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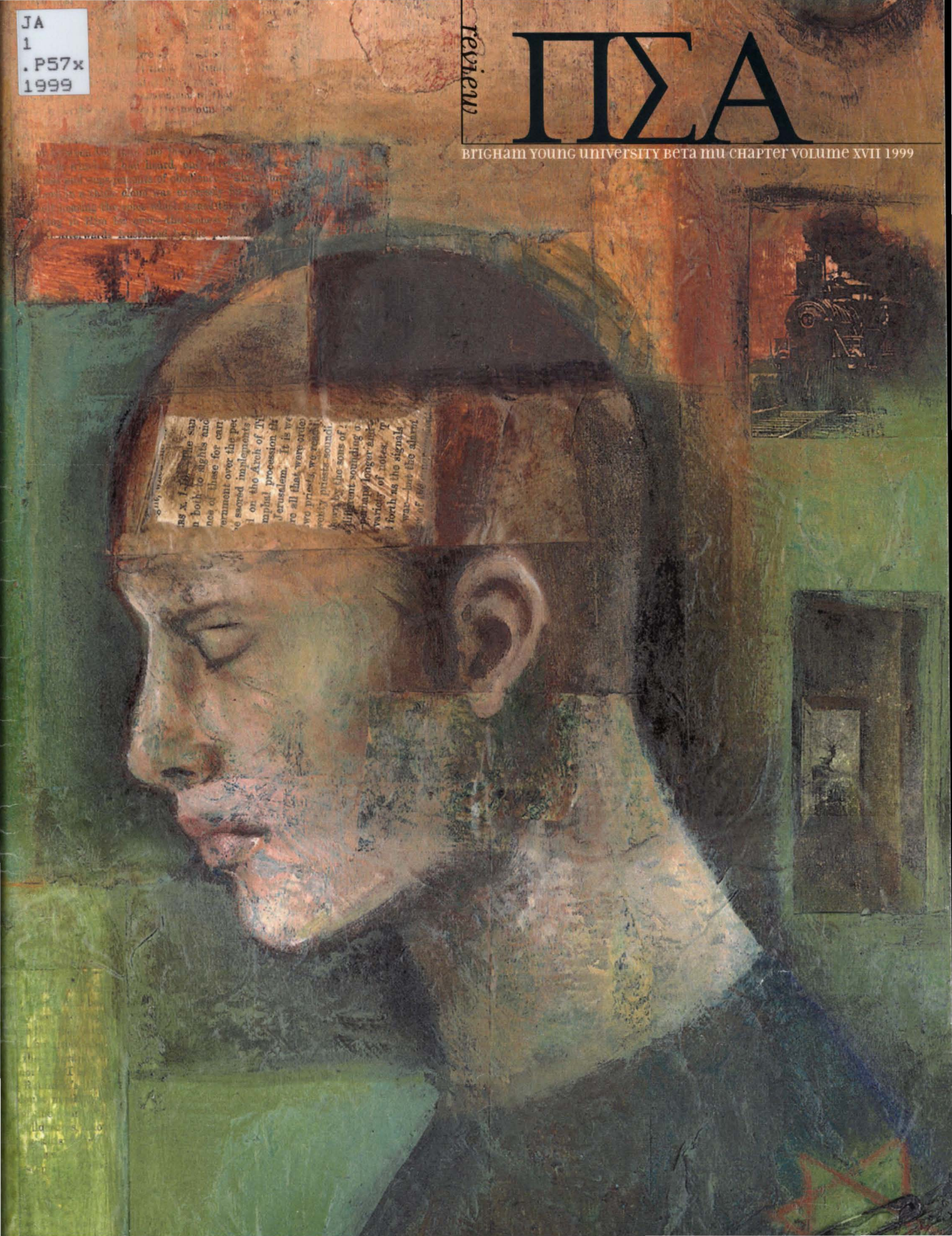
BRIGHAM YOUNG UNIVERSITY BETA MU CHAPTER VOLUME XVII 1999



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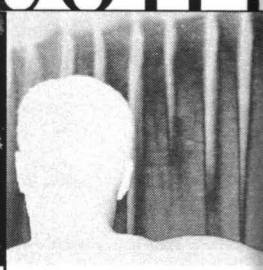

Stamps. Special Thanks to:

Dr. Ray Christensen, Dr. Eric Hyer, Dr. Byron Daynes,

The Political Science Department,

Kennedy Center, and General Education/Honors.

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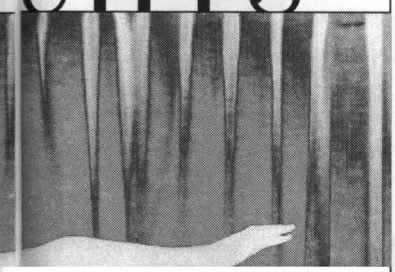
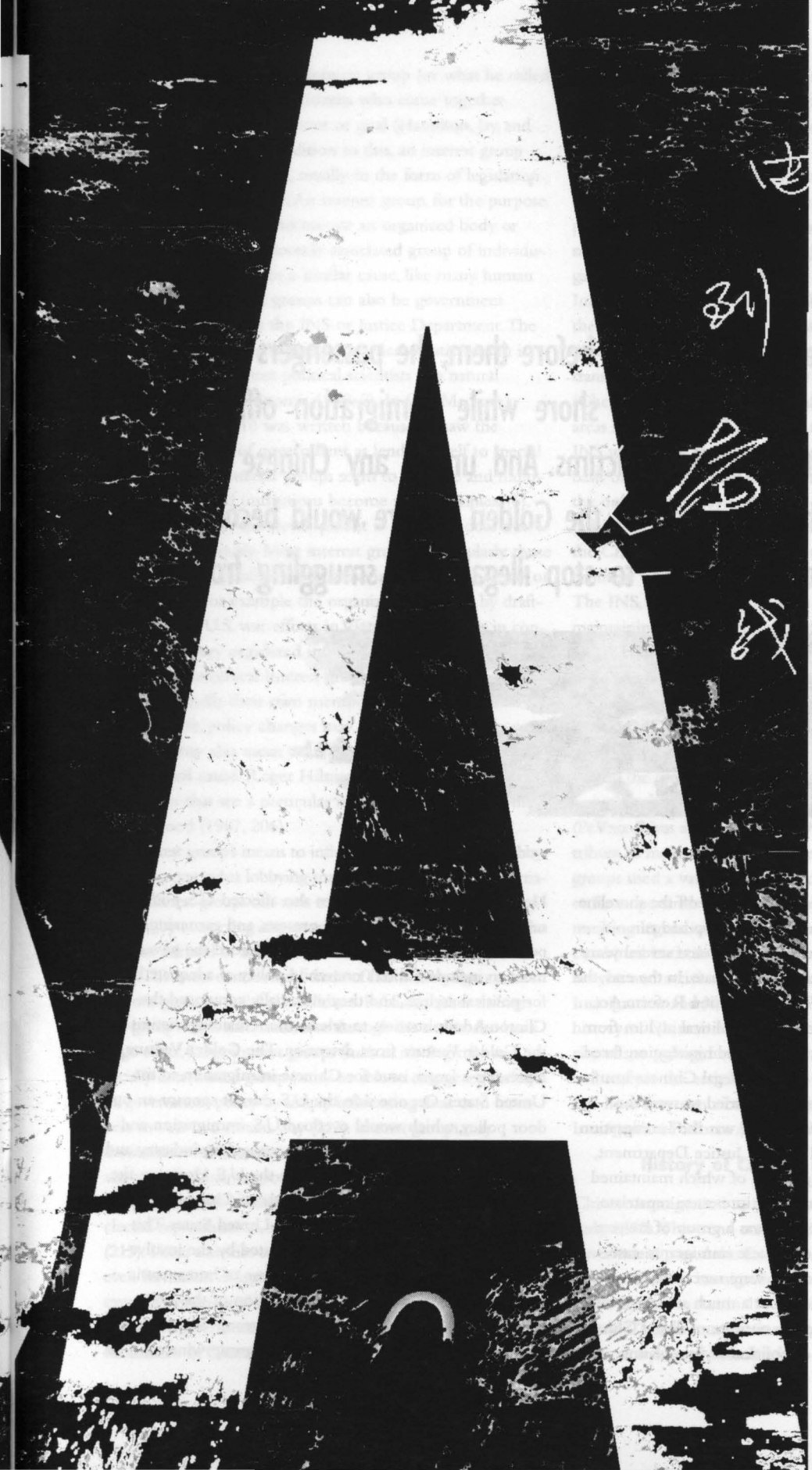




THE GOLDEN VENTURE AND AMERICAN IMMIGRATION LAWS

by Jennifer Riddle

Introduction

Unlike any Chinese alien before them, the passengers of the Golden Venture waited on the shore while immigration officials combed the water for more victims. And unlike any Chinese alien before them, the passengers of the Golden Venture would become Clinton's example—an effort to stop illegal alien smuggling from China.

Those that were rescued from the water just off the shoreline of Long Island, NY, after their smuggling ship had run aground on June 6, 1993, would spend the next several years in detention centers, stirring a national debate. In the end, the debate culminated into the 1996 Immigration Reform Act. The passengers claimed to be seeking political asylum from China's one-child policy. The Clinton Administration faced the task of deciding what to do with illegal Chinese immigrants. Two main sides developed and tried to sway the Administration in their favor. The first was the Immigration and Naturalization Service (INS), the Justice Department, and several members of Congress, all of which maintained that it was in the United States' best interest to repatriate the Chinese nationals. The second was a group of lawyers and activists who took up the Chinese immigrants' case. The INS and its fellow supporters were successful in prompting the government to adopt a much stricter immigration law in 1996, reducing the number of illegal Chinese immigrants and the number of political asylum claims.

However, human rights groups also affected U.S. policy by suing the government, staging protests, and garnering support in Congress as well. Their efforts forced the government to include China's one-child policy as adequate basis for political asylum, and they eventually convinced the Clinton Administration to release the remaining victims of the Golden Venture from detention. The Golden Venture represents a larger issue for Chinese immigration to the United States. On one side, the U.S. cannot sponsor an open door policy, which would overload U.S. immigration and asylum courts, as well as add to the smuggling industry and crime in Chinese neighborhoods in the U.S. However, the U.S. cannot ignore the human tragedy of Chinese immigrants seeking political refuge in the United States. This public policy issue is further complicated by the involvement of interest groups, making it a case of bureaucratic politics as well, as is seen in the formation of the 1996 Immigration Reform Act, where each group won some of their objectives, without one particular group winning it all.

Theoretical Framework

James Madison defined an interest group (or what he called a faction) as a number of citizens who come together because of a common interest or goal (Hamilton, Jay, and Madison 1787, 46). In addition to this, an interest group seeks government action, usually in the form of legislation that works in their favor. An interest group, for the purpose of this paper, does not necessitate an organized body or institution, but even a loosely associated group of individuals who are working for a similar cause, like many human rights groups. Interest groups can also be government bureaucracies, such as the INS or Justice Department. The development of interest groups in a democratic system is largely viewed by most political scientists as a natural process (Cigler and Loomis 1998, 2). In fact, Madison's Federalist Paper #10 was written because he saw the American system of government as lending itself to special interest groups. Interest groups seem to increase and multiply as society and institutions become more complex (6). However, though this development is natural, it does not occur spontaneously. Most interest groups, particularly those that emphasize public interest, arise in response to events or disturbances, for example the organized resistance by draft-aged men to U.S. war efforts in Vietnam (7). This is in contrast to the very organized interest groups, such as professional or economical interest groups, which seek legislation that will benefit their own members. In the groups discussed above, policy changes may benefit their own members, but may also mean a shift in favor of a certain ideology or moral cause. Roger Hilsman says that these are interest groups that see a particular moral issue as a part of the public good (1987, 206).

An interest group's means to influence usually comes by lobbying. However, what lobbying may imply has a range of alternatives. Interest groups can seek to influence government or legislation by contacting important actors in the government who may be a friend or a supporter of the group (Hilsman 1987, 212). The most controversial tactic of late is campaign contributions given to political candidates. Publicity, either through the group's own mechanisms or through the media, also has a large effect. Large interest groups (such as ideologically and racially determined groups) may be able to change legislation or government policy by simply influencing their own members to vote in a certain way (213). Interest groups may demonstrate or use violence (214). There are also some smaller activities that interest groups do on a regular basis; tracking legislation, submitting amici curiae briefs to courts, contacting elected representatives, and even filing their own law suits (215). These activities can result in the prevention, change, or even formation of legislation, the issuing or over-riding of executive orders, and court decisions—thus affecting every branch of government, if the group is successful.

In the case of Chinese immigration and the Golden Venture, the Board of Immigration Appeals ruled in 1989 that the one-child policy was not grounds for political asylum. However, President George Bush issued an executive order, over-ruling the Board. When the Golden Venture incident occurred, the Clinton Administration was in office. Most of the Chinese nationals who were on the smuggling ship assumed that Clinton would support Bush's ruling; however, Clinton referred back to the original 1989 decision in an effort to decrease asylum abuse and illegal smuggling (Mangaliman 1993, 45).

Interest groups started to formulate around this case when the Golden Venture grounded off the coastline of New York. After the passengers were secured on the beach, they were transported to jails, where many of them remained for years (Cheng 1997, A07). Lawyers and activists in the surrounding areas were spurred to action by this event arguing that the INS was wrong to put political refugees in jail. The main basis of their argument was the moral issue associated with the one-child policy and forced abortions. These individuals did not establish a cohesive organization in order to pursue the Chinese's case, but many of their tactics towards the government were the same as a formalized group.

The INS, whose main incentive is a bureaucratic interest in maintaining U.S. borders, argued against the Chinese immigrants because of the correlation between illegal alien smuggling and crime in U.S. cities. The immigrants who are smuggled into the U.S. have usually paid smugglers 20 to 30 thousand dollars. The Chinese are then forced into manual labor and servitude by those who loaned them the money. Women among the group are often forced to work as prostitutes. And sometimes, the smugglers use violence to exact their money (PeVrez-Rivas and Rashbaum 1993, 7). These violations contribute to massive crime in Chinese neighborhoods. Both groups used a variety of tactics common to interest groups in order to persuade the president into acting in their favor. The resulting legislation, the Immigration Reform Act of 1996, combined both the public movement by the human rights lawyers and activists and the internal influence of the Immigration and Naturalization Service. After discussing the history of Chinese immigration to the United States and the rise of smuggling, I will turn to the Golden Venture incident and analyze the activities of the competing interest groups and how they contributed to the formation of the Immigration Reform Act of 1996.

History of Chinese Immigration to the United States

Chinese immigration to the United States dates back to the early 1850s. This trend continued until 1882, when the U.S. government passed the Exclusion Act, a racially based restriction on Chinese immigration (Burdman 1993, A1). The reversal of the Exclusion Act in 1965 and other U.S. policy changes toward Chinese immigration occurred under the umbrella of political asylum as a result of the United States' growing policy

to give refuge to those fleeing communist oppression. "Asylum is the special refugee status given to all aliens who can show they have a well-founded fear of persecution in their native land" (Brown 1993, AS). In order to apply for political asylum, the individual would need to physically represent him or herself at one of the U.S. land border or port of entry sites. Immigration officers, along with the Attorney General, would decide whether the individual's case justified granting asylum (U.S. Congress, House 1993). The U.S. asylum policy included those who were fleeing for political reasons, but not for economic reasons (Freedman 1993, Al). Furthermore, the original asylum law, though it did include political oppression in the form of racial discrimination, religious persecution, etc., did not include persecution because of population control policies.

Bush Administration and Political Asylum

In the late 1980s, growing concern over China's recognition of human rights spurred U.S. leadership to change the limitations of the asylum policy, especially because of the 1979 decision of the Chinese government to enact the one-child policy. This law stipulated that Chinese families, because of the rising threat of over-population, would only be allowed one child. This was enforced through the local governments, who also encouraged community members to watch for policy violations. The one-child policy was also enforced through automatic sterilization and intrauterine devices (Olojede 1998, A4). During the Reagan and Bush Administrations, stories of pregnancy check sites—roadblocks set up by the Chinese police—forced abortions, including late term abortions, and other stories about destroyed homes and possessions and large fines, became prevalent in the U.S., receiving public and official response (Hood 1993, 12).

