislation.

C. *Senate Action on the Bill*

The Senate voted on the religious freedom bill on May 27, 1993.¹⁹⁸ At the outset, Jepsen endorsed the bill, which had been amended to specify that the intention of the legislation “is limited to the issue of the free exercise of religion” and does not implicate the establishment clause.¹⁹⁹ In other words, in response to questions raised in the public hearing and House debate, the bill had been amended to stipulate that the state would continue to provide subsidies to religious organizations or schools, such as bus services.²⁰⁰ One member sought confirmation that all relevant parties had been consulted in the writing of the amendment, and Jepsen responded affirmatively.²⁰¹ Another member asked whether criminal actions would be protected under the new law, and Jepsen requested that discussion of the question be deferred until the amendment was adopted.²⁰² The Senate then voted to adopt the amendment and began debate on the new version of the bill.²⁰³

Jepsen next led his colleagues through a brief history of the high standard of review that protected religious freedom until the *Smith* decision in 1989.²⁰⁴ He explained how the Court’s decision diminished religious free exercise protections, in effect making “the free exercise clause of our Constitution null and void.”²⁰⁵ Returning to the issue of criminal conduct, the senator insisted “the compelling interest standard leaves plenty of room to rule invalid the more extreme forms of religious practice . . . while protecting the legitimate exercise of religion.”²⁰⁶ Although no senator asked a question on the topic, Jepsen also stipulated that the law is not meant to address the thorny matter of abortion rights.²⁰⁷ He made clear that “nothing in this law . . . is intended to expand or diminish or in any way affect abortion rights as they may exist in this state or any rights to choose or any issues affecting funding”²⁰⁸ Discovering a text he had intended to read into the record, Jepsen then continued his discussion of the abortion

¹⁹⁸ CONN. GEN. ASSEMB., SENATE PROCEEDINGS 1993, vol. 36, part 8, at 2779–80 (1993).

¹⁹⁹ *Id.* at 2776.

²⁰⁰ *Id.* at 2775–76.

²⁰¹ *Id.* at 2777.

²⁰² *Id.* at 2779.

²⁰³ *Id.* at 2779.

²⁰⁴ *Id.* at 2780.

²⁰⁵ *Id.* at 2782.

²⁰⁶ *Id.* at 2783.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 2783.

issue.²⁰⁹ He noted that some have suggested that if *Roe v. Wade*²¹⁰ were reversed, the new law could be used to overturn restrictions on abortion.²¹¹ Unpersuaded by this argument, the senator stated: “[T]his bill does not expand contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court’s free exercise[] jurisprudence under the compelling interest prior to the Smith case.”²¹² No further questions were raised and the bill passed by a vote of thirty-six to zero.²¹³

D. *Final Action on the Bill*

Two weeks after the Senate unanimously voted to pass the religious freedom bill, on June 1, 1993, the House also voted to approve H.B. 5645.²¹⁴ Tulisano indicated that the amendment satisfied his wish to make crystal clear that nothing in the new legislation would affect “the establishment clause . . . and it would not in any way [a]ffect any funding or benefits given to religiously oriented groups.”²¹⁵ Immediately following his statement, the House voted.²¹⁶ The final tally was 141 in favor of the bill, 1 opposed, and 9 either absent or not voting.²¹⁷ On June 29, 1993, Governor Lowell Weicker, Jr. signed the bill into law,²¹⁸ an event that was not covered by the local press.

CONCLUSION

A review of the legislative history of Connecticut’s Religious Freedom Act of 1993 reveals that the decision to support the nation’s first state religious freedom law was relatively easy for most state legislators. Witness testimony and exchanges among the legislators in the Connecticut House and Senate supports then-Senator Jepsen’s sense that, for the most part, the new law was uncontroversial. While the legislative debate in both 1991 and 1993 was robust, and there were important disagreements among the participants, the overwhelming majority of those who contributed to the discussions, fully and unequivocally, supported the bill and endorsed its passage. The only significant stakeholder to oppose the legislation in both 1991 and 1993 was the CCC, whose position in opposition seems surprising today. It is important to remember that, at the time, the Church

²⁰⁹ *Id.* at 2784–85.

²¹⁰ 410 U.S. 113, *reh. denied*, 410 U.S. 959 (1973).

²¹¹ CONN. GEN. ASSEMB., SENATE PROCEEDINGS 1993, vol. 36, part 8, at 2785 (1993).

²¹² *Id.*

²¹³ *Id.* at 2900.

²¹⁴ CONN. GEN. ASSEMB., HOUSE PROCEEDINGS 1993, vol. 36, part 25, at 9069 (1993).

²¹⁵ *Id.* at 9068–69.

²¹⁶ *Id.*

²¹⁷ *Id.* at 9070.

