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ESSAY: Religious Freedom in the Nineties: Betwixt and Between Flores and Smith

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SUMMARY:

... This meant that, in order to override a religious liberty claim, the State, e.g., the government, had to prove that its action advanced a compelling state interest. ... The *Smith* decision thus threatened the continued vitality of individual religious rights under the Bill of Rights by eliminating a pure religious liberty defense to generally applicable laws. ... Essentially overruling *Smith* by legislation, RFRA became the mainstay of religious liberty claims of every stripe. ... The principal, and now on-going, threat to religious liberty posed by *Smith* is not primarily related to so-called "mainstream" religions. ... For example, the *Smith* Court ignored the intent of the Framers of the First Amendment by subjecting religious liberty to the dictates of lawmakers and majoritarianism. ... Reports indicate that several states have passed or plan to pass their own RFRA laws so that religious liberty will be protected with respect to actions of the States. ... State constitutions provide a base of support for the concept, if not always the implementation, of religious liberty. ... One must consider carefully the wisdom of turning to state politics to fill the void in religious liberty law now left by the highest court in the land. ...

TEXT:

[*105] In 1990, the United States Supreme Court stunned the organized religious community when, without being asked to do so, it overturned three decades of established free exercise jurisprudence. In *Employment Division, Oregon Department of Human Resources v. Smith*,ⁿ¹ the Court upheld Oregon's denial of unemployment benefits for two Native American Church members who had been fired for their sacramental use of peyote.

Prior to *Smith*, the Supreme Court had subjected laws or government actions affecting religion to the "compelling state interest" test.ⁿ² This meant that, in order to override a religious liberty claim, the State, e.g., the government, had to prove that its action advanced a compelling state interest. Moreover, even if the State proved its compelling interest, the State also was required to demonstrate that its means of regulation constituted the least restrictive means of accomplishing its interest. Likewise, if the State's objective could be served as well by granting an exemption to individuals whose religious beliefs were burdened by such state action, such an exemption was required to be given.

Ignoring three decades of its own established free exercise jurisprudence, the Court concluded in *Smith* that its compelling state interest test need not be employed in the case of so-called "generally applicable" laws regulating what was deemed to be socially harmful

conduct. n3 Religiously neutral laws may bypass the test and need only be rationally related to a legitimate state interest. The *Smith* decision thus threatened the continued vitality of individual religious rights under the Bill of Rights by eliminating a pure religious liberty defense to generally applicable laws. Religious liberty would now be subjected to majoritarian rule, and individual religious freedom would be [*106] subordinated to legislative enactments unless religion was the specific target of an enactment.

This meant that, to bar or limit a religious practice, the government would now need only a legislative majority. For example, post-*Smith*, Sikhs were forced to remove their turbans in order to work on construction sites, n4 a Hmong immigrant family from Laos and Jewish individuals were forced to endure autopsies of loved ones in violation of their religious beliefs, n5 and the religious liberties of prisoners were curtailed as part of routine prison regulations. n6

Many in the organized religious community, both conservative and liberal, protested the *Smith* decision, and a coalition arose to seek a legislative remedy for it. n7 Congress responded by enacting the Religious Freedom Restoration Act (RFRA), n8 which attempted to legislate restoration of the pre-*Smith* judicial standard in Free Exercise cases by establishing a statutory claim to the free exercise of religion.

President Bill Clinton signed RFRA into law on November 16, 1993. RFRA replaced the *Smith* general application test for free exercise cases with a strict scrutiny analysis. Specifically, RFRA provided that government may not substantially burden a person's exercise of religion even if the burden is imposed by a law of general application, unless the government proves that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. Essentially overruling *Smith* by legislation, RFRA became the mainstay of religious liberty claims of every stripe.

The *Smith* decision, its aftermath and the interests expressed in RFRA came to a boil on June 25, 1997, when the United States Supreme Court announced its decision in *City of Boerne v. Flores*. n9 In *Flores*, a Catholic church argued that the City of Boerne's denial of a building permit for the church's expansion was unconstitutional, since the city substantially burdened the religious exercise of the church practitioners, and the city could not justify the permit denial with a [*107] narrowly-tailored compelling interest as statutorily required by Congress in RFRA. The issue before the Court was whether RFRA was constitutional as it applied to the City of Boerne, an arm of the state government. n10

By a 6-3 margin, the Court struck down portions of RFRA as a violation of the principles necessary to maintain the constitutional separation of powers and the federal balance. The *Flores* Court held that Congress' enforcement power under the Fourteenth Amendment extends only to its "enforcing" provisions and that Congress does not have the power to determine what constitutes a violation of the Constitution. In RFRA, Congress had relied on its Fourteenth Amendment enforcement power to impose the more protective strict judicial scrutiny analysis to state regulations that burdened religious expression.