In addition to the one-child policy, China further ignored human rights in 1989 when the government used violent means to crush a student demonstration in Tiananmen Square. The event was viewed by much of the American public and again spurred U.S. leadership to react.

Congress argued for the U.S. to rebuke the Chinese for their actions. Both Democrats and Republicans in the House called on the Bush Administration to at least allow Chinese students and others (about 45,000) already in the U.S. to extend their visas—even if only on a temporary basis. The Chinese Immigration Relief Act of 1989, as it became known, gave non-immigrant status to Chinese nationals who were staying in the U.S. as students or visitors and even granted permanent resident status in some cases (U.S. Congress, Senate 1989). In addition to this, the U.S. would accept Chinese nationals who fled China after the Tiananmen Square incident. The legislation passed the House in a vote, 258 to 162 (Kenworthy 1989, A6).

Following this Act, President Bush issued an executive order in 1990 that not only reiterated the U.S. commitment to safe guarding Chinese students against persecution, but also anyone who might be fleeing their country's measures for population control. This allowed immigrants to cite the one-child policy as basis for political asylum (Gladwell and Stassen-Berger 1993, A3). Bush's executive order immediately resulted in an increase in Chinese immigration—worrying Immigration and Nationalization Service (INS) officials, especially because the order did not have a specific time limit where it would then be discontinued (Hood 1993, 12). The earliest results indicated 80 percent of Chinese immigrants claiming political asylum received it (Forney 1993, 3).

On a national level, asylum applications rose from approximately 30,000 a year in the 1980s to 150,000 a year in the 1990s (U.S. Congress, House 1996). The processing of asylum claims was held up by a backlog of more that 111,000 cases, meaning that it would take years for U.S. officials to catch up to the growing demand (Kamen 1991, Al). While immigrants waited for their asylum hearings, they were granted the right to counsel and given work permits—allowing them to stay in the country until their case was reviewed (Boston Globe 1993, A6). This allowed immigrants to file for asylum, receive their work permit, and then "disappear;" in fact, one report stated that less than half of Chinese asylum applicants in New York showed up for their hearings (Burdman 1993, Al).

Bush's decision was upheld by his supporters even after he lost the Presidency in 1992 to Bill Clinton. Buh's cabinet sponsored multiple memos on granting asylum on the basis of the one-child policy. These memos became influential in the handling of immigration cases, where judges even threw out cases before their hearings—granting asylum by simply writing "INS policy" on the bottom of the decision (Hood 1993, 12).

Illegal Alien Smuggling

Most officials argue that the majority of Chinese who enter the U.S. are not valid candidates for political asylum, rather they know that the immigration law and the current backlog of cases will promise them work permits, allowing them to remain in the U.S. One Chinese expert stated that it was "absurd to call these [Chinese immigrants] political refugees." Some are able to get tourist visas, but don't return upon the expiration of their legal stay. In order to avoid further deportation, many illegal immigrants are coached by smugglers to tell INS officials that they will kill themselves if they are returned to China (Burdman 1993, Al). These claims often result in at least work permits.

However, smugglers contribute the most to the problem of illegal immigration and asylum abuse. Smugglers are "organized crime rings that transport illegal aliens into the United States by land, sea, and air; alien smuggling both adds to the overall numbers of illegal aliens in the United States and increases the financial incentives for such trafficking to con-

tinue" (U.S. Congress, House 1996). U. S. officials estimate that illegal alien smuggling generates a $7 billion annual profit for the smugglers.

Immigration experts claim that there are 200,000 to 300,000 Chinese illegal immigrants (Olojede 1998, A4). The majority of them are peasants or uneducated workers (Schmetzer 1993, C19). Smuggling has become the prime industry particularly in Fujian province, where those who did succeed in gaining wealth in the U.S. return to build large homes and flaunt their new-found prestige (Branigin 1996, A3).

However, this picture of Chinese becoming wealthy in the U.S. is largely fictitious. In reality, the increased population of Chinese immigrants in cities like New York have forced Chinese to live together in squalor—one author described it as being packed in bunk beds, which are only available to sleep on in shifts (Hood 1993, 12).

Methods Used in Smuggling

Smugglers have used various routes to transport illegal immigrants, including routes through South and Central America, where the immigrants are able to get false American or Canadian visas (DeStefano 1991, 8). Sometimes smugglers will travel across the Atlantic in order to reach New York, stopping in various African countries to regroup and collect more immigrants (Suro 1994, A1).

The most common method before 1993 was by boat. Immigration officials indicate that as many as 100,000 Chinese have been smuggled into the U.S. via boat (Kamen 1993, A1). The U.S. became aware of this in 1991 when a boat carrying 132 illegal aliens from China was spotted off the coast of Los Angeles (Treaster 1993, A1).

Officials believe that businesses and contacts in Chinatown provide the smugglers with the false identification that they need. Various gangs in New York's Chinatown that are thought to have engaged in alien smuggling, including the Fukien American Association (Hood 1993, 12) and the so-called "White Tigers" (Suro 1994, A1). These organizations, or others, use individuals called snakeheads to recruit illegal immigrants and to collect the money for the passage.

Typically, the prospective alien would pay $3,000 to $5,000 to get a local coordinator for the passage—usually to transfer the person to Hong Kong or Thailand. The smugglers' fee is $35,000 to $50,000, which one report claims only $10,000 actual pays for the trip itself (Kamen 1991, A1). As a down payment, the Chinese will pay around $1,500, which used to be higher but was driven down by the immense competition in the smuggling business (Kleinfield 1993, A1). The immigrants are expected to repay the snakeheads once they reach the U.S., even if they are detained in jail or deported to China. Most of the immigrants are taken to Chinatown, where they are overseen by the smuggling organizations (Gladwell and Stassen-Berger 1993, A3). They will in effect become indentured servants, working to pay off their loans for the passage. They live in quarters provided by their employer, which are often set up by the smugglers themselves (Kleinfield 1993, A1). They typically work in sweatshops, restaurants, or laundries. And everything is controlled by the snakeheads, even the immigrants' food source. Obviously, this is an added incentive for the aliens to turn to crime themselves so that they will be able to survive the pressure of the smugglers (Kamen 1991, A1). One group of 23 Chinese men, who were arrested for beating up another man, were identified as being new immigrants who had already joined the smuggler's gang (Kamen 1991, A1). It is also not unusual for the immigrants to make around two dollars an hour and work for twelve to fourteen hours a day. Some of the immigrants are forced into drug smuggling or prostitution (Kleinfield 1993, A1). And the wages are getting worse. As smuggling has become more prevalent and more immigrants have moved into Chinatown, employers are able to pay less for the labor, especially in cities like New York and San Francisco, where the smuggling is the highest (Hood 1993, 12).

When the new aliens cannot make their payments, the snakeheads often use torture and scare tactics in order to secure their money. There have been several cases of kidnappings, some which included burnings with cigarettes (DeStefano 1991, 8). One Chinese alien was kidnapped at gunpoint from his apartment, after which he was beaten with a hammer—breaking several of his ribs (Kleinfield 1993, A1). In addition to this, there have been house burnings and shooting. Obviously, smuggling has contributed to crime in Chinese communities, but particularly in New York's Chinatown, where most of the incidents discussed above took place.

U.S. Reaction to Immigration

The increase in Chinese immigration and the simultaneous increase in crime have led many Americans to be more adamant about stopping immigration and Chinese immigration in particular. As recorded in opinion polls around the height of the smuggling, most Americans agreed that illegal immigrants were an extra burden on the U.S. state and welfare program. One U.S. representative, Lamar Smith, stated that "illegal aliens take jobs, public benefits, and engage in criminal activity" (Roddy 1998, B1). Some members of Congress started arguing for a stronger immigration law (Orlando Sentinel 1994, A5). The Chinese government accused the U.S. of encouraging illegal immigration by having a liberal asylum law. And when U.S. officials demanded that China control its borders and stop smuggling, they responded by saying that the U.S. should first improve its immigration law (Forney 1993, 3). It seems that the U.S. will have to be the one who stops the immigration. China was once very effective in controlling its borders, especially during the Moaist era, but with international demands for human rights and the increasing mobility of their people, China would most likely offend human rights organizations in order to deter further smuggling.

Immigration officials indicate that as many as 100,000 Chinese have been smuggled into the U.S. via boat.

The Golden Venture

The Golden Venture was the 24th ship carrying Chinese immigrants between 1992 and June of 1993. Each passenger was charged $30,000 for the passage that started in Bangkok. After sailing to Mombasa, Kenya, where the ship picked up another 199 Chinese, the ship started across the Atlantic (Gladwell and Stassen-Berger 1993, A3). Later reports of the voyage indicated that the conditions were wretched, with the entire group of immigrants being forced to stay on the lower deck, where it became very hot and stifling. There was little available food or fresh water (Freedman 1993, Al). As they approached the New York shore, two smaller boats were expected to come relieve the ship of its cargo, but when they failed to arrive, the immigrants mutinied. One of the Chinese immigrants gained control of the ship and started maneuvering it closer to the shore; however, the ship ran aground off Jacob Riis Park (Gladwell and Stassen-Berger 1993, A3). Many of the immigrants jumped into the water and started swimming for the shoreline. Ten of them died, while the rest were brought up onto the shore by immigration officials (Freedman 1993, Al). Ninety percent of the passengers claimed political asylum, mostly on the grounds that either themselves or their wives had been discriminated against because of the one-child policy—some of them claiming to have had forced abortions (Katz 1994, A20). However, immigration officials suggested that they needed to make an example out of the aliens in order to prevent the problem from growing (Gladwell and Stassen-Berger 1993, A3). So, starting with the Golden Venture, Clinton "ordered a crackdown on immigrant smuggling," beginning a new U.S. policy to combat the organized smugglers and rampant illegal immigration to the U.S. (Freedman 1993, Al).

The immigrants were sent to detention centers in New York, Pennsylvania, and Virginia (Arnold 1993, A24). Many of the immigrants were not allowed bail because of "exclusion proceedings," meaning that because they were still 200 yards off the shore line, the U.S. could detain them in jail indefinitely without bail until they can be sent back to their home country (Dillow 1996, A27). The women on board were taken by the Red Cross, where they were examined and questioned by immigration officials. All of the women claimed persecution from China's population laws. Several of them even had ample evidence of such persecution, but again, they were transferred to detention centers (Dillow 1996, A27). The crewmembers, including the Indonesian captain, were charged with conspiracy to transport aliens illegally into the United States (Gladwell and Stassen-Berger 1993, A3). And officials said that the rest of the immigrants could remain in jail for several months, if not years, until their cases could be heard in order to determine political asylum.

However, even though the Clinton Administration was recognized for taking a hard stand on immigrant smuggling, immigration officials quickly discovered that the costs of keeping the ship for investigation was $125,000 (Burdman 1993, Al). Furthermore, the detention of the immigrants each cost approximately $65 a day, or $24,000 a year, until their cases would finally be heard (Arnold 1993, A24). Only a new immigration law could offer a permanent solution.

Rethinking Immigration Laws Li Huan, China's deputy director for border defense said that America's law allowed immigrants, as soon as they landed on U.S. soil, to claim political asylum encouraging illegal smuggling (Schmetzer 1993, C 19). Furthermore, the law allows the aliens work permits in the mean time, which is also supporting the criminal element by enabling the snakeheads to place illegal aliens into near servitude situations.

The Clinton Administration stated that Bush's policy was being misused by the Chinese nationals and needed to be changed (Freedman 1993, Al). However, the U.S. was ill equipped to take on a more forceful policy. The Coast Guard was really the U.S's only enforcement, and even then, their strategies were largely limited to patrolling coastal waters (Treaster 1993, Al). Therefore, the U.S. had to attempt different methods. One included cooperating with the Chinese government to advertise the dangers that awaited illegal aliens. The Chinese government hung posters and showed television programs made by the U.S. Information Agency, both of which threatened Chinese to not attempt immigration showing the immigrants from the Golden Venture being jailed (Kamen 1993, Al). The Chinese government also contributed by arresting those suspected in smuggling operations, giving them prison sentences up to five years (Forney 1993, 3).

The U.S. also started making small procedural changes to their asylum and immigration laws. First, they stated that those immigrants who had already been in the country for thirty days could no longer apply for asylum (Brown 1993, AS). President Clinton also announced that there would be a higher standard of proof regarding the granting of asylum, stating that there would have to be substantial evidence that the person faced eminent persecution in their home country (Levy 1993, Al 9). And in the case of those claiming asylum for their country's population control, they would have to prove that they had been selectively forced to be sterilized or have an abortion (Katz 1994, A20). The U.S. also tried to divert illegal aliens elsewhere so that they would not land on U.S. soil, therefore avoiding asylum claims being made in the first place. For example, the U.S. persuaded Mexico to allow the immigrants to land on its shores instead of the U.S. (Tell 1993, 18). The National Security Council also permitted the use of wiretaps, and conspiracy and forfeiture laws to seize money and property obtained through smuggling, thus dissuading the Chinese crime organizations in the U.S. The maximum prison sentence for illegal alien smuggling was also

increased from five years to ten. Clinton said that all of this was meant to send a clear message to smugglers and potential illegal immigrants (Suro 1994, A1).

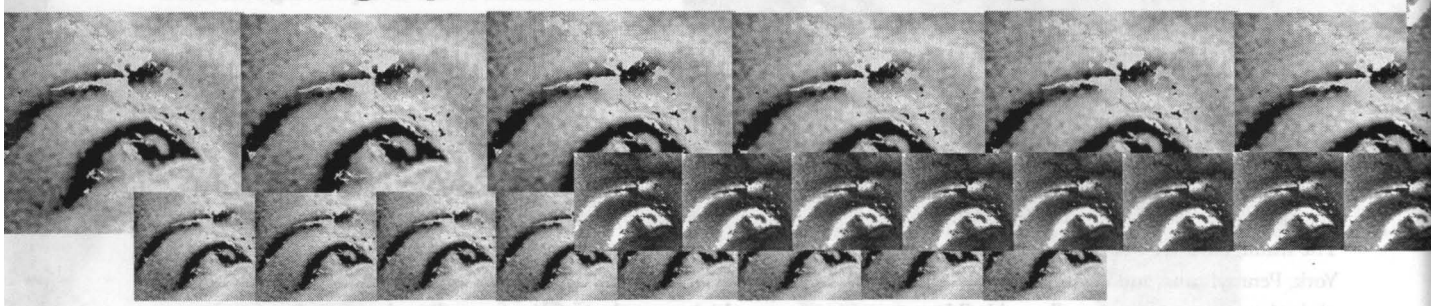
Stricter measures were taken with other ships that followed the Golden Venture. Immigrants from more than a dozen ships were detained or deported. One ship, named Oops II, was beached during heavy fog; all those aboard were arrested (Olojede 1998, A4). Another ship, leaving from Honduras with 524 Chinese, was intercepted by U.S. officials, and all the would-be immigrants were diverted back towards China (Hood 1993, 12). U.S. officials off the coast of Mexico went as far as to ignore advice from the United Nations workers, when they stopped a ship carrying 659 Chinese. The U.N. workers determined that approximately 58 of the passengers had legitimate asylum claims, but the U.S. only accepted one for a hearing (Beck 1993, 5). U.S. courts also started prosecuting smugglers (Burdman 1993, A1).

