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Observers from outside the United States must be struck by the difference between the broadly tolerant and inclusive character of public attitudes toward religious exercise in this nation, and the narrow compass of constitutional protection provided by its courts. After the Supreme Court's well-known 1990 decision, *Employment Division v. Smith*,[1] the courts ceased to provide any protection under the Free Exercise Clause from any application of a neutral and generally applicable law. Even before *Smith*, when the Court purported to hold that the government could not interfere with religious exercise without a compelling governmental interest,[2] free exercise claimants very rarely prevailed in court. Almost always, the courts ruled either that there had been no burden on religious exercise[3] or that the government's justification (even if seemingly weak) was compelling.[4]

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1. 494 U.S. 872 (1990).

2. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (allowing governmental restriction of tax-exempt status based on fundamental and overriding government interests "in eradicating racial discrimination in education"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (stating that only government interests of highest order could overcome legitimate free exercise of religion claims); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (allowing government limitation of exercise of religion only to protect paramount interests).

3. *See generally* Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961) (finding Sunday closing law did not make any of appellant's religious practices unlawful); Lyng v. Northwest Indian Cemetery Protection Ass'n, 475 U.S. 439, 450–51 (1998) (holding that construction of logging road through sacred lands did not coerce beliefs and, therefore, did not violate the free exercise clause); Tony & Susan Alamo Foundation v. Donovan, 417 U.S. 290, 303–05 (1985) (holding that requiring religious volunteers to accept a minimum wage did not violate their beliefs).

4. *See generally Bob Jones Univ.*, 461 U.S. at 604 (determining "eradicati[on] [of] racial discrimination in education" constituted sufficient government interest to allow denial of tax benefits); United States v. Lee, 455 U.S. 252, 257–59 (1982) (finding burdens on religion caused by mandatory participation in social security system justified); Goldman v. Weinberger, 472 U.S. 1016 (1986) (finding government interest in military morale overriding Jewish military officers' claim to wear yarmulke with the uniform).

Yet, even a cursory look at the statute books, or a more detailed look at actual practices in the cities and states of the United States, will reveal that the free exercise of religion is an honored value in American life and that members of minority religious groups often are given accommodations and exemptions that enable them to practice their faith even when it comes into conflict with generally applicable laws. Even before *Smith*, the greatest protection for free exercise of religion was not the prospect of successful litigation—since free exercise litigation was rarely successful—but the ability of religious individuals and groups to persuade government officials to provide reasonable accommodations to their religious needs. The great value of the pre-*Smith* constitutional doctrine was that it helped persons aggrieved by neutral and generally applicable laws to obtain a second look from an official who might be less impressed by the bureaucratic imperative of enforcing the rules as written, all the time, without exception.

This pattern—generous protection for civil liberties by political functionaries and scant protection by the courts—seems to defy our usual expectations about judicial review and about the comparative competence of governmental institutions. Basic political science courses often describe judicial review as fundamental to the protection of individual interests from majority rule. The ability to challenge governmental action in court gives non-majoritarian interests an avenue to overcome the majoritarian pronouncements of the legislatures. The democratic institutions of government represent majority rule, while the courts in our system—or in any system with judicial review—are more amenable to protecting minority interests.

If this traditional political science model is applied in practice to the free exercise of religion, we would expect to find laws passed by majoritarian legislatures that violate the free exercise of religion, followed by court decisions protecting religious minorities. (I speak of religious minorities because, even though the First Amendment protects all religions equally, legislation rarely has a negative impact upon the practitioners of large, powerful religions. They are usually able to organize and protect themselves in the political process without ever having to go to court. Or so one would expect from the traditional political science model.) And yet, when we look at the actual record of democratic institutions versus the courts in the United States, it turns out that reality does not conform to the political science model we have been taught. It is very nearly the opposite. Leg-

islatures have shown a remarkable degree of solicitude for minority religious interests, and courts in the United States have repeatedly—not always, but frequently—struck down the efforts of legislatures to protect minority religious groups as unconstitutional.