In the opinion written by Justice Kennedy, the Court stated:

The design of the Amendment and the text . . . are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. n11

Although RFRA's mandate extends to any branch of federal or state government, to all officials and to other persons acting under color of law, the Court did not address the applicability of RFRA to the federal government and federal laws. Rather, the holding in *Flores* turned upon the authority of Congress to impose burdens upon the States. The Court stressed that RFRA would impermissibly "intrude into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." n12

After striking portions of RFRA as unconstitutional, the Court made it clear that its test of the Free Exercise Clause analysis enunciated in *Smith* will remain intact, at least as to States. Having found that the zoning regulations at issue constitute laws of general application, the *Flores* Court held in favor of the government's denial of the building permit:

Numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been [*108] burdened any more than other citizens, let alone burdened because of their religious beliefs. n13

The *Flores* Court noted that it will apply the *Smith* standard in deciding whether the Free Exercise Clause has been violated and that it will not apply the compelling state interest requirement unless the regulatory law impacts the Free Exercise Clause *and* some other constitutional protection such as freedom of speech or freedom of the press. n14

THE POST-RFRA LANDSCAPE

The principal, and now on-going, threat to religious liberty posed by *Smith* is not primarily related to so-called "mainstream" religions. These religions often have the resources, including the political clout, to compel legislative bodies to accommodate, to varying degrees, their needs. n15

The principal threat of *Smith* is to small or unpopular faiths. For example, few would envision the enforcement of a prohibition against serving wine to minors as part of the Christian sacrament. However, the *Smith* case forbade the use of peyote by Native Americans who use it for sacramental purposes.

Given the importance of individual liberty in our nation's heritage and jurisprudence, it would be surprising if *Smith* represents the *status quo*. Several forums are available to change its contours.

Supreme Court Review

Neither *Flores* nor *Smith* seem likely to be the last word on the Supreme Court's free exercise jurisprudence. This appears to be predicted in the writings of the Justices themselves. For example, Justice O'Connor foreshadowed a re-examination of *Smith* in her dissent to the *Flores* decision. n16 Although she agreed that Congress lacks the power to decree the substance of the Fourteenth Amendment's restrictions on the States and that Congress lacks the ability [*109] independently to define or expand the scope of constitutional rights by statute, Justice O'Connor expressed support for re-examination and replacement of the *Smith* test and advocated that the Court re-adopt the strict scrutiny analysis favored by Congress. n17 Justice Souter entreated the Court earlier, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, n18 to re-examine the *Smith* test in the next case that would turn on its application. n19

While many doubt there are five votes on the Court to reverse the ruling, at least a re-examination and re-formulation seem necessary and inevitable. For example, the *Smith* Court

ignored the intent of the Framers of the First Amendment by subjecting religious liberty to the dictates of lawmakers and majoritarianism. In the course of making its sweeping rule, *Smith* did not inquire into the roots of the free exercise of religion to interpret the original meaning of the Free Exercise Clause. Before *Smith*, little information existed on the history of the Free Exercise Clause in either United States Supreme Court opinions or in scholarly articles. More extensive legal scholarship developed after *Smith* confirms that the pre-*Smith* compelling interest test is in fact consistent with the original understanding that free exercise of religion was to be protected from the burdensome effects of neutral laws of general applicability.

The longstanding method of exempting religious practices from generally applicable laws as an acceptable means of protecting religious beliefs is more consistent with the Framers' intent than a position of facial neutrality.

Indeed, the Framers sought to establish rights of conscience where minority religious views would be protected from majoritarian excesses. The First Amendment was born from the fires of religious persecution. The entire historical record -- including the records of the debate as the First Congress adopted the Bill of Rights and the records of the state legislatures ratifying the Constitution -- unequivocally demonstrates that the Free Exercise and Establishment Clauses of the First Amendment were aimed at two goals: the nonestablishment of a national religion and the accommodation of rights of religious practice and conscience to promote religious tolerance. The freedom guaranteed under the Free Exercise Clause, like the Free Speech, Free Press and Establishment Clauses, was a preferred freedom. The Framers believed that religious beliefs merited special protection, not because those beliefs were qualitatively superior to non-religious judgments, but **[*110]** because of the conflict between dual sovereigns, both of whom demanded obedience that was beyond the individual's control to harmonize.

The history and original intent of the Free Exercise Clause support protection of religious individuals through providing exemptions, not merely prohibiting anti-religious discrimination. Thus, the Free Exercise Clause was an affirmative statement which permitted exemptions from generally applicable laws for religious acts, subject only to the limitation that the religious acts not violate laws preserving peace, safety and the private rights of others.