There was some question over whether these new procedures could prevent legitimate refugees from reaching the U.S.; however, this concern was largely overlooked by many members of Congress as several of them started introducing and supporting various reform laws (Arnold 1993, A24). One representative from Kentucky, Romano Mazzoli, joined both a Democrat from New York and a Republican from Florida in proposing new legislation aimed at stopping illegal aliens from using political asylum (Brown 1993, A5). Senator Alan Simpson favored a similar proposal, sponsoring a bill that would prevent foreigners without proper travel documents from claiming political asylum (Burdman 1993, A1). Californian Republicans, Robert Dornan and Dana Rohrabacher, wanted to remove population control as being grounds for asylum all together (Dillow 1996, A27). Another Congressman from Arizona, Bob Stump, supported overhauling the entire system, proposing the Immigration Moratorium Act of 1994 (Ling-Ling 1994, C3). In the end, the actions of the INS and various Congress members resulted in a new Immigration Reform Act in 1996 based on the changes made from 1993 to 1995 and on further reforms.

Immigration Reform Act of 1996

Citing the Golden Venture as the event that prompted new immigration reforms, the 1996 Immigration Reform Act states that the U.S. must reassert its own sovereignty over its borders. As a result, INS was granted more patrol agents, specifically an annual increase of 1,000 until the end of the twentieth century, enhanced training procedures, and new technology to track illegal immigrants (U.S. Congress, House 1996). Also, the initiative granted immigration officials more authority in dealing with illegal aliens, doubling the penalties for smuggling ventures, expanding asset seizures, and other strategies for handling organized crime. A pre-inspection system was also started at various high volume airports around the world. U.S. officials would inspect visas and other documents in order to exclude fraudulent cases. If found, these individuals were turned away from boarding the aircraft (The White House 1993a). By 1997, the U.S. Operation Global Reach, as it became known, opened thirteen inspection sites like these in China, South America, and Africa (Bass and McDonnell 1997, A14). When illegal aliens did succeed in reaching the U.S., if their asylum claim was quickly determined to be fraudulent, then the expedited exclusion legislation allowed the U.S. to deport them back to their native country quickly (The White House 1993b). To deal with asylum claims, the number of asylum officers was increased by 100 percent (U.S. Congress, House 1998). Also, to alleviate the lack of detention space, Congress authorized the use of closed military bases for those waiting for asylum hearings or repatriation (U.S. Congress, House 1993).

One activist said that the obstinacy of the INS i they were merely trying to [guard] their own sovereignty, at expense of human rights



Effect of Immigration Reforms

The 1996 Act also cited that there had been a fifty percent drop in the number of asylum applications following the Golden Venture incident (U.S. Congress, House 1996). U.S. officials concluded that it is a combination of these stories about "ill-fated" ships, increased INS enforcement, and cooperation with the Chinese government that has prompted the decline (Kamen 1993, A1). In fact, only one known smuggling ship landed in the year following the Golden Venture, a ship that dropped off 110 aliens on a beach in Virginia. Most of these immigrants were found in a raid and were arrested by immigration forces (Suro 1994, A1).

Even with the renovated immigration force, smuggling still remains an option to Chinese who want to flee economic and political oppression (Cheng 1997, A4). However, regardless of this, the problem of illegal alien smuggling has diminished. But there are other arguments, like those coming from immigration rights groups and other interest groups, which say that the new immigration laws are rejecting legitimate asylum cases, especially those fleeing China's population controls.

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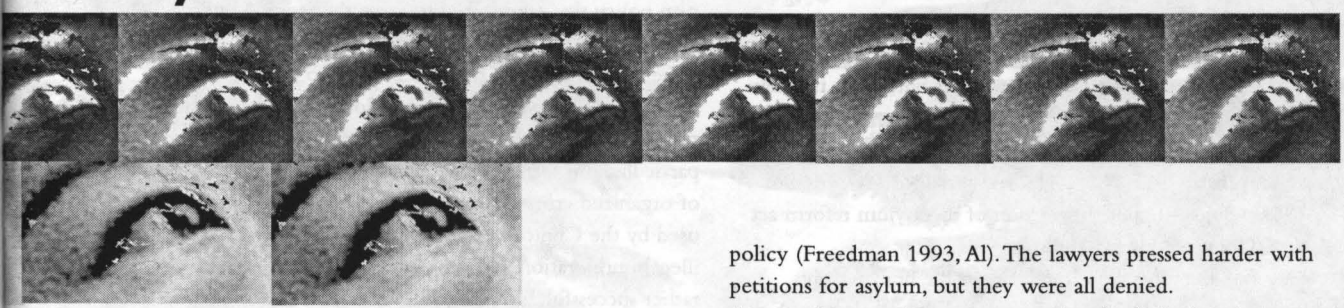

Immigration Activists and Immigration Reform

The Golden Venture incident, having been the incentive for immigration reforms, was also successful in provoking attention from human rights groups, anti-abortion groups, and other activists. This support was particularly bolstered when the INS detained the immigrants from the Golden Venture in prisons along the East Coast. Immigration lawyers started offering their services to the Chinese, and several held meetings in the community. Lawyers and other groups, including religious groups like the Quakers and even the Catholic Church, started protesting on behalf of the Chinese immigrants. One paralegal in New York quit her job in order to work on the immigrants' cases full time (Cheng 1997, 07). Several of the lawyers prepared appeals for the Chinese' asylum claims. And many worked to raise money by selling artwork that the immigrants did both on the ship and in jail. One effort raised $150,000 (Katz 1997, R21).

However, when one group of lawyers arrived at a detention center in New York, they were turned away by officials, refusing to allow the lawyers access to the Chinese. The officials at the detention center justified their actions by stating that it is up to the immigrants to get their own lawyers, but that the detention center was not available for "lawyers to solicit" business. The immigration lawyers retaliated further by suggesting that the INS was refusing the immigrants the right to counsel, as guaranteed in the 1980 Asylum Law (Lin 1993, 6). Furthermore, the immigration lawyers recognized that the government agents processing the asylum claims were chosen with the idea of decreasing smuggling, which immediately set them against the Chinese immigrants. And the INS, who oversaw the entire operation, was particularly impatient with asylum claims based on China's one-child policy (Hood 1993, 12). Therefore, the lawyers decided to file suit against the government, claiming that the INS was violating the 1980 Asylum Law, which allowed for access to counsel, and the subsequent executive orders that provided political asylum based on the one-child policy (Freedman 1993, A1). The lawyers pressed harder with petitions for asylum, but they were all denied.

As more human rights groups got involved, the immigrants themselves started to protest. One group of women inmates engaged in a hunger strike. They claimed that they had fled China because of the one-child policy and thought that a hunger strike might gain them attention and more support. However, the U.S. government largely resisted reaction to the hunger protest. Eventually, the health of the women was questionable and the protest was abandoned, though it lasted for more than three weeks (Katz 1994, A20). One activist said that the obstinacy of the INS in respect to the Chinese immigrants showed that they were merely trying to "[guard] their own territory and their own sovereignty, at the expense of human rights" (Maynard 1998). Acting on behalf of the women, the Vatican arranged for nine of the immigrants to be transferred to Ecuador. At this point, many of the groups started protesting and lobbying the government and Congress members (Katz 1997, R2 1). Anti-abortion groups and others opposed to China's population laws lobbied the

government to make it easier for Chinese immigrants to receive political asylum. And as the 1996 reform was drafted, these groups also criticized the government, saying that the bill would deny sanctuary to legitimate refugees. They were successful in gaining some support in Congress. Congressman Henry Hyde from Illinois and Chris Smith from New Jersey wrote letters to both the Justice Department and the State Department for sending back refugees to China, who were then "re-educated" by the Chinese government. Also, Rep. Smith argued that most of the immigrants were fleeing China's one-child policy (Maynard 1998). The Clinton Administration responded by stating that the Chinese immigrants could get asylum if they could prove that they "faced persecution based on coercive family planning policies." However, the result of this announcement was not what the activist groups had hoped for, being that only one received asylum. Following this, Rep. Smith introduced legislation that considered forced abortions and sterilizations grounds for political asylum, independent of Bush's executive orders but under the new 1996 reforms (Katz 1994, A20). The law was finally changed in 1997, allowing population control as a basis for political asylum (Katz 1997, R21). The law provided for a total of 1,000 refugees under this section of the asylum reform act (U.S. Congress, House 1996).

However, the most significant win for the human rights groups came in 1997, when President Clinton, reacting to the relentless lobbying, released the remaining victims of the Golden Venture (Katz 1997, R21). Clinton granted them "safe haven," being that they were fleeing China's one-child policy. Only 53 remained from the original 300, but it still represented a significant number (The White House 1997). This marked a serious switch in the Clinton Administration, who had decided to take a hard line with illegal immigration. This latest act worried some that it would again promote smuggling and crime, but the lawyers who worked with the Chinese stated that they would stay close to them and help them to become settled in the U.S. without having to turn to crime.

Conclusion

Though the INS and the Justice Department were the larger winners in the 1996 Reform Act, receiving harsher penalties for illegal alien smugglers and better enforcement power, the interest groups that became involved in the plight of the Golden Venture immigrants were still successful in guaranteeing the right of Chinese immigrants to claim political asylum based on China's one-child policy. Furthermore, these activist groups were successful in making the Clinton Administration reverse its policies toward the Golden Venture immigrants, by eventually setting them free from detention. Before the Golden Venture, American immigration policy was engineered to serve the purposes of the Cold War, to protect the U.S. relationship with China at the same time as opening the U.S. borders to those fleeing the oppressive Chinese government. However, these generous policies were largely abused, creating a national dilemma, particularly in terms of violence and the increasing existence of organized crime groups. The Golden Venture incident was used by the Clinton Administration as an example to curb illegal immigration and smuggling actions. This tactic was rather successful, though it sparked a debate within the U.S. as to whether harsher immigration policies could hurt the cases of legitimate refugees, as the activist groups behind the Golden Venture argued. The 1996 law, which reformed the immigration policies of the Eighties and the Bush Administration, eventually included the arguments of these interest groups, illustrating the influence of interest group politics on the making of foreign policy.

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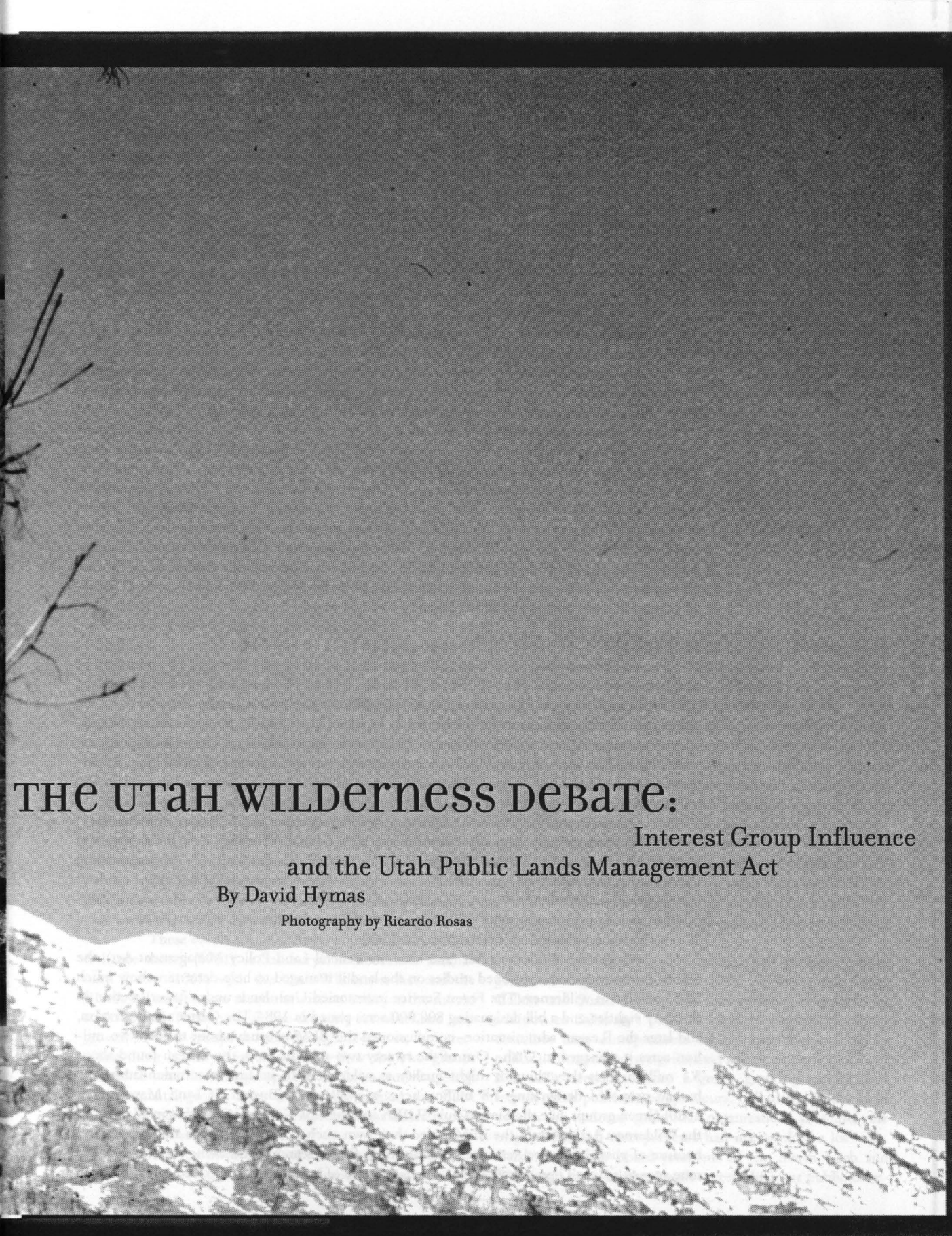

The Utah Wilderness Debate:

Interest Group Influence and the Utah Public Lands Management Act

By David Hymas

Photography by Ricardo Rosas

Introduction

Wilderness designation has long been a thorny issue in Utah. Nowhere is this more true than in the debate over wilderness designation on land controlled by the Bureau of Land Management (BLM) in Utah. "Of the 54,344,423 acres in Utah 21.8 percent is privately owned, state agencies control 10.5 percent and federal agencies control 63.4 percent" (Woolf 1996, A1). Of the 63.4 percent, 41 percent is managed by the BLM. As a result, Utah finds itself caught between the interests of the state and the federal government.

While the issue has had a long history in Utah, it came to a head in 1995 with Rep. James Hansen's (R, UT) Utah Public Lands Management Act (H.R. 1745). The bill looked to have an easy road to passage as Hansen had just become chairman of the House Subcommittee on National Parks, Forests, and Lands, and the newly elected Republican 104th Congress focused on an admittedly less stringent environmental agenda. Yet, despite an easy ride through the subcommittee, Hansen pulled the bill from a full floor vote because it lacked votes. Its Senate counterpart, S. 884, was brought down by a filibuster from Sen. Bill Bradley (D, NJ). Given the initial support for the bill and the Republican majority this outcome was curious. Indeed, the debate over the fate of some obscure redrock areas in Utah became one of the biggest environmental debates of the 104th Congress. This paper will seek to explain how environmental groups achieved this victory. More specifically, it will explore the relationship between the bill's defeat and strategies used by the Utah Wilderness Coalition (UWC) and the Southern Utah Wilderness Alliance (SUWA). It will look at the history of the bill and wilderness in general, the origins of these groups, and strategies they used to defeat HR 1745. Finally, it will build a theoretical framework around their origins and strategies and how they relate.

History of Wilderness Designation

Wilderness designation began as a government policy in the 1920s with the Forest Service designating some forest lands as wilderness. Wilderness received Congressional protection with the passage of the Wilderness Preservation Act of 1964. The act stated "it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness" (Wilderness Preservation Act 1964). It originally set aside nine million acres of federal land as wilderness and outlined a system whereby more wilderness could be added. Since the act's passage, the federal government has designated more than 100 million acres as wilderness areas (about 4 percent of the nation's land) (Hamilton 1994, 47).

According to the act, land qualified as wilderness under the following conditions: (1) the land "appears to have been affected primarily by the forces of nature with the imprints of man's work substantially unnoticeable" [essentially meaning it is roadless]; (2) "has outstanding opportunities for solitude or a primitive and unconfined type of recreation"; (3) it must be at least 5,000 acres in size (4) there are areas of "ecological, geological, or other features of scientific, educational, scenic, or historical value"; (5) there is a possibility that the land will return to a natural state if left alone (Wilderness Preservation Act 1964).