²¹⁸ *Bill Status: H.B. 5645, Session Year 1993, supra* note 175.

was preoccupied with the abortion issue, especially in the wake of the U.S. Supreme Court's *Planned Parenthood v. Casey*²¹⁹ decision in 1992. While some Court watchers had expected the Court to overturn *Roe v. Wade*, the 5-4 plurality opinion explicitly affirmed a woman's right to choose to terminate a pregnancy,²²⁰ while more-restrictive state practices aimed at creating obstacles for women to access abortion were approved. As the earlier analysis of the USCC's written testimony at the time of the 1993 legislative hearing indicates, the Church regarded proposed state religious freedom laws, at both the state and federal levels, as a genuine threat to its agenda to ban abortion in America.²²¹

Another indicator of the lack of political controversy about the bill is the small number of potential stakeholders who contributed to the debate, either at the hearings or through written testimony submitted to the Judiciary Committee. Clearly, most religious organizations and other concerned groups did not expend time and resources to the passage of the bill. In 1991, in addition to the testimony of Perry Dunn, Michael Farris, and Stephen Mendleson at the March 18 hearing, the Judiciary Committee received only four submissions of written testimony. One was in opposition to the bill from the CCC and three were in support of the bill. Submissions were made by the Church of Psychiatry, the Christian Legal Society, and the American Coalition for Freedom of Connecticut.²²² Likewise, in 1993, the CCC testified at the March 1 hearing and also submitted copious written testimony in opposition to the bill before the state legislature. Two individual letters were also submitted in favor of the bill by individuals affiliated with the Connecticut Anti-Defamation League.²²³ This written testimony supplemented the testimony of the two participants at the 1993 hearing, King, representing the CCC, and Leikind of the Anti-Defamation League. What accounts for the lack of participation among potential stakeholders? One can fairly conclude that the legislation, which garnered so little public attention and was aimed at *restoring* broad religious freedom protections to believers and nonbelievers alike, was

²¹⁹ 505 U.S. 833 (1992).

²²⁰ *Roe v. Wade*, 410 U.S. 113, 153, *reh. denied*, 410 U.S. 959 (1973).

²²¹ See *supra* Part II.A.1.

²²² *An Act Concerning the Restoration of Religious Freedom: Hearing on H.B. 6699 Before the J. Comm. on the Judiciary*, 1991 Conn. Gen. Assemb., Reg. Sess. (Conn. 1991) (written testimony presented to the judiciary committee of Catherine Ludlum, Church of Psychiatry); *id.* (written testimony presented to the judiciary committee of Steven T. McFarland, Dir., Center for Law & Religious Freedom, Christian Legal Soc'y); *id.* (written testimony presented to the judiciary committee of Allan J. Ballinger, Exec. Dir., American Freedom Coalition of Conn.).

²²³ *An Act Concerning Religious Freedom: Hearing on H.B. 5645 Before the J. Comm. on the Judiciary*, 1993 Conn. Gen. Assemb., Reg. Sess. (Conn. 1993) (written testimony presented to the judiciary committee of Steve Shaw, Dir., Conn. Anti-Defamation League); *id.* (written testimony presented to the judiciary committee of David R. Schaefer, Chairman, Conn. Anti-Defamation League)

regarded as routine, necessary, and compatible with a normative set of deeply held values.

Although the issues of abortion and gay rights did arise briefly in the legislative debates taking place in early 1990s, attitudes about those matters did not prevent legislators from developing and passing a strong state religious freedom law. Indeed, the CCC was an outlier with respect to its consistent opposition to the state religious freedom bill, even after the USCC offered its late support of the federal bill in March of 1993.²²⁴ In 1993, Farris, who today leads his organization's efforts to challenge state antidiscrimination laws on first amendment grounds at the state and federal level, testified in support of the Connecticut religious freedom law. Indeed, he was the only participant to articulate concerns about the potential conflict between the rights of religious believers and the claims of gays and lesbians seeking protection against discrimination in public accommodations. Recognizing the potential conflicts, especially since Connecticut had just passed its own sexual orientation antidiscrimination law,²²⁵ he nevertheless responded to questions about these matters in a matter-of-fact way and did not express alarm. The political landscape has radically changed in the two decades since Connecticut passed both of these laws. The legislative history of the state's religious freedom bill provides an important context for understanding today's political polarization that has resulted in the inability of elected officials and judges at all levels of government to resolve these competing claims.

²²⁴ Press Release, United States Catholic Conference, In Support of the Draft "Religious Freedom Restoration Act" (Mar. 11, 1993) (on file with the Connecticut State Library).

²²⁵ CONN. GEN. STAT. §§ 41a-81a et seq; *see supra* note 75 and accompanying text.