Deference to the majority will was exquisitely married to the important constitutional tradition of individual rights. This marriage was clearly evident in the express constraints imposed by the Bill of Rights, as well as in provisions establishing limited government and checks and balances expressed elsewhere in the Constitution. The system of checks and balances was seen as inadequate by itself, however, to assure that no single group could gain sufficient power to enable it to oppress or frustrate the religious preferences of any other group. Minority groups, even those with requisite influence at the state level, might not have equivalent influence at the national level and might be subjected to laws of general application which would tend to oppress religion. Therefore, the passage of the Free Exercise Clause itself lends support to the idea that the Framers intended to provide exemptions as a means of protecting minority religions from laws of general application. The Supreme Court must consider the historical record to ensure that free exercise jurisprudence is not left in an unsettled and, to a broad spectrum of society, unsettling condition.

There are other important reasons to reconsider *Smith*. First, the *Smith* rule was established without briefing and oral argument. Rarely, if ever, has the Court decided an issue of such magnitude, not presented by the parties or the facts of the case, without notice and argument. Second, and related to the first reason, *Smith* set forth a broader constitutional rule than was necessary to resolve the case. Indeed, Justice O'Connor reached the same result as the majority by applying the existing free exercise precedents. n20

In sum, there is ample support for the Court's revitalization and endorsement of the compelling interest test instead of continuing support for *Smith's* rejection of it. The Court should reconsider and reject its holding in *Smith*.

[*111] *Federal By-Pass*

The Supreme Court decided in *Flores* that the Fourteenth Amendment, which empowers Congress to enforce constitutional rights against State and local governments, did not give federal lawmakers the right to broaden the Supreme Court's definition of religious liberty and then require lower governments to respect it. Ostensibly, the *Flores* decision would not, then, prevent RFRA from being applied to federal laws and policies.

However, neither does *Flores* seem to prevent Congress from requiring States and their subsidiaries to accommodate religious liberty infringements in programs which have a federal funding component. This will undoubtedly be refined and tested in the courts.

State Legislation

Pending changes in the *Smith* rule, the post-*Flores* landscape includes state legislative forays. Reports indicate that several states have passed or plan to pass their own RFRA laws so that religious liberty will be protected with respect to actions of the States. The Associated Press has reported that Rhode Island and Connecticut have passed such laws. n21 Ohio is close to passing one as well, though it excludes cases affecting prison inmates. n22 The Virginia, n23 Michigan, n24 New York, n25 California, n26 New Jersey n27 and Florida n28 legislatures are also reported to be considering such laws.

State Constitutions

State constitutions provide a base of support for the concept, if not always the implementation, of religious liberty. Thus, state constitutions and state constitutional amendments, where necessary, might provide a basis for religious liberty which is more easily obtained than a retrenchment by the United States Supreme Court.

[*112] *Federal Constitutional Amendment*

A federal constitutional amendment is a theoretical possibility. However, federal constitutional amendments are lengthy and time-consuming, and the requisite draftsmanship may be difficult to obtain, especially in view of the intensity and diversity of those who express an interest in these matters.

CONCLUSION

Although *Smith* provides little support for pure religious liberty, important reservations remain about resorting to majoritarian remedies such as RFRA, at either the state or federal level, to protect or create religious rights.

The wisdom of routinely subjecting the guarantees in the Bill of Rights to the majoritarian political process is doubtful. This concern is somewhat ironically demonstrated by the fact that some of the civil liberties organizations which supported RFRA disagreed when other ideological forces sought to amend the Bill of Rights by statute to prohibit, for example, flag burning.

The role of the state and federal legislatures in segregation -- and the role of the United States Supreme Court in ending it -- serves as a painful reminder of the perils of relegating the freedoms enshrined in the Bill of Rights to majoritarian breezes. The States and Congress failed African Americans, for example, until the courts stepped in.

One must consider carefully the wisdom of turning to state politics to fill the void in religious liberty law now left by the highest court in the land. The eventual result of such a majoritarian approach could well be the dilution and devaluation of some very important freedoms, especially for the powerless and the minorities.

Moreover, by relegating the definition of individual religious rights to the political process, enactments such as RFRA could significantly weaken any substantial check on majoritarian excesses, since the Supreme Court's *Smith* standard of review subjects legislative action only to a standard of reasonableness. Virtually any religiously-neutral legislation could pass this scrutiny.