Under the Wilderness Act (and later the Federal Land Policy Management Act), the federal government commissioned studies on the land it managed to help determine how much land qualified as wilderness. The Forest Service inventoried Utah lands under its jurisdiction in the early eighties, and a bill designating 800,000 acres passed in 1984. The Carter administration, and later the Reagan administration, commissioned the BLM to study about twenty-two million acres it managed in Utah. Out of the twenty two-million acres, the Bureau found about 3.1 million acres they thought might qualify as wilderness. In its final recommendation, the bureau proposed designating 1.8 million acres as wilderness (Bureau of Land Management 1980). Green groups, like the Sierra Club, SUWA and the UWC, complained that in addition to the Wilderness Act's criteria, the BLM added their own, such as excluding large amounts of land because of possible mineral resources, findings from field research teams being rewritten by the state agency, reduced opportunities for solitude because of lack of vegetation, and excluding land

because of periphery development next to roadless areas (Utah Wilderness Coalition 1990). The agency also excluded land with roads, while the environmental community wanted to extend wilderness boundaries around some of them. The BLM defended their inventory process as being in accordance with the Wilderness Act's guidelines, while conservationists said the process was flawed, leaving out many areas that should have qualified.

Wilderness designation hurts business interests more than other designations because no other policy has proved to have such a far reaching effect at stopping development. "National parks can be developed to accommodate motorists; wildlife refuges can be logged, or drilled, or ravaged by speedboats and snowmobiles; wild-river designation protects only narrow bands of habitat" (Hamilton 1994, 46). A wilderness designation, on the other hand, only allows visitors to use non-mechanical transportation, i.e., hiking, canoeing, horseback, etc. Thus, grazing can continue, for example, as long as ranchers do not use mechanical means of transportation.

This idea of protection is critical to understanding the issue in Utah and other states. Conservationists realize that the best way to keep land from being developed is to have it designated as wilderness. As a result, wilderness has become a kind of "holy grail" for green organizations. Moreover, once land is designated as wilderness, it takes another act of Congress to change it, which can be a difficult proposition.

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Formation, Strategies and Theoretical Framework

The Southern Utah Wilderness Alliance was formed partly in response to the 1984 Utah Wilderness Act, which designated wilderness in Forest Service lands. The founders of SUWA saw 800,000 acres as a paltry number and vowed to not allow the same thing happen on BLM land. The Utah Wilderness Coalition was formed to combat the BLM's inventory process. The UWC did not agree with the BLM's findings, so they completed their own inventory of Utah's public lands. After months of field checking, map making, and photographic documentation by a network of volunteers, the UWC proposed 5.1 million acres be set aside as wilderness (this later increased to 5.7 million).

These events would seem to point to Truman's disturbance theory (1951) or Salisbury's homoeostatic mechanism theory (1969) with the Utah Wilderness Act and the BLM's 1.8 million acre recommendation acting as the shocks to the system. Truman would see the early members and later growth of these groups as latent groups. However, the interesting thing in this situation was not how the two groups reacted to other interest groups, but to the executive agency. Environmental groups have traditionally argued the BLM favors grazing, mining, and other development interests over environmental interests.

This fact involves several iron triangles or power triads (McFarland 1992) that have developed over time. Outside of small uncoordinated efforts by national environmental groups like the Wilderness Society, previous to SUWA and the UWC there had not been any interest groups to form any kind of countervailing power in Utah. According to McFarland, these groups would give the BLM more autonomy to make decisions and be the power broker between business and environmental interests. Without countervailing power, the BLM only heard one side of issues on land it managed.

The BLM's favoritism to business and ranching interests also influenced the attitudes of early group founders and members. The experience of some of SUWA's early founders, most notably Clive Kincaid, greatly aided this process. The Wilderness Society had hired Kincaid to review the BLM's wilderness inventories in the four corners areas. He became so disgusted with the process, he and a small handful of others started SUWA to combat the BLM's efforts (Smith 1998, 6). While Salisbury would probably classify Kincaid as a political entrepreneur, it was some time before he began to receive large benefits from the exchange with early members (Salisbury 1969). Residents of Escalante burned him and other founders in effigy and used their pictures to sight in their rifles (Smith 1998). One could classify the early foundations of SUWA as a grassroots victim organization (GVOs), despite the perceived harm was to the environment, not the founders. Foreman would see Kincaid as a organizational entrepreneur because he had experienced the BLM's "threat" firsthand and organized a group to do combat it. Early leaders could use their anger and frustration with the BLM's "lack" of consideration for their views to drive the beginnings of SUWA. Foreman also differentiated between community based and condition based GVOs (1995, 33-53). SUWA is an example of a community based GVO because the group formed in the Southern Utah areas around the most intense conflict.

Early leaders were inexperienced, however, in grassroots organization, so in 1988 SUWA hired Brant Calkin and Susan Tixier. This fact presents an interesting addition to Salisbury's political entrepreneur theory, which describes how entrepreneurs set up organizations. When political entrepreneurs, e.g. Kincaid and other early founders, lack skills needed to keep a group growing rapidly, they recruit other political entrepreneurs. Calkin and Tixier were experts in national grassroots organization, strategies the original political entrepreneurs had not worked a lot with. Calkin had been board president of the Sierra Club and Tixier had been involved with several different public inter-

est causes. Calkin and Tixier took SUWA in a different direction as they began to branch out across the nation in search of members and patrons, rather than concentrating on Utahans. In their six years with the group, SUWA went from 1,000 to over 10,000 members. They also established a full-time presence in Washington to oversee Congress and the Administration. These strategies were to pay large dividends in future battles over H.R. 1745.

The UWC is also an interesting organization. Its administrative base is quite small because its early founders set it up as an umbrella organization to coordinate the activities of other green groups like the Sierra Club, Wilderness Society, Southern Utah Wilderness Alliance (SUWA) and others from behind the scenes. The UWC has grown to more than 35 member organizations, each of which is a tremendous asset because each brings established resources that the UWC can use in its campaigns. The UWC has focused on gaining Congressional support for their 5.7 million acre proposal. As Berry pointed out, the success of a coalition is more likely if it allows member organizations to claim credit for successes (1997, 194). The UWC has been effective at coordinating efforts without being seen in the public eye as much as member organizations.

In his essay on coalition formation, Kevin Hula pointed out several interesting ideas that seem to hold with the UWC (1995, 239-58). He divided members of coalitions into core groups, specialists (or players), and periphery members. Core groups are those groups forming strategy for the coalition, founders, and resource rich interest groups. Specialists are groups who want to shape specific policies within the broader context of larger policies. Periphery groups are those who join simply to be seen with the coalition.

In this case the Sierra Club, SUWA and even the UWC itself could be classified as core groups. Groups like the Wilderness Society would be specialists because they were more interested in the specific idea of wilderness, rather than the broader issue of other kinds of environmental protection within Utah. The Wilderness Society was formed in the 1920s and 1930s around the goal of preserving wilderness on U.S. Forest Service Lands, making it a more nationally based organization.

There were also a number of periphery groups that wanted to tag along with the cause. Smaller interest groups, especially in the West, began to advertize the issue in order to lend support and gain exposure. For example, through their limited efforts, the Western Ancient Forest Campaign (WAFC) has gained exposure from the issue. Currently, they are pursuing strategies similar to ones used by the UWC to get more wilderness designation on Forest Service lands. By associating with the UWC, WAFC could gain credibility and contacts in their wilderness endeavors. There were also corporations that could be considered periphery groups. Companies like REI and Patagonia used money, publicity, and supplies for the reinventory process to support the coalition rather than any particular lobbying resources. They were able to gain exposure through the UWC's efforts by linking their names with the coalition. Finally, to broaden the coalition's base, several sportsmen's organizations joined. For example, the Utah Bowhunter's Association is a member of the UWC.

In the interim between the BLM's recommendation and congressional action, the UWC swelled to over 100 environmental organizations and SUWA's memberships well exceeded 10,000.

This is important because these groups are outside the normal scope of environmental groups. Indeed, many see the members of hunting groups opposed to most environmental agendas. Because they represented a larger set of interests, these groups could give more credibility to the UWC.

Hula also points to the large problem, similar in nature to membership within interest groups, of freeriding in coalitions. Larger coalitions may even reach a point where they resent periphery members. The UWC, on the other hand, needed support in large numbers in order to "get the word out." They did not have the luxury of being selective about those who wanted to join the coalition. The UWC also differs from other coalitions with the autonomy they retained given the larger groups, like the Sierra club, within the coalition. Hula claims the resources individual groups bring to the coalition determines group strategy. If this is true, the Sierra Club and other large members would likely play a larger role in the group and could hinder some of the coalitions autonomy. One explanation for the UWC's autonomy is the fact the wilderness is completely within Utah. National environmental group membership within Utah is not large. These groups may lend resources and help to the UWC because their ideologies and goals are similar, but their membership base outside of Utah probably would not drop significantly if they lost the issue. Contrasted with the Headwaters Forest (an attempt to protect a large section of Redwood trees) campaign outside San Francisco, where a large portion of the Sierra Club's members live, Utah wilderness is probably not as high a priority. In addition, the Sierra Club cannot call upon a large member base within Utah to help with the issue, forcing the UWC look to other organizations to augment its support.

The early organization of SUWA and the UWC combined with the slow process of getting the BLM recommendations to Congress in legislative text allowed SUWA

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and the UWC to mature slowly and gain support gradually in Congress and from citizens. By the time Rep. Hansen proposed his Utah Public Lands Management Act in 1995, SUWA and UWC were strong enough to bring to light many of its inadequacies. If the bill had come immediately after the BLM's 1.8 million recommendation in 1991, its fate may have been different. The issue was localized and obscure nationally, and the Democratic majority may not have had enough information to be familiar with it. Senator Bradley may have still filibustered the bill, but his incentive for filibustering would have been less clear. By the time he filibustered the bill in the spring of 1996, it had become national news allowing him to branch out beyond his New Jersey constituency. In the interim between the BLM's recommendation and Congressional action, the UWC swelled to over 100 environmental organizations and SUWA's membership well exceeded 10,000. This may have been very important for Sen. Bradley because many had speculated that he was interested in running for president, and indeed, his recent declaration that he will oppose Al Gore for the Democratic nomination for president in 2000 lends credence to this idea. The Utah issue allowed him to get his name out to more people.

Following the BLM's recommendations, Rep. Jim Hansen (R, UT) wrote a bill that would have designated 1.8 million acres of federal land as wilderness (later increased to 2.1 million) and released 1.4 million acres of land protected as temporary wilderness study areas (WSA's) to development (U.S. Congress, House 1995). Environmentalists saw Hansen's bill as one that favored industries over preservation. Beside the lack of acreage, they objected to language in the bill that returned any land in Utah not set aside as wilderness to multiple-use designations. Multiple-use designation allows development, off-road vehicle use, and many other uses wilderness designation would preclude. Federal lands in Utah could never be considered for wilderness again. Normally, the bureau manages land in WSA's as wilderness unless it is designated something else or until Congress acts. H.R. 1745 took that power away from the BLM and gave some of it to state agencies. This prevented federal agencies from protecting land with other designations like national parks and monuments, despite the fact that the BLM had seen enough redeeming value in them to designate them as WSA's. This "hard release language" angered most green groups. The bill also protected any projects or developments that were in the "public's best interest"; an inclusion aimed specifically at protecting water projects already planned in the wilderness areas. Environmental groups claimed that this would violate the intent of the '64 Wilderness Act and significantly alter its meaning (Nyhan 1995, 2178).

For SUWA and the UWC, Hansen's bill loomed like disaster on the horizon. They had to pool their resources and make an all-out effort to defeat the bill. Their efforts were aided by the fact the UWC had written their 5.7 million acres citizen proposal into bill form in 1989. Rep. Wayne Owens (D, UT) sponsored the bill, but in 1992 he was defeated in a run for the Senate. America's Redrock Wilderness Act, H.R. 1500, was reintroduced by Rep. Maurice Hinchey (D, NY) in 1993, but republican opposition, especially from the Utah delegation, kept the bill from ever leaving the subcommittee. With Hansen as chair of the Subcommittee on National Forests, Parks and Lands, members of the Subcommittee defeated 1500 21-9, choosing instead to concentrate on Hansen's proposal (Beneson 1995, 2359).

The UWC had to concentrate on what could be considered an outside-in strategy. This is a combination of Wright's inside and outside strategies. Wright examined interest group roles in lobbying legislators as they wrote bills and how those lobbying efforts help formulate policy within the bill (1996, 39-40). These kinds of lobbying practices would be considered by most to be an insider strategy. The citizen's proposal, however, was written entirely by the UWC. It was not watered down with various markups or compromises. Once it was written, the UWC shopped it around until they could find a sponsor. This enabled them to hold firm on specific issues, but has, more than likely, hindered more widespread support. So while the Coalition did use Congress members to get their bill to the floor, it would pursue a route not often taken n trying to get the bill passed.

With Hansen as chair and a Republican majority, the UWC could not muster enough support for H.R. 1500 within the subcommittee, so they took it to the rest of Congress. This is where Calkin and Tixier's efforts really paid off. By establishing a Washington office years before and focusing on a national membership, the UWC could bring acute attention on the bill on a national level. Legislators who did not know where most of these lands were received calls from constituents within their districts, grabbing their attention more quickly. The UWC also used this advantage in fighting H.R. 1745. Members across the nation could call their Congress members in opposition to Hansen's bill and suggest an alternative, H.R. 1500. Environmental groups recognized there was no way to get their bill through Hansen's subcommittee, so they focused on an outside-in strategy inside Congress to get the necessary 218 votes (a majority of the House) to bring the bill directly to a floor. By the end of the 104th Congress, SUWA and the UWC had amassed 116 cosponsors in the House. Pursuing this kind of strategy has a huge cost of time, but according to the UWC, "we are lining up support now for America's Redrock Wilderness Act, so we will have something to build on in the future" (Utah Wilderness Coalition 1997, 1).

This time constraint provides a possible advantage to environmental groups. Hansen noted that policy makers will prefer interest groups over political parties when interest groups have a comparative advantage over political parties in providing electoral information and mobilizing constituents and when an issue is recurring (Hansen 1987). The wilderness question in Utah has dragged on for more than a decade with no end in sight. This fact aided SUWA and UWC because policy makers have turned to them in larger numbers as they demonstrate their ability to provide electoral information and mobilize the electorate. Despite their differences in opinion, recently even the Utah delegation has proposed including SUWA in forming a compromise bill. This points to the

stature SUWA has achieved over time.

SUWA has focused intensely on motivating the electorate and organizing grassroots efforts. They initiated a number of successful strategies in bolstering opposition to Hansen's H.R. 1745. As noted before, the time between the origin of SUWA and the UWC contributed significantly to their success in defeating the bill. Using a mix of outside and inside strategies, SUWA and the UWC were able to mobilize members and the pubic to speak out against Hansen's bill.

First, Rep. Hansen and Governor Mike Leavitt held hearings on the bill in five different Utah cities. Only one of these meeting was held in an urban area, despite the support wilderness enjoyed along the Wasatch Front. Using an outside strategy, environmental groups put out the call to arms and packed the meeting houses, causing many rural locals to accuse SUWA of "fixing" the hearings. Pro-wilderness Utahans turned out en masse at all five public hearings. "Wilderness advocates were in the majority at each of the meetings even though four were held in remote rural areas.

Number of Acres	Support (in percentages of Utahans polled)
No Wilderness Acres	4.5
1 Million Acres	12.3
1.9 Million Acres (approx. amount in 1745)	11.6
2.9 Million Acres	10.1
3.2 Million Acres	23.2
5.7 Million Acres	30.6
Agree With None	7.7

Source: Hearing Before the Subcommittee on National Parks, Forests, and Lands

Of the 22,000 comments collected by the governors office, 73% were in favor of [H.R. 1500]" (SUWA 1995, 5).