The most conspicuous example of this exchange of traditional political roles may be seen in the recent interplay between the Congress of the United States and the United States Supreme Court in the wake of the *Smith*[5] decision. The Court in *Smith* held that the Free Exercise Clause provides no protection against laws that are neutral and of general applicability.[6] The print was barely dry on the Supreme Court's decision in *Smith* when Congress began considering legislation to reverse that decision. Although it could not overturn the Supreme Court's constitutional interpretation, Congress sought, through enactment of a federal civil rights statute, the Religious Freedom Restoration Act ("RFRA"),[7] to provide a statutory remedy for any person whose exercise of religion is substantially burdened by a governmental act. Through RFRA, Congress sought to provide the same statutory protection that the Supreme Court had previously provided as a matter of constitutional interpretation.

Let us consider the traditional political science model in light of these developments—the decision in *Smith* and the enactment of RFRA. In *Smith*, the Supreme Court stated that it was not the judiciary's task to protect minority religious interests, and the Court worried openly about "courting anarchy."[8] Accordingly, the Court's decision upheld majoritarian values and preserved the ability of the government to ensure that governmental policy is enforced without the irritant of minority religious interests. In contrast, the Congress of the United States did not equate protection of minority religious interests with the possibility of courting anarchy. By enacting RFRA, Congress commanded that majoritarian interests should take second seat to minority religious interests, where this can be accomplished without undue harm to legitimate governmental interests. Remarkably—in light of the traditional political science model—the legislation passed Congress by a unanimous vote in the House of Representatives and a nearly unanimous vote in the Senate.[9] It was the

5. 494 U.S. 872 (1990).

6. *Id.* at 879.

7. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

8. *Smith*, 494 U.S. at 888.

9. The Senate passed RFRA by a vote of 97 to 3, and the House of Representatives

legislature, not the judiciary, that was more responsive to minority interests; and it was the Court, not the legislature, that was most solicitous of majoritarian values.

The juxtaposition of roles becomes even more peculiar when you consider that the United States Supreme Court subsequently held RFRA unconstitutional, at least as applied to the actions of state and local governments.[10] In *City of Boerne v. Flores*, the Court struck down RFRA, calling the Act "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[11] In critique of the *City of Boerne* decision, I have previously argued that the Court should have pursued a more modest judicial role, giving greater respect to the democratic choices represented by congressional enactment of RFRA.[12] However, regardless of the correctness of the *City of Boerne* decision, the entire saga casts doubt on the traditional political science model, in which judicial review provides a backstop for minority interests against a legislative branch that is presumed to be concerned with the majority.

Looking more broadly at this question, we find that the actions of Congress and the Supreme Court surrounding the *Smith* case were not aberrational. Many pieces of recent legislation were enacted precisely in order to provide protection for individual rights that the courts failed to provide. Contrary to the majoritarian principles traditionally evident in legislation, such statutes demonstrate the desire of the legislature to correct perceived failures of the federal courts to enforce and protect religious liberty. A number of recent examples serve to illustrate this phenomenon.

In 1984, Congress passed the Equal Access Act[13] to protect the rights of religious students to meet for bible study and prayer as noncurricular clubs in the public schools. This statute countered decisions of the federal courts of appeals that had uniformly held that

passed the Act unanimously. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

10. *See* City of Boerne v. Flores, 521 U.S. 507 (1997). The Court's opinion did not hold RFRA unconstitutional as applied to the actions of the federal government, and thus the Act likely still applies to federal governmental action. *See In re* Young, 141 F.3d 854, 858–59 (8th Cir. 1998).

11. *Flores*, 521 U.S. at 532.