Although the Supreme Court refused to sanction an amendment of the Bill of Rights through the legislative process, concern remains that *Smith*'s majoritarian approach will inexorably move legislatures to define the Bill of Rights in extremes heretofore limited by the slower pace of judicial review and procedure, the more conservative rules of judicial interpretation such as *stare decisis*, and, from time to time, the [*113] reluctance of courts to intrude upon what are clearly social policy questions as opposed to matters of constitutional right.

In the end, the philosophy of subjecting what has been a matter of constitutional right to the legislative process could produce at least three outcomes with harmful potential: (1) less individual freedom; (2) politicization of the Bill of Rights; and (3) instability in the law, including more frequent strife and confrontation between the judicial and legislative branches.

It is important to avoid hasty fixes to complex constitutional problems. If legislation or constitutional amendments are the solution, it is imperative that they be properly worded and narrowly tailored. This means that prudent deliberation must be the order of the day, and the myriad of alternatives must be carefully considered. Otherwise, the delicate balance effected by the First Amendment may never be restored, and the erosion of religious freedom will most likely continue.

FOOTNOTES:

n1 494 U.S. 872 (1990).

n2 See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Ind. Employment Security Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

n3 *Smith*, 494 U.S. at 885.

n4 See, e.g., Edward McGlynn Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 *BYU L. REV.* 189, 220 n.115 (citing OSHA Notice CPL 2 (Nov. 5, 1990) (post-*Smith* regulation that revoked an Amish and Sikh exemption from the hard hat requirement on construction sites)).

n5 See, e.g., *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (Hmong family); *Liberman v. Riverside Mem'l Chapel, Inc.*, 225 A.D.2d 283 (N.Y. App. Div. 1996) (Jewish family).

n6 But see Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 *YALE L.J.* 459 (1996).

n7 The Coalition for the Free Exercise of Religion consisted of over 50 ideologically diverse groups. See Michael P. Farris & Jordan W. Lorence, *Employment Division and the Need for the Religious Freedom Restoration Act*, 6 *REGENT U. L. REV.* 65, 88-89 & n.131 (1995).

n8 42 U.S.C. § 2000bb (1994).

n9 117 S. Ct. 2157 (1997).

n10 *Id.* at 2160.

n11 *Id.* at 2164.

n12 *Id.* at 2171.

n13 *Id.*

n14 *Id.* at 2161.

n15 This, obviously, is not to say that the *Smith* rule cannot affect mainstream religions. The *Flores* case itself involved a mainstream denomination seeking to expand its facilities for a rapidly-growing congregation. A Virginia case also demonstrates the potential for a wide range of *Smith* effects on mainstream religions. *Stuart Circle Parish v. Board of Zoning*, 946 F. Supp. 1225 (E.D. Va. 1996). The case involves a Richmond, Virginia, ordinance which limits feeding programs for the homeless. Under the ordinance, groups cannot feed more than 30 people outside the downtown district more than seven times a year unless they pay a \$ 1,000 fee for the right to seek approval from a zoning board. Under *Smith*, this religion-based work is entitled to no exemption from the city ordinance.

n16 *Flores*, 117 S. Ct. at 2176 (O'Connor, J., dissenting).

n17 *Id.* at 2176, 2178.

n18 508 U.S. 520 (1993).

n19 *Id.* at 559 (Souter, J., concurring).

n20 *Employment Div., Or. Dep't of Human Resources v. Smith*, 494 U.S. 872, 903-07 (1990) (O'Connor, J., concurring).

n21 See Virginia Culver, *Court Blow Not Seen as Fatal to Religious Liberty*, DENVER POST, Aug. 9, 1997, at B-06.

n22 See Llen Oxman, *AG Wants State Religious Liberty Law*, NAT'L L.J., July 14, 1997, at A8.

n23 See Carrie Johnson, *Gilmore, Beyer Support Religious Freedom Measure*, RICHMOND-TIMES DISPATCH, Sept. 5, 1997, at B1.

n24 See Greta Guest, *House Passes Bill to Preserve Religious Freedom*, ASSOCIATED PRESS POL. SERV., July 3, 1997, available at 1997 WL 2537355; see also Oxman *supra* note 22.

n25 See John Caher, *Religion Bill Held in Assembly May Be Considered Next Week*, TIMES UNION (Albany, N.Y.), July 10, 1997, available at 1997 WL 3501786.

n26 See Larry B. Stammer, *Bill Would Implement State Version of Federal Religious Freedom Act*, L.A. TIMES, Oct. 11, 1997, at B4.

n27 See Joe Donohue, *Legislators Offer Bill to Bolster Religion's Freedom from State*, STARLEDGER (Newark, N.J.), Sept. 18, 1997, available at 1997 WL 12548149.

n28 See Oxman *supra* note 22.