Second, SUWA also initiated a huge public campaign against 1745. Using another outside strategy, they urged members to target papers in Utah and across the nation with editorials and letters to the editors. Papers across the nation began to run letters on an issue many people had never even heard of. Articles and editorials against 1745 appeared in western papers like the Salt Lake Tribune, Deseret News, Las Vegas Sun, the Santa Fe New Mexican, and the Denver Post. This was followed by coverage from national publications and news organizations like the New York Times, Washington Post, Newsweek, Time, Rolling Stone, USA Weekend, CBS, CNN, and NBC News (SUWA 1995, 4). Utah public opinion also turned on the bill. The following poll from 2 News in Utah showed most Utahans did not agree with the wilderness acreage contained in H.R. 1745. A clear majority, 63.9 percent, of Utahans preferred more wilderness than was designated in 1745. 30. 6 percent preferred the previous bill, H.R. 1500, that Republicans had so easily defeated in subcommittee.

This proposal was based on environmental group numbers, and neither the BLM nor any other government agency ever proposed such a large number. In fact, the BLM could only find 3.5 million acres that even qualified for wilderness, yet the public supported the 5.7 number.

This public opinion gave environmental groups the power to go before Congress members and lobby more effectively. By demonstrating to them that they had support in Utah, and that the bill had become extremely unpopular in the Congress as a whole, they could offer them a political prize by placing them on "their side." Once on the environmentalist's "team", groups could identify the Congress member with the support in the West.

Third, as the pressure mounted and H.R. 1745 gained momentum, using an inside strategy SUWA staffers swarmed to Washington to lobby Congress (SUWA 1995). Again the fact they had already established a Washington office, combined with the continual efforts of members of the UWC, enabled SUWA to step quickly into the fray. In addition, members of the UWC, such as the Sierra Club and Wilderness Society, were able to mobilize their resources in opposition to 1745. As Berry noted, different niches existed for the particular resources of a given group (1997, 204). Different groups in the coalition used their particular strengths and contacts to fill these niches and lobby Congress more efficiently and effectively.

The Sierra Club and Wilderness Society, among others, both appeared before the Subcommittee to testify against the bill. The Sierra Club is famous for its lobbying of Congress members by professional lobbyists (Wenner 1990, 285-6). The Wilderness Society divides its energies into the following three areas: "research and analysis of issues, education and constituency building among the public, and policy

By demonstrating to them that they had support in Utah, and that the bill had become extremely unpopular in the Congress as a whole, they could offer them a political prize by placing them on "their side."

advocacy within Congress and...[its] agencies" (321). While the Wilderness Society may not have qualified as a specialist group under Hula's definition, testifying before Congress and providing information on wilderness was not a difficult stretch. Because they had these kinds of resources prior to the UWC, the UWC was able to use them when they were needed most. These groups' resources were greatly augmented by the specialized resources of the UWC and SUWA who had concentrated on the specific Utah issue. The UWC and SUWA were able to relate information to other members and aid them in their statements against the bill.

Finally, SUWA staged an impressive grassroots campaign, a classic outside strategy. Letters from across the nation began to pour into Congressional offices. SUWA also encouraged and helped pay some of the costs to fly active members to Washington to personally lobby their respective Congress members. Berry noted that grassroots campaigns often combine mail and member visits to Washington with a

group's lobbying efforts prior to a close vote (1997, 134-5), and this case was no exception. "Authors Terry Tempest Williams and Stephen Trimble traveled to D.C. to give Congress copies of Testimony, a collection of poems, essays, and stories defending Utah wilderness, written by twenty western writers including a Pulitzer Prize winner, a National Book Award winner, and a former U.S. Poet laureate. A coffee table book on Utah by author Brooke Williams and photographer Tom Till was donated for distribution to U.S. Senators" (SUWA 1995, 4). Other high-profile, outspoken members, like Robert Redford and former Rep. Wayne Owens, used their connections in Washington to lobby Congress members as well. SUWA also developed a high-tech, interactive Internet site coupled with an e-mail action alert list to inform members instantly about changing developments in the debate.

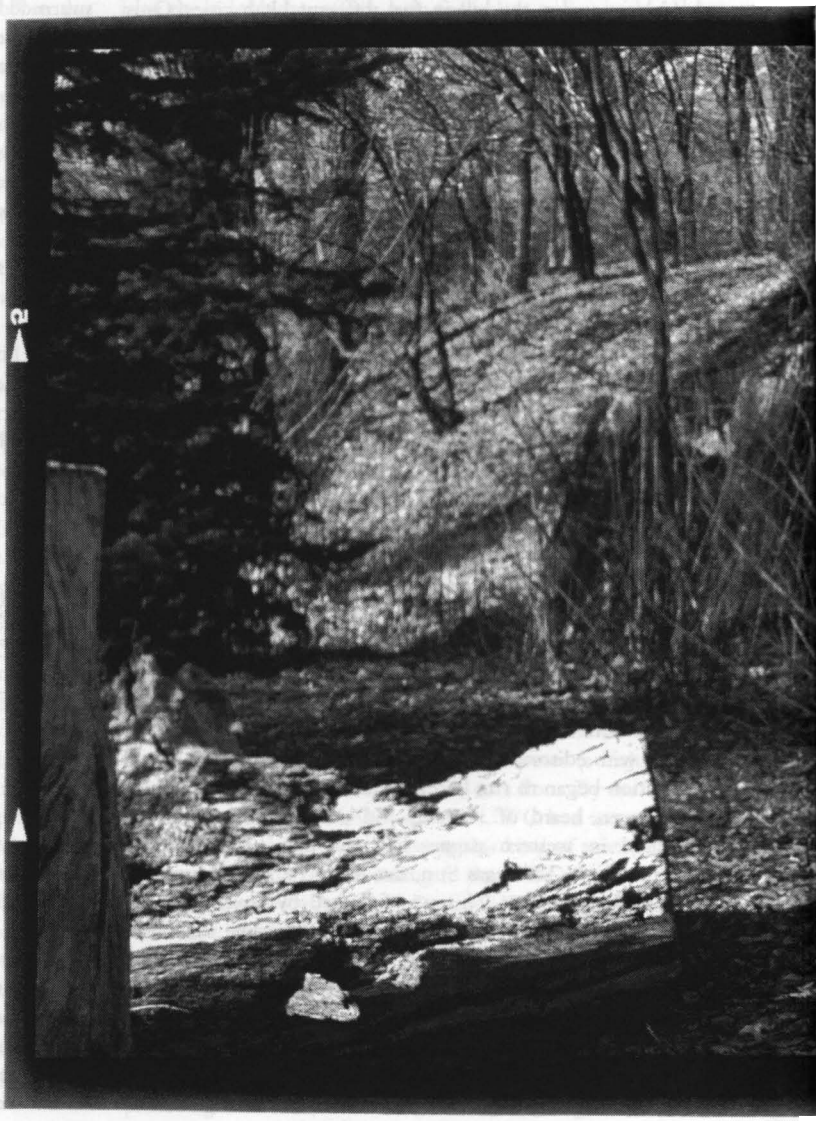
With this increased member activity and mobilization, House and Senate members had to declare their support or opposition to 1745. With the decline in strength of political parties, the electorate is less likely to solidly identify themselves with the platform of a given party. As a result, parties prefer to remain more ideologically vague and less issue-oriented. In Berry's words, interest groups are policy maximizers and political parties are vote maximizers (1997, 47). Single-issue interest groups have helped define the issues with politicians. They have served to put the candidate on their side or "the other side." This is especially disheartening for candidates who want to avoid declaring themselves on the issues (Oberstar 1983, 616-23).

Environmental groups have used this fact to define issues to their advantage, as was the case in defining the support and opposition to 1745. By placing candidates in "their camp" or the opposing camp, the UWC and SUWA helped the electorate know who supported what. Oberstar, Berry and Wright have all pointed out how modern technology has made this ability even more powerful with the advent of television, computerized mail techniques and professional public relations experts. These mediums allow interest groups to bypass political parties and reach the electorate directly. This contact was especially important in the opposition to 1745 because Republicans had a majority in Congress. SUWA and the UWC needed effective ways, such as e mail, newsletters, faxes, etc, to communicate directly with supporters.

Furthermore, use of wilderness areas has increased since the 1970s (Lucas 1989, 41-55). This is particularly significant when one considers that this use translates into more voters being able to understand what is in some of these wild lands. The task, then, for the UWC and SUWA was to motivate and alert this section of the population to the Utah issue and help them understand how it would affect them, despite the fact they may never visit Utah. Newsletters, newspaper campaigns, and the Internet were all effective ways to help those outside Utah know about the issue and see how it would affect them.

Oberstar noted Anthony Downs' theory on beating an incumbent in talking about single issue interest group strategies. According to Downs, an incumbent could be defeated when the following three conditions hold true:

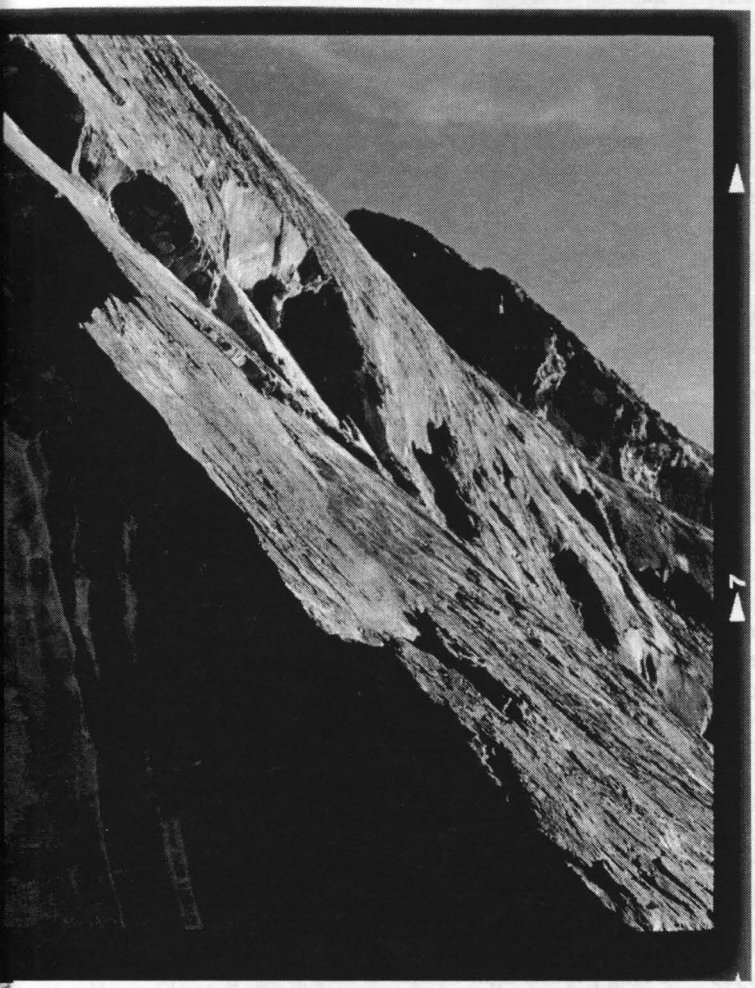
"First, a majority of the citizens are in a minority



on at least one issue under consideration. Secondly, when in the minority a citizen has a more intensely held preference. Third, the opposition need not commit itself on any of the issues under consideration until the incumbent has announced his position" (Oberstar 1983, 621).

Downs' theory can also apply to a bill or policy that has a majority backing like 1745 did. This theory is significant

because of the intensely held preferences of the environmental groups and their supporters, especially in the West. Policy makers in opposition to 1745 could identify with these supporters and gain their backing. Congress members did not need to commit themselves to either side of 1745 until after the bill was introduced in Congress and environmental groups had showed its national appeal. Environmental groups



were able to operate on their "intense preferences" to help gain support for their side. Rep. Hansen and his supporters, representing the incumbent, had already staked out their position with the bill's introduction. Environmental groups made it next to impossible for anyone supporting the bill to court the "green" vote because they had immediately come out in opposition. They created a dichotomous choice for the electorate and policy makers.

The UWC and SUWA could use 1745 to help other candidates outline their environmental agenda. No longer was the issue unique to Utah or even the West, with the intense lobbying efforts and grassroots work being done, it had become a national issue. Congress members such as Rep. Hinchey (a first term representative) could use the issue to show their constituents their support for the environment. Even Sen. Bill Bradley (D, NJ) became involved, as he eventually filibustered the Senate version of the bill. As noted before, some have speculated this was an attempt to gain national support for a possible bid at the Democratic nomination for president in 2000. He had considered running for president in 1996, and some analysts had even linked him as a possible running mate to Ross Perot in 1992 or with Colin Powell in 2000 (Rose 1995). Environmental groups handed him the Utah wilderness controversy with its national exposure on a silver platter.

CONCLUSION

While H.R. 1745 did skate through the House Subcommittee on National Parks, Forests, and Lands (Beneson 1995, 2359), once it reached the House floor, support dried up, and the bill was pulled to escape an embarrassing defeat, though Hansen and other members of the Utah delegation claimed that it was pulled in order to receive more debate (Woolf 1995, A1). The UWC and SUWA had achieved a victory many did not think possible in the face of the odds against them. The groups showed how a combination of inside and outside strategies can help defeat a bill despite initial support within Congress for the bill.

This issue saw the extensive use of lobbying both at the national and state level. Strategies used by SUWA and the UWC support Wright's theory about how interest groups will approach Congress at different stages of a bill's progress (Wright 1196, 75-113). Wright asserted that groups will first try to influence the formulation of a given bill. Second, they will try to influence policy makers by testifying and submitting written comments at hearings and markup sessions. Finally, groups will focus on the floor and conference action in Congress. They do this by heightening their presence in Washington and forming broad based coalitions. Grassroots organization is also important at this stage.

The Utah wilderness debate followed these steps closely. In the early stages groups tried to affect 1745's formulation by pushing for 1500. Admittedly they had a hard time in the Republican controlled subcommittee, but they could use 1500 to try and soften the language within 1745. When this was not successful, as noted previously, UWC members, like the Sierra Club, SUWA, and the Wilderness Society, testified against 1745 in hearings. SUWA and others also submitted letters and other written comments to be entered into the official record in an attempt to influence members (U.S. Congress, House, 1995). Many wilderness advocates were able to attend the local hearings held in Utah, allowing them to testify rather than submitting comments. Finally, after the bill passed the subcommittee, groups swarmed Congress members. SUWA staffers flew to Washington along with different members of the

group. SUWA and the UWC intensified the grassroots campaign to try and bring pressure upon Congress members across the nation. Outspoken members and influential friends lobbied Congress on behalf of the bill. The UWC also intensified its efforts in lobbying. The coalition was aided by the fact it had broadened its base and expanded its membership in the previous years, giving it more resources to use.

The debate also shows the importance of a maturation period for an interest group. Talking about the early days of SUWA, one founder said,

"...Working on leads, loans, and favors, [we] met deadline after deadline on environmental assessments and appeals. Our board could wait for its by-laws, a typewritten newsletter would be put off another month, and T-shirts were a good idea, but who had time? We fed off an adrenaline cocktail: the visceral mix of gorgeous country, death threats, and the unwavering support of just about every desert rat living in redrock Utah" (Smith 1998, 5-6).

Early on, the groups simply did not have the resources, members, money, or staff to sustain the kind of grassroots and lobbying effort they did in response to 1745. Gais and Walker call this a strategy of survival, one that is necessary for a group to grow (1991). This is a key lesson. Groups must recognize issues quickly and try to delay them, so they can grow strong enough to combat them. Policy makers, who want to get laws through the process quickly, must try their best to get issues through the system as fast as possible in order to avoid future complications. This debate also points at a glaring problem with pluralist theory. Countervailing power takes time to organize, meaning many issues may get through the cracks before Truman's latent groups can organize. The 1984 Utah Wilderness Act demonstrated how if latent groups cannot organize fast enough, legislation they might oppose can pass without receiving their input.