12. Michael W. McConnell, *The Supreme Court, 1996 Term: Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997).

13. 20 U.S.C. §§ 4071–4074 (1988).

secondary schools were not a public forum where religious views could be freely expressed.[14] In 1994, Congress passed the American Indian Religious Freedom Act Amendments,[15] countering the precise decision in the *Smith* case and protecting religious use of peyote by Native Americans. In establishing such protection, Congress declared that "the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment."[16] In 1998, the Religious Liberty and Charitable Donation Protection Act[17] was signed into law to protect religious institutions, churches, and religious donors from bankruptcy courts that sought to seize contributions that had been made in the ordinary course of giving prior to the donor's filing for bankruptcy.

Most recently, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000,[18] restricting certain governmental burdens on religious exercise by states and local governments. First, in response to zoning boards resisting religious land use, the Act prohibits enforcement of land use regulations "that impose[] a substantial burden on the religious exercise of a person, including a religious assembly or institution."[19] This section of the Act protects religious construction activities, such as the building of houses of worship, and restricts government control of religious property use, such as restrictions on whether churches are able to operate homeless shelters and feeding programs on their premises. Second, the Act prohibits imposition of governmental restrictions that substantially burden the religious rights of persons "residing in or confined to an institution."[20]

Further, within the United States political framework, Congress is not the sole legislative body to enact statutes addressing the free exercise of religious rights of individuals. A number of states have

14. *See* Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); *see also* Brandon v. Board of Educ., 635 F.2d 971, 980 (2d Cir. 1980).

15. 42 U.S.C. § 1996a (1994).

16. *Id.* § (a)(5).

17. Pub. L. No. 105-183, 112 Stat. 517 (1998) (principally codified at 11 U.S.C. §§ 544, 548, and 1325 (Supp. IV 1998)).

18. Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000).

19. *Id.* § 2(a)(1).

20. *Id.* § 3(a).

passed their own versions of RFRA, protecting the free exercise of religion at the state level.[21] These state laws provide protection not only when religion is singled out for purposeful discrimination, but also when a neutral and generally applicable law creates incidental burdens on the practice of religion. In fact, a recent survey of federal and state law revealed more than 2000 different state and federal statutes that protect religions, and especially religious minorities, against various forms of legislation.[22]

Indeed, the variety of forms of protection offered through legislation is mind boggling. Consider these examples: A statute addressing meat inspection includes specific protections for kosher slaughterhouses; the Social Security law includes protections for ministers in churches that do not believe in the compulsory contributions by clergy to social security; state licensing statutes include protections for religious daycare centers; employment discrimination laws provide protections for the hiring practices of churches and synagogues; Medicare and Medicaid protect members of religions that do not believe in medicine so that they may still take some advantage of those programs. These are just a few of literally hundreds of examples.

The attention paid by the legislatures of the United States, whether state or federal, to the free exercise of religion is quite remarkable. In fact, a comparison of free exercise constitutional cases heard in all of the courts with the record of legislatures in passing religious accommodation laws demonstrates that legislatures, rather than courts, have been most attentive to the problems created for religious minorities by generally applicable laws. Court cases addressing the free exercise of religion are more likely to consider whether legislative accommodations of individual religious liberty violate the Establishment Clause than whether individual religious rights have been violated. Consider the different pieces of federal legislation cited previously. Tellingly, all but one of these statutes have been the subject of serious judicial challenge, based on the claim that they violate the Establishment Clause. For example, the Religious Land Use and Institutionalized Persons Act was signed into law only recently.

21. *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 607 n.4 (1999).

22. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

However, defendants have already challenged the constitutionality of the Act in four different cases.

It has been said that in theory, theory and practice are the same; but in practice, they are different. In political science theory, the judicial system is more likely than the legislature to be receptive to the needs of religious minorities or, for that matter, other civil rights minorities. The practice is quite different. In practice, in a properly constituted democratic system, the legislatures frequently have provided greater protection for the rights of religious liberty than has been provided through constitutional decisions from the courts.