Unless a dramatic change occurs in Congress (such as occurred in 1994), the UWC and SUWA groups will continue to pursue the status quo and passage of H.R. 1500. They mobilized the constituency effectively enabling them to wield power when dealing with Congress members. This power translated into promises of eventual votes. By turning the issue into a national one, they helped promote their own issues with the help of members outside the Utah. This support was vital considering the Utah delegation's enthusiastic support of 1745. The same techniques will probably decide future public land debates. Whoever can mobilize the constituency the best will attempt to influence candidates with a vested interest in the issue.

The history of H.R. 1745 also lends some credence to Gais and Walker's theory of when groups will use inside and outside strategies. They theorized groups will increase their use of inside and outside strategies as the conflict of an issue increases. This was certainly true in this case. SUWA and the UWC used a combination of lobbying strategies coupled with grassroots organization as the conflict surrounding 1745 heightened. However, this experience would weaken their assertion citizen's groups usually concentrate on outside strategies. Even early on, SUWA was trying to influence BLM policy, and the UWC was trying to counter the BLM's inventory process. They appeared at open hearings held by the agency and consistently challenged their findings. These activities were long before they had enough members to initiate a large grassroots campaign. Gais and Walker did not claim citizen's groups exclusively use outside strategies, yet their static examination of a dynamic relationship may have left their analysis with some holes.

In addition, the coalition created by the UWC contributes to Hula's theory on how coalitions motivate the electorate by using their specific strengths. As discussed earlier, the UWC used different strengths of its members to lobby Congress, support a grassroots campaign, and "get the word out." One interesting side note to Hula's theory is how time was an ally to the UWC. The coalition took time to develop. It was a dynamic process over the space of a decade, allowing members and staff to learn on the job. By the time the showdown with 1745 came, members of the coalition were ready to fight it. More important, they had the resources to fight it.

Finally, a note on the future of Utah wilderness. As of August 1, 1996, Interior Secretary Bruce Babbitt announced a new study of 2.5 million federally managed acres in Utah previously deemed unsuitable as wilderness by the BLM. Various "career professionals" will decide the fate of the land and attempt to finish the study in about six months (Woolf 1996, A1). Considering the first study took over a decade and cost millions of dollars, the process will be difficult at best. Rep. Hansen has struck back saying that is it illegal to do two studies when the law only called for one. Several firms, like the Utah Counties Association, filed suit against Babbitt, but were defeated in early March 1998 in federal district court. The case is under appeal.

For the near future, no change seems likely. While environmental groups won a battle in 1995, public support might begin to wane as they desire closure. This happened in Montana as the state witnessed sixteen bills concerning wilderness allotments get defeated in just over a decade. The UWC and SUWA have continued to seek cosponsors for America's Redrock Wilderness Act (they currently have over 130) and Rep. Hansen is attempting to introduce several new "compromise" bills. More than likely, Utah citizens are in for a long political fight because as long as an agreement is not reached, Utah will continue to have the government managing over 3.2 million acres as wilderness. Anyone who has studied Congress knows that it is much easier to stop something from passing than to ramrod a bill through to law. This is the irony; compromise has not been considered between the 1.8 and the 5.7 million acre figures, assuring Utah twice the number proposed in 1745. Environmental groups remain quite happy with the results.

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religious freedom: fundamental liberty, satutory right or less?

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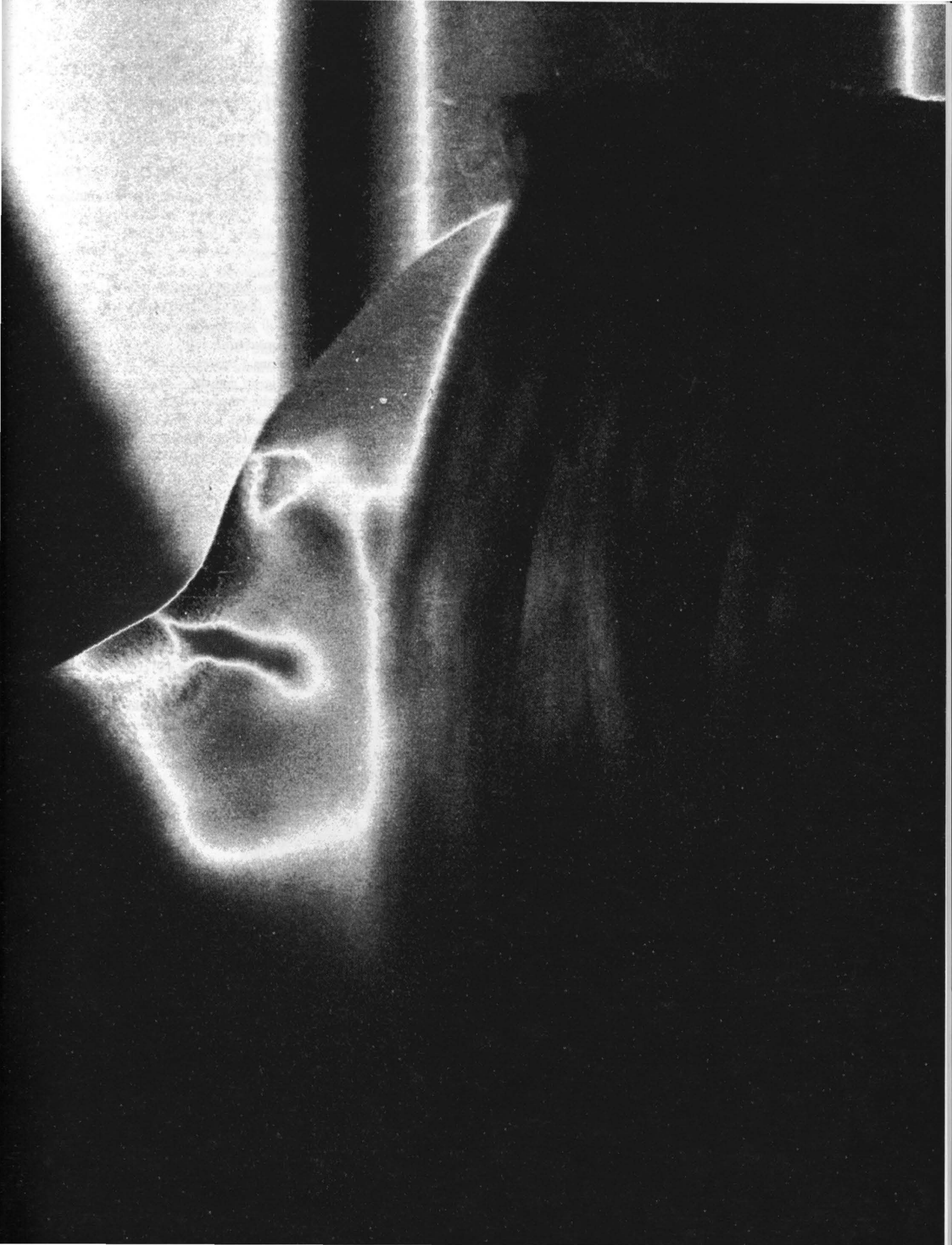


"In my opinion the conscientiuons scruples of all men should be treated with great delicacy and tenderness... and it is my desire, that the laws may always be as extensivevely accommodated to them, as due regard for protection and essential interest of the nation may justify and permit."

Geroge Washington

1. *Introduction*

In order to maintain an appropriate barrier between church and state and insure the propagation of religious freedom, the First Amendment to the U.S. Constitution specifically limits the federal government's authority to legislate in regards to religion. As such it is commonly understood and accepted that Congress may not make laws that have the specific intent of either supporting or hindering religious groups. However, if a law of general applicability (one which does not single out religion as a category for intentional treatment or mistreatment) does have the effect of incidentally burdening religious practice, its legitimacy is less certain. Most argue that if these laws do in fact hinder the practice of religion and thus violate a basic constitutional right, then they should at least be heavily scrutinized, if not automatically ruled as unconstitutional. Recently, however, that understanding has failed to capture a majority in the honorable opinions of the Supreme Court. In June 1998, both houses of Congress proposed legislation intending to afford a greater protection of religious liberties. Supported by a diverse coalition of more than sixty religious and civil liberties groups, the Religious Liberty Protection Act (RLPA) seeks to remedy the burdens of these generally applicable laws upon religious practices left otherwise exposed by the Supreme Court's decision in City of Boerne v. Flores (City of Boerne v. Flores 1997, 2157). This is not a new battle for Congress. In wake of the Court's decision in Employment Division v. Smith (Employment Division v. Smith 1990, 872), Congress similarly responded with the Religious Freedom Restoration Act (RFRA) in 1993. Passing with overwhelming support, Court observers thought that this put an end to the issue. However, the Flores decision effectively nullified RFRA as unconstitutional, thus prompting supporters to regroup and try again with RLPA.

This debate over federal law with regards to religious liberty has indeed been a heated process in the last decade. It has prompted serious discourse in at least two fields of study. First, it has raised legal questions dealing with Free Exercise Clause jurisprudence, basic structural questions of separation of powers, federalism and the status of fundamental rights. Second, it has provided political scientists with copious material in analyzing the relationships between the various branches of government. From the latter perspective, interplay, particularly of Congress and the Court, is a model of policy decision making in which the various branches engage in "an ongoing and, ultimately, productive dialogue about the meaning of First Amendment religious liberty protections" (Devins 1998, 647). The working out of this dialogue demonstrates an interactive process and "reaffirms the original constitutional understanding that the court and the President and the Congress (not Congress alone) would determine statutory policy" (Eskridge 1991, 617).1

In this essay I will discuss the proposed Religious Liberty Protection Act, considering both its legal concerns and its political considerations. I proceed in Part II by outlining a historical look at religion and the Constitution in this past century as it relates to the current controversy. From this perspective it is easy to discern how the Court's historic Smith decision departed drastically from the correct and established precedent of protecting religious liberty, and how rather than simply passing as a momentary whim of bad jurisprudence, the court strengthened its stand in Flores seven years later. I further explain how RLPA seeks to fulfill the mission of RFRA by making up for the latter's constitutional shortcomings. In Part III I look at the political game through a positive political theory model developed by William Eskridge, Jr. (1991). Viewed as an interactive and dynamic game, Congress may rightfully be seen as having challenged the Court when it proposed RFRA, and I discuss whether the Flores decision was a predictable or appropriate response to such a "turf" challenge. Part IV concludes that RLPA is facially constitutional, and that if it can muster the same overwhelming support as RFRA, it should be held as such. To the extent that the Supreme Court recognizes and shows deference toward Congress's power under the Spending and Commerce Clauses, RLPA should withstand its scrutiny.

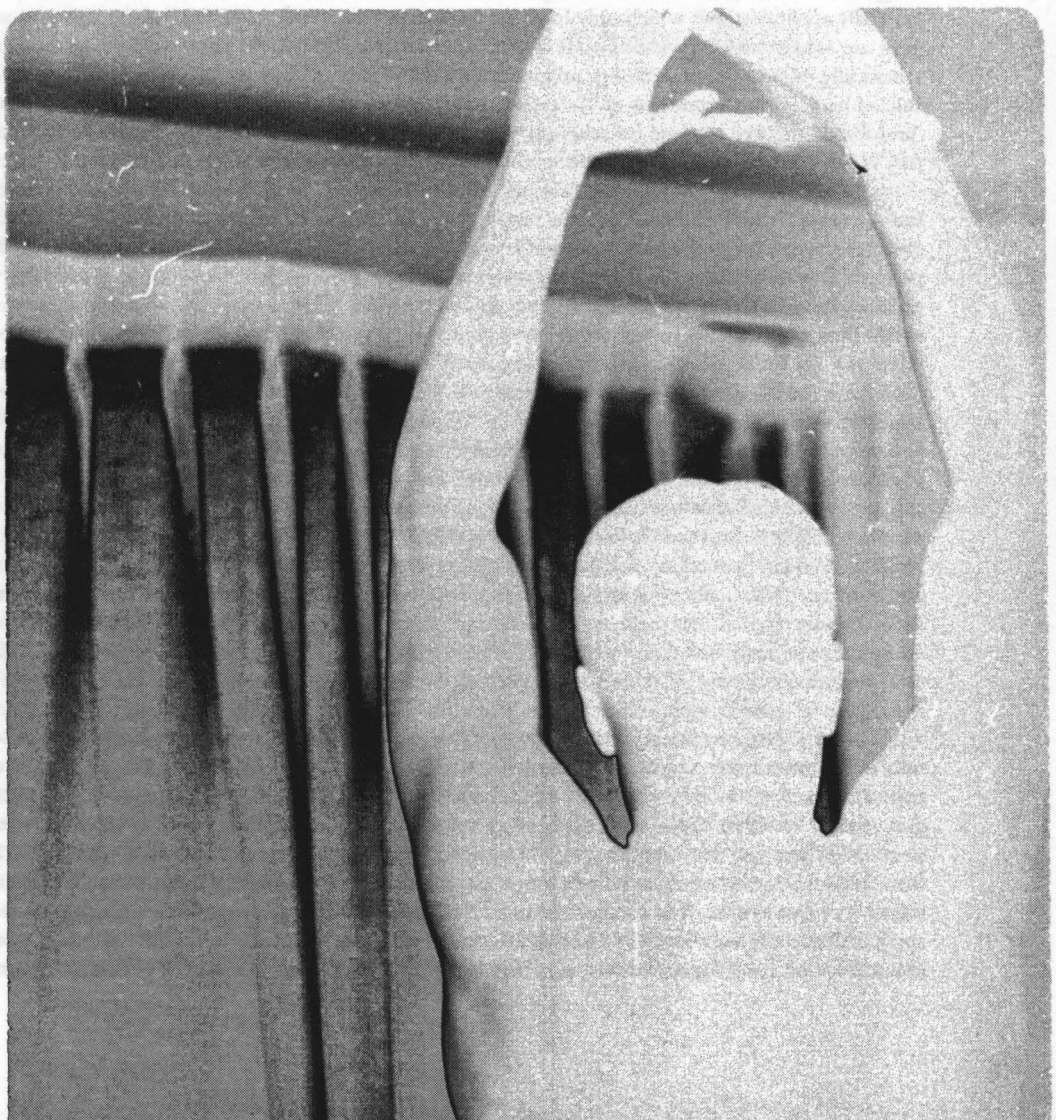
2. *A Legal Understanding*

A. From Lochner to Smith

Any time the Supreme Court reviews a law to determine its constitutionality, it can employ one of two basic tests. The majority of cases are subject to a simple rational basis test which only requires the government to demonstrate that the law in question is "rationally related to a legitimate government purpose" (qtd. in Stone et al. 1996, 573). Other times the court has seen fit to subject laws to a more heightened scrutiny. This test requires government to assume the burden of proving that a given law is "narrowly tailored" to serve a "compelling" state interest. This more stringent review has been applied (and arguably misapplied) in various types of cases throughout constitutional history. For example, during the early part of this century, a very laissez-faire minded Court liberally applied strict scrutiny to any case of economic concern, effectively usurping legislative power by over-

turning many state and federal statutory laws. This trend, beginning as it did with the case of Lochner v. New York (Lochner v. New York 1905, 45), became known as the Lochner era. Under pressure from legal scholars and the other branches of government, the Court began to limit its use of this test and "rather firmly established that it will afford heightened or strict scrutiny where the law under review either contains a suspect classification or impacts a fundamental right" (Lee 1993, 80).

This is probably as it should be. As discussed below in Part III, a respect for democracy should prompt the courts to adopt an attitude of deference toward the legislatures in general, while still protecting the fundamental rights of minorities who do not as easily gain access to the political process. The obvious difficulty, then, is determining which rights are "fundamental" and thus subject to strict scrutiny. After all, the Constitution neither explicitly nor implicitly denotes a hierarchy of rights. Historically, fundamental rights have been defined as those which fall under the Fourteenth Amendment's Equal Protection Clause as determined by the courts. Yet, whatever the list may include, we can assume that religious liberty is numbered among them, at least since Cantwell v. Connecticut (Cantwell v. Connecticut 1940,296). In this case the Court determined that "the fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment" (Cantwell v. Connecticut 1940, 303). This, of course, includes the Free Exercise Clause. Accordingly, this principle of applying strict scrutiny to laws which infringe upon the free exercise of religion (even if only incidentally) became established at least by the time of Sherbert v. Verner (Sherbert v. Verner 1963, 398), and further strengthened by Wisconsin v. Yoder (Wisconsin v. Yoder 1972, 205). In both of these cases, a generally applicable law had the effect of hindering the free exercise of religion. In both cases, the court recognized the need to protect this fundamental right and judged the respective



statutes according to the strictest scrutiny. Writing for the Court, Chief Justice Burger reemphasized the basic principle: "[Only] those interests of the highest order and those not otherwise served can overbalance the legitimate claims of free exercise of religion" (qtd. in Stone et al. 1996, 1593, emphasis added). It seemed that the standard was set.

Then in 1990, the Court made an unprecedented move in the case of Employment Division v. Smith (Employment Division v. Smith 1990, 872). When members of the Native American Church were denied unemployment benefits after being fired from their jobs for ingesting peyote, they filed suit claiming that the existing controlled substances laws effectively burdened the free exercise of their religion. Court observers waited to see whether the statute would be upheld or if it would fail to survive strict scrutiny. As it turned out, the statute was upheld without surviving this rigorous test; it did not have to because the test was not invoked. In his majority opinion, Justice Scalia abandoned the compelling interest test for generally applicable laws that do not single out religions and only incidentally inhibit religion. (Employment Division v. Smith 1990, 878).

Though he is not wholly without precedent, this decision flips the prevailing standard on its head. Attempting to show consistency, Scalia first tries to dismiss the idea that generally applicable laws which only incidentally burden religion are subject to strict scrutiny. He claims that only laws specifically aimed at prohibiting religion merit this test. Indeed he accuses respondents of "carry[ing] the meaning of 'prohibiting the free exercise [of religion]' one large step further" (qtd. in Stone et al. 1996, 1599).

This notion is silly for two reasons. First, historically the Supreme Court has been asked to review few laws that specifically target religion; it simply has not been a considerable problem. The most common and controversial cases dealing with the Free Exercise Clause are those which are generally applicable. As Justice O'Connor's concurring opinion points out:

Generally applicable laws are [not] "one large step" removed from laws aimed at specific religious practices. The First Amendment...does not distinguish between laws that are generally applicable and laws that target particular religious practices... Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice (qtd. in Stone et al. 1996, 1603, emphasis added). Second, to declare that religious liberty is not burdened if the effect is only incidental is preposterous. Indeed, Yoder clarifies that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability...

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion (qtd. in Lee 1993, 87). Scalia further attempts to show consistency by dismissing this clear precedent of Yoder, claiming that the Court only applies strict scrutiny in hybrid cases. That is, he claims that burdens to free exercise from neutral, generally applicable laws can only receive heightened First Amendment protection when coupled with other "constitutional protections such as freedom of speech and of the press..." (Stone et al. 1996, 1600). This seems to imply that the fundamental right of religious freedom is only secondary to other rights and alone is insufficient to invite the most considerable protection and the strictest scrutiny. This claim, too, seems unconvincing. As stated by Rex Lee, The first freedom of the First Amendment is the free exercise of religion, and nothing in the text, history or previous judicial interpretation of the Free Exercise Clause suggests that this freedom must depend upon some other constitutional guarantee for protection (1993, 88). Furthermore, while he cites Yoder in defense of this proposition, Scalia fails to recognize that the Court's opinion in that case affirmed "that the Free Exercise Clause (by itself) often requires exemptions to generally applicable law" (Lee 1993, 88).

From this point, Scalia's argument only worsens. He does admit that respondents are not demanding an unqualified nullification of every law that hinders any minority religion anywhere, but are simply asking for the most heightened scrutiny to be invoked in such cases. Yet, he denies this request in a long chain of unconvincing arguments. First, he says that it only applies to unemployment compensation cases (which is a questionable response since Smith is such a case) and that even if extended beyond such, it could never apply to criminal cases. Second, he claims that the only reason they apply the test in such cases is under "the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason" (qtd. in Stone et al. 1996, 1601, emphasis added). Again, it leaves one wondering why religious freedom is not a good enough reason to independently merit its own "individual exemption." Third, he defends the compelling interest test in cases of racial inequality and free speech cases, but contends that the effects of applying this stringent test to Free Exercise cases would produce "a constitutional anomaly" (qtd. in Stone et al. 1996, 1601). As if this is not sufficiently blatant, he concludes that protecting the Free Exercise portion of the First Amendment by the most stringent means available is a "luxury," and that "[a]ny society adopting such a system would be courting anarchy" (qtd. in Stone et al. 1996, 1602).

Unfortunately, the Court's opinion adopts the attitude and has the effect of relegating religious freedom and toleration to second-class status which Scalia dismisses as an "unavoidable consequence of democratic government" (qtd. in Stone et al. 1996, 1603). In her concurring opinion, Justice O'Connor criticizes the Court on each of the above assertions. Ultimately she challenges her colleagues to fulfill their obligation of protecting minority rights, subjecting all challenged laws under Free Exercise claims to strict scrutiny in "a case-by-case determination of the question, sensitive to the facts of each particular claim" (qtd. in Stone et al. 1996, 1604). After all, as the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity... The compelling interest test reflects the First Amendments mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a luxury [is] to denigrate '[t]he very purpose of a Bill of Rights' (qtd. in Stone et al. 1996 1605).

B. RFRA—A legislative response

Recognizing the necessity of protecting religious liberty as a fundamental right (at least on par with free speech and racial equality) immediately reached beyond the Court's minority to Congress. In the following years, lawmakers from both houses of Congress proposed several versions of the Religious Freedom Restoration Act (RFRA). In 1993, with overwhelming support in both houses and great commendation by President Clinton, RFRA became law. It responded to Smith by legislatively mandating that "[g]overnment shall not burden a persons' exercise of religion, even if the burden results from a rule of general applicability" unless such a law can survive the most heightened scrutiny (U.S. Congress 1993, sec. 3(a)-(b)). Simply stated, RFRA sought to restore the most stringent protection of what historically recognized as a fundamental right. The important concern with surviving as constitutional, however, resided in effectively establishing a "head of power" from whence Congress could claim legitimate authority for enacting RFRA

Simply stated, RFRA sought to restore the most stringent protection of what historically recognized as a fundamental right. The important concern with surviving as constitutional, however, resided in effectively establishing a "head of power" from whence Congress could claim legitimate authority for enacting RFRA.

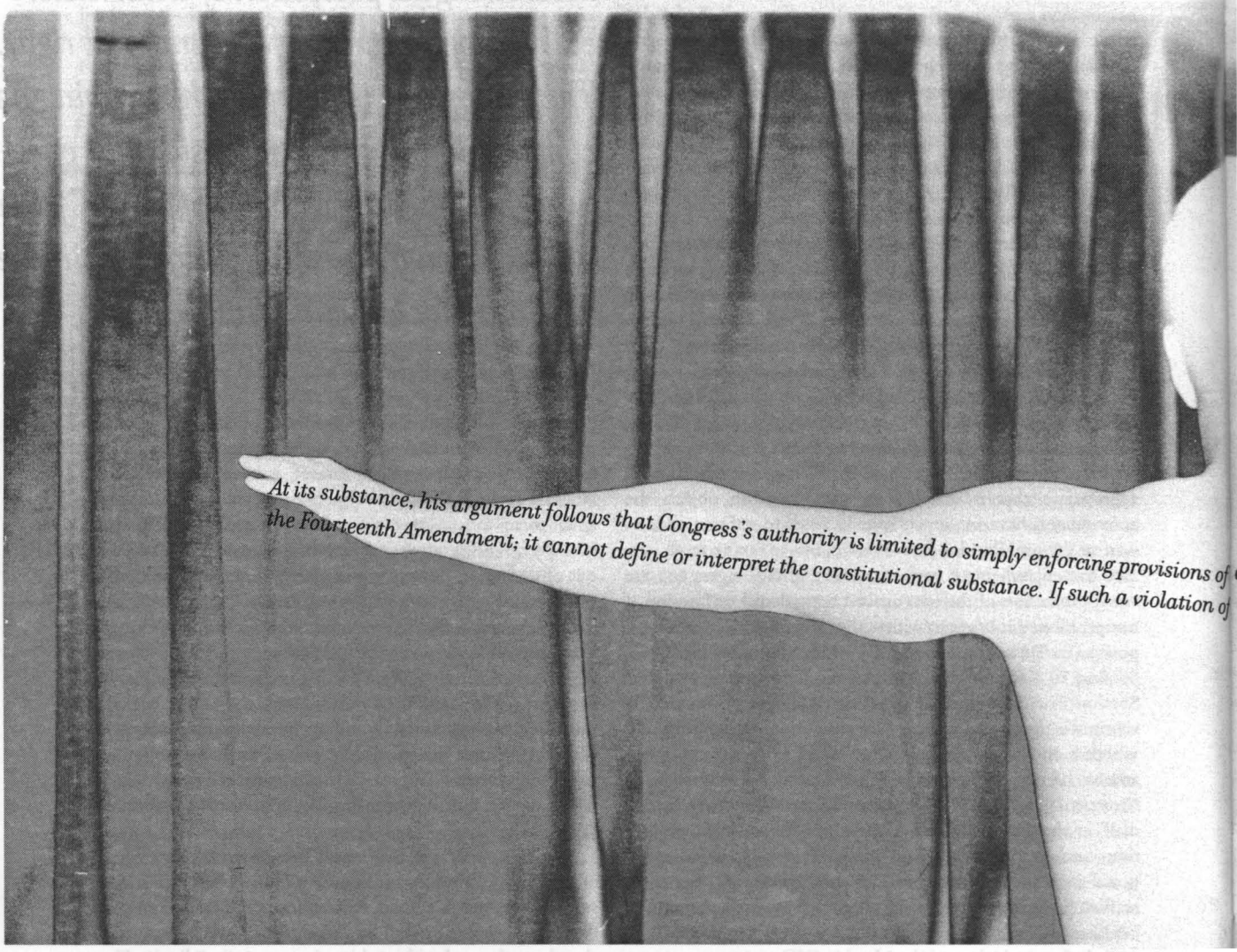
According to the bill itself, Congress derives constitutional authority from Section Five of the Fourteenth Amendment. Granting Congress the power "to enforce by appropriate legislation, the provisions of this article" (qtd. in Lee 1993, 90), and recognizing that First Amendment rights are adopted as part of the "fundamental liberties" of the Fourteenth Amendment (Cantwell v. Connecticut 1940, 303), RFRA is asserted as such "appropriate legislation." This is legitimized by at least three Supreme Court decisions. First in Ex Parte Virginia, the court held that What-ever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited is brought within the domain of Congressional power (Ex Parte Virginia1880, 345-346, emphasis added).
Second, in Katzenbach v. Morgan the Court reaffirmed that Section Five is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" (Katzenbach v. Morgan 1966, 651). The Court has dubbed this power "remedial" in that it can enforce Fourteenth Amendment protections and guarantees, though it cannot declare its constitutional substance. Finally, both of these previous cases were reaffirmed in the more recent case of City of Richmond v. J.A.Croson, Co. (City of Richmond v. J.A.Croson, Co 1989, 469). In her majority opinion, Justice O'Connor even quotes Ex Parte Virginia in stating that both the Thirteenth and Fourteenth Amendment "were intended to be what they really are, limitations of the powers of the States and enlargements of the power of Congress." (qtd. in Stone et al. 653). Besides, the type of legislation that has historically been most suspect and thus most adamantly scrutinized by the Court, is that which limits or narrows minority rights. Why? Because legislation often has the effect of hindering some amount of liberty somewhere, and that hindrance will be felt most acutely by minority groups which cannot as readily protect their interests through the political process. It has then traditionally fallen to the courts to protect these rights and liberties. However, RFRA proposed just the opposite; Congress went out of its way to protect minority rights. As such, one would think that the Court would have readily accepted this legislation. Unfortunately, as discussed below it did not. Thus, the usual paradigm of Congress inhibiting minority rights and the Court defending these rights has been reversed in this past decade. We are left to wonder why the Court has taken this unnecessarily hostile stand against religion. As Rex Lee observes, "[f]rom the standpoint of constitutional policy, giving those within a suspect class [minority religions] a lesser, rather than a greater, protection is the ultimate perversion" (1993, 95).

In 1997, the Supreme Court heard the case of City of Boerne v. Flores (City of Boerne v. Flores 1997, 2157). In this case, Flores, the Catholic Archbishop of San Antonio, was denied a building permit for enlarging a church because the church was located within a historic preservation district. Flores filed suit claming protection under RFRA. In its decision, the Court concluded that RFRA was unconstitutional because it exceeded Congress's power to enact it. In the majority opinion, Justice Kennedy rehashed all the old arguments of Smith and reaffirmed the Court's stand. He then turned to examine the central question regarding the legislative authority by which RFRA was enacted. As anticipated, the argument centered

around the distinction of Congress's Section Five power as being remedial rather than substantive. Kennedy concedes the argument made above—that Section Five is indeed "a positive grant of legislative power"—but also warns, "that '[a]s broad as the congressional enforcement power is, it is not unlimited'" (U.S. Supreme Court 1997, 6). At its substance, his argument follows that Congress's authority is limited to simply enforcing provisions of the Fourteenth Amendment; it cannot define or interpret the constitutional substance. If such a violation of

best. He acknowledges that the respondents already recognize this distinction and simply claim "that RFRA is a proper exercise of Congress's remedial or preventative power ...[and] is a reasonable means of protecting the free exercise of religion as defined by Smith" (U.S. Supreme Court 1997, 10). Finally, he turns to considering whether or not this is so.

Providing a series of arguments that are no better than those found in Smith, the Court does conclude that RFRA is so out of proportion to a supposed remedial or



authority is demonstrable, then RFRA must be unconstitutional—first, for compromising principles of federalism and second, for violating the established structure of separation of powers.

To this extent, Kennedy follows a historical overview of the drafting of the Fourteenth Amendment, and a series of Supreme Court opinions supporting this remedial/substantive dichotomy. This is instructional, of course, but probably moot at

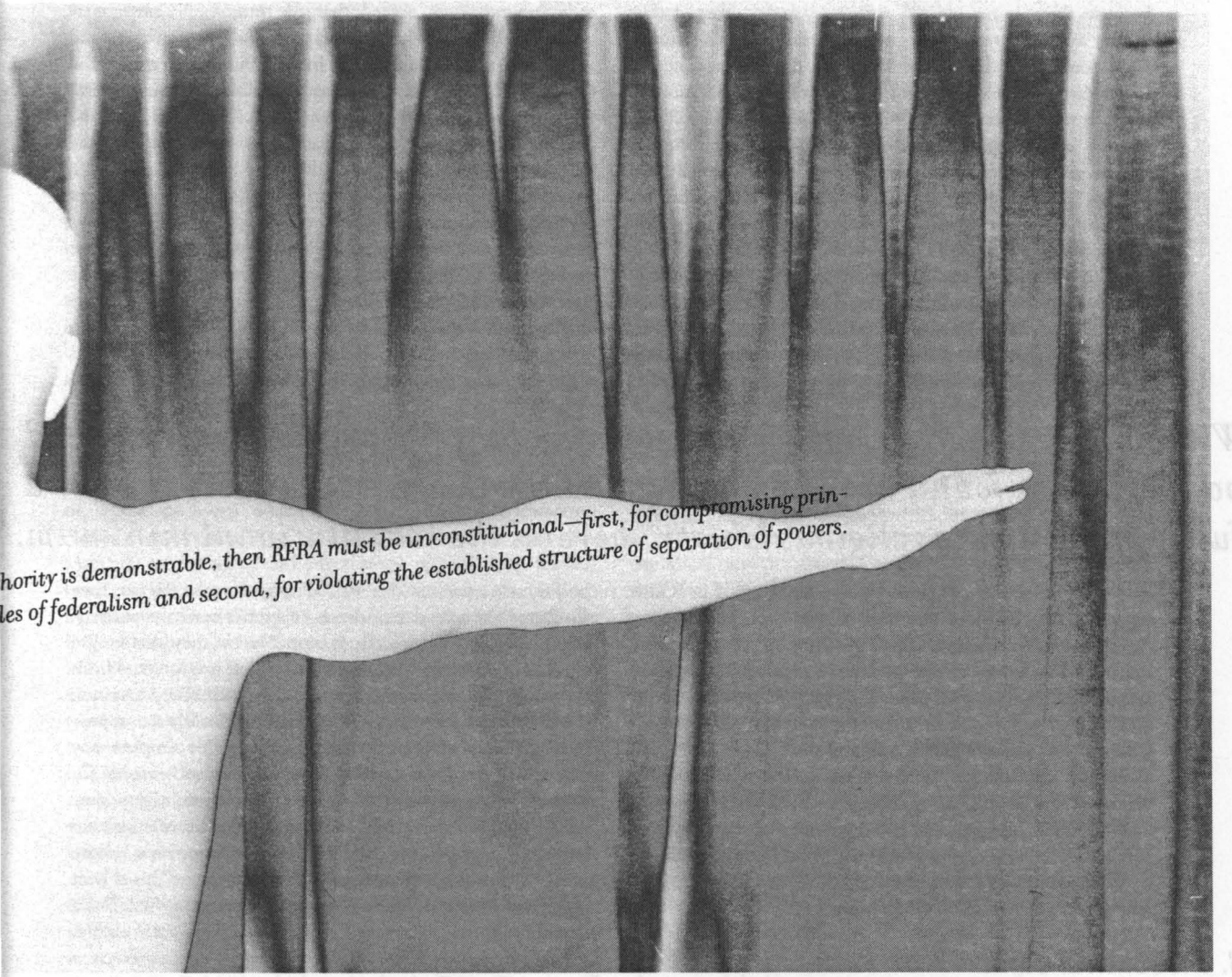
preventative object that it cannot be understood as responsive to or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections (U.S. Supreme Court 1997 11, emphasis added). Of course, the questionable reasoning as to how the majority arrives at this conclusion is not significant for this essay. At the very least we must accept that RFRA is uncon-

stitutional, if for no other reason than that the Court said so. The point is that if Congress now hopes to provide a legislative remedy through the Religious Liberty Protection Act (RLPA), they will need to find a new constitutional "hook," and be sure to satisfy the demands of federalism and separation of powers concerns as understood by the Court in Flores.

D. RLPA – Another chance?

ciencies of RFRA as outlined in Flores. Specifically, he responded to the three-part challenge of: (1) identifying an appropriate constitutional footing or "head of power"which will, (2) preserve the integrity of the structured separation of powers and, (3) satisfy the demands of federalism.

As recognized above, the danger of declaring Congressional authority from the Section Five enforcement power is that the Court always has the prerogative of declar-



On June 23, 1998, Professor Michael W. McConnell of the University of Utah School of Law addressed the Senate Judiciary Committee during hearings on the Religious Liberty Protection Act (RLPA). In this address, he clearly and convincingly defended RLPA as an appropriate and constitutionally sound remedy to the defi-

ing any statutory provision as having crossed the line from remedial enforcement to substantive interpretation. Such was the downfall RFRA. Congress viewed Smith as having minimized the protection afforded to religious liberty, but its response was invalidated because the Court saw it as an assumption of power beyond the authority of simply enforcing constitutional rights. Notice, however, what the Court did

not say: Flores did not suggest—and no other precedent of the Court suggests—that there is anything improper about the Congressional objective of protecting religious freedom beyond the constitutional minimum, so long as Congress does so through other constitutionally vested powers (McConnell 1998, 2, emphasis added).

With RLPA, Congress has chosen as its "other constitutionally vested powers" those found in the Spending and the Commerce Clauses to offer a fuller protection to religious liberty "beyond the constitutional minimum." As such, it avoids the shady issue of violating the separation of powers, because there is no judicial authority to be usurped; they merely assert their power in protecting religion as a statutory right (on par with environmental or disabilities concerns) rather than as a constitutional right. Avoiding any questionable constitutional interpretation, Congress simply declared religion as "an important human value that [it] can promote to the full extent of its constitutional powers" (McConnell 1998, 2). This seems especially safe since, in the last half of the century, the Court's established precedent has been to uphold Congress's Spending and Commerce Clause authority to legislate "beyond the constitutional minimum." Similarly, while the court has concluded that neutral and generally applicable laws cannot violate the Free Exercise Clause, that does not prevent Congress from protecting religious freedom under the Spending Clause and Commerce Clause (McConnell 1998, 3)

"With RLPA, Congress has chosen as its "other constitutionally vested powers "those found in the Spending and the Commerce Clauses to offer a fuller protection to religious liberty" beyond the constitutional minimum."

Federalism concerns are also ameliorated in RLPA, especially due to the Commerce Clause section. Precedent clearly reserves to Congress (over the States) the right to regulate behavior outside of commercial considerations under the authority of regulating commerce. To the extent that a particular activity demonstrably affects or touches on "interstate commerce," it falls within the scope of the Commerce Clause, and is thus regulable. Since much of the free exercise of religion will affect and be affected by commerce (such as the Flores situation), RLPA can justifiably exercise that power over any State prerogative. As McConnell concludes, "[t]he Commerce Clause is our constitution's means of demarcating the federal from the state spheres of regulation" (McConnell 1998, 5).

3. The Political Game

In this section I am primarily concerned with exploring the politics of the Smith-RFRA/Flores-RLPA "game" being played between the various branches of government. I will begin by establishing a general theory of how the branches (specifically Congress and the Courts) should work together within the constitutional framework. I will then introduce a model based on game theory which seeks to demonstrate the relationship as it is played out in the course of the policymaking process. Finally, I will demonstrate that the model fails to fully explain Flores, and seek to offer a proper explanation as to why this is so.

A. America's Constitutional Democracy

During the battle over the Constitution's ratification, both Federalists and Anti-Federalists considered the power of the judiciary. In debating judicial review (the authority to rule on the constitutionality of laws), the two sides, represented by "Publius" and "Brutus" respectively, actually found a lot of common ground. Both agreed that the proposed Constitution allowed the Courts to have the final say in its interpretation and application in reviewing all laws. Indeed, Publius asserts that the Constitution delineates this power accordingly: The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding form the legislative body (Chadwick 1987, 423). They also agreed that the justice's independence and life tenure during good behavior would effectively strengthen the Court's power and lead to judicial review. The only argument was whether or not this would be a good thing. I argue that it is.

Any democratic form of government derives its authority either directly or indirectly from the people. While the Founders favored this idea of popular sovereignty, they also feared the excess and abuses of such a system—particularly the problem of majority faction. That is, they also sought to protect minorities who are otherwise left unprotected from the will of the majority. Therefore, they established a system which effectively combines "majority rule" with the appropriate structures to protect minority rights. The simplest way to do that is to constitutionally declare rights, and provide for a branch of government that can enforce those rights irrespective of the majority. The judiciary fulfills this role, and has historically provided the means of relief for minorities whose voices are otherwise stifled by the political process; this at least assures that their fundamental rights are not also stifled. Thus, as Rex Lee asserts, "Constitutional rights are, by their nature, minority rights" (Lee 1993, 75)

The difficulty comes in recognizing that the Court can exercise tremendous control in the realm of policymaking that is otherwise reserved for Congress. This is not to say that the oversimplified paradigm of a tripartite government, where the three branches exercise total and complete power in their sphere, separate form the respective powers of the others, is correct or even desired. As Richard Neustadt so succinctly stated, the Constitution did not provide a government

of separate powers, "[r]ather it created a government of separated institutions sharing power" (qtd. in Nivola and Rosenbloom 1990, 331). However, a respect for democracy should still dictate to the Court a general "attitude of deference toward the legislature, and a consequent reluctance to rule against constitutionality" (Lee 1993, 78). Of course, the Court should pay close attention, because legislative policy choices, reflecting the will and efforts of the majority, tend to limit minority rights. When this happens, the Court has the obligation to intervene and overturn such laws. As we have already seen, strange constitutional and political questions arise when just the opposite happens—when Congress attempts to implement legislation that strengthens (rather than limits) minority rights.

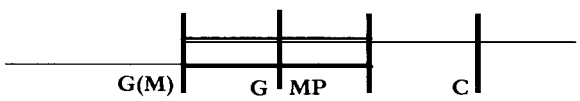
B. Positive game theory analysis

One way to describe the interplay between the branches of government is with a game model. Professor William Eskridge Jr. offers such a model relating to this interaction over civil rights legislation (1991). In it he describes how certain legislative acts (especially the Civil Rights Act of 1990) have been implemented by Congress in attempts to overturn what they see as judicial misinterpretations. This has some readily apparent similarities to the situation we have discussed herein. Indeed, smacking of RFRA both in name and language, the Civil Rights Restoration Act of 1987 declared that its purpose, is to reaffirm pre-Grove City College judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes (qtd. in Eskridge 1991, 636). Similarly the Civil Rights Act of 1990 declared that, in a series of recent decisions addressing employment discrimination claims under Federal Law the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protection. This bill responds to the Supreme Courts recent decisions by restoring the civil rights protections that were dramatically limited by those decisions (qtd. in Eskridge 1991, 638).
Notice, also, that by narrowly interpreting the statutes, the Court had effectively limited minority rights that Congress tried to strengthen, as in the RFRA-Flores situation. As mentioned above, this abandons and reverses the usual paradigm of Congress limiting, and the Court protecting such rights. Assuming, then, that we are dealing with similar circumstances (albeit with religious freedom rather that civil rights) we can try to apply this model.

The players of the game are the Supreme Court (C), the "legislative gatekeepers" (G), the Congress as a whole (M), and the President (P). The game begins with the Court's interpretation of a statute. It then flows in the pattern C Æ G Æ M Æ P Æ M in which each player decides how it will respond to the previous play within its scope and power (Eskridge 1991, 644). These responses are subject to and constrained by the following considerations and assumptions:
1. The game is played in the sequence outlined above.
2. Each of the players acts on complete information and knowledge thus perfectly anticipating the "future course of play"
3. No player will want to "make a decision that will be overturned by another player with the authority to do so."
4. Resulting from 1, 2, and 3, each player has an "indifference point" which is the point on the political spectrum that the player likes just as much as another point in the opposite direction
5. The veto median (V) is the point that divides congress with one-third on one side and two-thirds on the other side of the spectrum. This is obviously important for the president who is contemplating a potential veto (Eskridge 1991, 644-5).
Played on a linear field from left (liberal) to right (conservative), the game exists within a political alignment that demonstrates the climate in which it will be played, and which should dictate the outcome. In the early to mid 1990's, the configuration would resemble.

Figure 1

Religious Liberty Preferences, 1990-97



This simply means that during this era, the Court (C) has taken a more conservative stance on its religious freedom preferences than Congress (M) and the President (P), while the "gatekeepers" (G) are at least slightly more liberal than Congress as a whole. The indifference point (G (M)) is equidistant from G, in the opposite direction than M. Thus, when the game begins, the Court should abandon its policy preference and compromise on a stand at or just to the left of M. This is dictated by assumption #3 because,if the Court implements its own preferences (C) through interpretation...it will be overridden, because the gatekeepers will have an incentive to introducing overruling legislation (they prefer any $x < C$, and the ultimate result $M < C$), and Congress will vote for its preferred outcome over that of the Court (it prefers M to C) (Eskridge 1991,. 650).

Unfortunately, when RFRA came up for review in Flores this is exactly what did not occur. Rather than deferring to Congress and abandoning its Smith jurisprudence, the Court reaffirmed and took a strong stand at C. According to the model, this should not have happened. This, of course, is only going to invite a legislative override with complete support of the President, ultimately resulting in a loss for the Court. Why would the Court do that, and why does the model not account for it? The inconsistencies may be explicated by simply altering the model as Eskridge did when he found such anomalies in his case study. By amending the model with "informational assumptions," he assumes the game to be even more dynamic such that policy preferences are formed and determined during the game in response to the arguments of the other players (Eskridge 1991, 656). This leads to two alternative explanations in our example.

The first is called the "information variation" and declares that "the Court will stick to its preferences and try to persuade the gatekeepers and Congress of its views" (Eskridge 1991, 658). However, reading Flores one does not exactly feel like the Court was trying to persuade; it comes across more as

backlash at Congress for challenging its Smith holding. The second possibility—the "distributive variation"—asserts that the Court may have tried to shift leftward from its preference toward M, but "was simply mistaken about the congressional median" (Eskridge 1991, 658). This, too, fails in our example because with the broad (almost unanimous) and intense congressional support of RFRA, there could clearly be no mistake in judging M's position. Besides, there is nothing to suggest that the Court shifted at all; on the contrary, it simply appears that they thumbed their noses at the legislative branch, openly inviting further challenges. According to the model (even after amending), this is a foolish move for the Court, because it will inevitably lead to a legislative override and thus allow Congress to win the game. Assuming that the justices possess good political savvy, we must admit that the model simply fails to explain this exchange for some reason or another.

The problem lies in the assumption that the Smith-RFRA-Flores game is similar to civil rights game used by Eskridge. While I pointed out some superficial similarities between the two, there is one significant difference: the model was designed to deal with various interpretations and preferences of statutory policy, while the Court in Flores raised the question to the level of constitutional law. Quite simply, feeling challenged by the inflammatory rhetoric of RFRA, the Court sought to "protect its turf and institutional legitimacy" (Devins 1998, 650). Knowing they could not do so on the normal playing field described by our model, they raised the game to the higher level of constitutional interpretation. At this level the Court clearly has the home field advantage and needs only to invoke its authority to "say what the law is" (Marbury v. Madison 1803). By upping the stakes in this way, the Court sends a clear message to Congress:

It is difficult to predict what the outcome of RLPA will be. It did not pass in 1998, but it will assuredly be proposed again this session. However, at this point it is uncertain whether or not it will even be enacted. After all, Congress will be reluctant to risk the time and political capital on a battle they cannot win—it is no fun playing when you know your are going to lose. Besides, the lack of substantial harm to religious liberty may not warrant any more challenges at the federal level. Consequently, the issue may have lost some salience to politicians who do not perceive it as important to their constituents. Put simply, Congress just may not be willing to "take it to the mat" again. If that is true, then what is next? As I see it, there are three things that could happen.

4. Conclusion

First, RLPA might become law. If this happens, it does stand at least a fair chance of survival. Since it does not hinge on the questionable interpretation of the substantive/remedial powers of the Enforcement Clause, the Court should no longer perceive it as a threat to their judicial authority. However, if the Court is still determined to enforce its position, it might fight the bill on the issue of federalism in reviewing the Commerce Clause. Second, the question may simply have to remain at the state level. Indeed, many states have already adopted their own RFRA legislation. Third, Congress may seek to pass a Constitutional Amendment. This is, of course, unlikely given the difficulty and improbability of approving such an amendment let alone its ratification; right now they do not even have enough interest or support to pass it as a normal legislative act. Regardless of what happens, it is of great significance that the issue has presented itself for our consideration. Religious liberty is a fundamental right that we are guaranteed under our noble Constitution, yet if we fail to fully understand and protect that freedom, we may not recognize when it is taken from us. Worse yet, we may not care. Especially in the types of cases discussed herein, when the threat to religious freedom comes from benign, generally applicable laws, we must recognize that the effects are no less real or disastrous than if intentional. Thus, we cannot afford to be apathetic and simply go on living in the anticipation of peripheral concerns and problems with little concern for religious freedom issues. This is particularly true of our current preoccupation with Y2K and the end of the world. Of course, when that does occur and the Good Lord comes down to usher it all in, then as Rex Lee points out, "all laws should be generally applicable" (Lee 1993, 96).

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Brigham Young University
Religious Freedom: Fundamental Liberty, Statutory Right or Less?
Nathan Dullum 11 December 1998PlSc 361 (Edwards)

"In my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit." George Washington

"writing is the art of binding the world with words..."