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SHOULD CONGRESS PASS LEGISLATION RESTORING THE BROADER INTERPRETATION OF FREE EXERCISE OF RELIGION?

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Throughout the last 200 years, courts have predominantly used two approaches to analyze questions of religious liberty. Both of these approaches have important precursors in American tradition and both were used in early state court decisions. Each approach has had noble defenders on both sides of the political spectrum.

The first approach treats the Free Exercise Clause[1] of the First Amendment as a guarantee that the government will not direct any of its legislation specifically against the practice of a religion. In other words, the government is forbidden from singling out any one religion or making a religious practice the object of its legislation. Those who adhere to this approach view the First Amendment simply as a religious anti-discrimination provision.[2]

The other predominant approach to the question of religious liberty posits that all citizens are entitled to practice religion to the maximum extent possible, consistent with the maintenance of the peace and safety of the state.[3] This formulation, which parallels the wording of many early state constitutions,[4] sounds somewhat old-fashioned today. In recent years, the Supreme Court has expounded this view in more modern terms by stating that a burden on the free exercise of religion is constitutional only if there is a compelling governmental interest that

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). The first clause is referred to as the Establishment Clause; the second is the Free Exercise Clause. Both of the Religion Clauses have been made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Everson v. Board of Educ., 330 U.S. 1 (1947) (Establishment Clause).

2. *See, e.g.*, Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373.

3. *See, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that freedom of religion is susceptible to restriction only to prevent grave and immediate danger to interests that the state may lawfully protect).

4. *See infra* notes 16-18 and accompanying text for a discussion of these state constitutions.

justifies that burden.[5]

Because these definitions are exceedingly abstract, a few examples are necessary to demonstrate how these approaches affect real life situations. All of these examples involve generally applicable laws that were enacted for valid reasons and are generally constitutional. In the minds of the drafters, these laws have nothing to do with religion. Nevertheless, as applied to certain religions in specific circumstances, the laws have the effect of limiting the free exercise of religion.

For example, laws that prohibit discrimination in employment on the basis of gender are generally applicable and not directed at religion. They can significantly intrude on the free exercise of religion, however, if applied to the hiring of priests by the Roman Catholic Church. Because Catholic doctrine permits only males to serve as priests, an anti-discrimination law applied to the Catholic Church would require the Church to prove in court that gender is a bona fide occupational qualification for priesthood.[6] The court would be forced to decide whether this religious tenet is actually necessary for the Church to carry out its goals.

Historic preservation laws are also generally applicable laws that are not aimed at religion, but which can have the effect of preventing churches from making religiously significant changes to their places of worship. In 1990, for example, authorities in Boston prohibited a Jesuit church located in that

5. As actually applied, this standard does not provide as much protection for religion as the wording might suggest. The last major free exercise victory was Wisconsin v. Yoder, 406 U.S. 205 (1972). After *Yoder*, whenever the Supreme Court applied the compelling interest test to any case not governed by clear precedent, it found either that the free exercise right was not burdened or that the governmental interest was compelling. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting a free exercise challenge to income tax provisions said to deter adherents from engaging in certain church-related activities); Susan & Tony Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (upholding minimum wage laws against a free exercise challenge); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding the application of tax regulations preventing racial discrimination in the educational context against a free exercise challenge); United States v. Lee, 455 U.S. 252 (1982) (granting no relief to an Amish employer who failed, for religious reasons, to contribute to the social security tax system).

6. Section 703(e) of Title VII of the Civil Rights Act of 1964 permits gender-based classifications only "where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1988). This exception to Title VII's anti-discrimination provisions was "meant to be an extremely narrow exception to the general prohibition of discrimination . . . ." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

city from rearranging its sanctuary.[7] Under the law, the church would be forced to justify its desire to make the changes, and secular authorities would analyze complex theological arguments to determine if the reasons for the changes outweigh the city's reasons for objecting to them.

Religious teachings proscribing certain types of clothing have also come into conflict with generally applicable laws. Occupational Safety and Health Administration regulations require people who work on construction sites to wear hard hats,[8] but for both the Amish and the Sikhs doing so would be inconsistent with their religious beliefs. Strict enforcement of the law would mean that Amish and Sikhs could not be employed in the construction industry. Similarly, many public schools require students to wear certain types of clothing to gym classes. Under Moslem and Hindu teaching, however, the required dress may be considered immodest for girls.

When these issues have actually arisen, courts or the authorities enforcing the rules have usually made accommodations for the religious minorities.[9] For example, where required gym uniforms violate a certain religious group's teachings, the girls would either be allowed to wear a different form of dress or would be excused from class. Such accommodations were consistent with and arguably required by the Supreme Court's rulings on the subject of religious liberty up until last year's decision in *Employment Division, Department of Human Resources v. Smith.*[10]

In *Smith*, the Court departed sharply from its precedent in the religious liberty area by rejecting the compelling-interest test. The Court held that, except in a few nebulously defined cases, the government is not required to make exceptions from a generally applicable law for religious groups whose free exer-

7. *See* Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990). The Jesuits sought to change the design of the altar and add pastoral counseling rooms nearby. On appeal, the Supreme Judicial Court of Massachusetts struck down the landmark commission's action under the state constitution. *See id.* at 571.

8. 29 C.F.R. § 1926.100(a)(1991) provides that "[e]mployees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets."

9. *See* Rayburn v. Grand Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir.), *cert. denied*, 478 U.S. 1020 (1985) (holding that the hiring of clergy cannot be subjected to Title VII); OSHA Instruction STD 1-6.3 (Oct. 30, 1978), *revoked by* OSHA Notice CPL 2 (Nov. 5, 1990) (allowing religious exemption to hard hat rule).

10. 110 S.Ct. 1595 (1990).

cise is burdened by the law.[11] Though the Court explicitly affirmed the power of the legislature to accommodate burdened religious groups, it held that such accommodations are not required by the Free Exercise Clause of the First Amendment.[12]

From a policy perspective, the argument in favor of accommodating burdened religious groups is compelling. Given the tremendous diversity of the United States and the extent of government regulation, it is not surprising that well-intentioned, broadly-applicable legislation often conflicts, sometimes severely, with the religious beliefs of certain groups of people. Given our society's dedication to religious toleration and pluralism, it makes sense to create exceptions for those groups whenever that can be reasonably done. Asking that laws be written and enforced in such a way so that they do not conflict with people's fundamental religious beliefs is not a particularly radical request. As is suggested by the examples given above, in most cases religious beliefs can be accommodated with little effort and without creating any severe problems.

The more difficult question is whether the First Amendment actually *requires* accommodations in the types of cases discussed above. Although the policy argument for allowing accommodations in these cases is fairly straightforward, the constitutional argument is more complex. Several reasons, however, support the belief that the Constitution requires accommodations and that the Court misinterpreted the First Amendment in *Smith*.

The first reason can be found by studying the language of the Constitution itself. The First Amendment provides that Congress—which after incorporation through the Fourteenth Amendment means government in general[13]—"shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[14] This text appears to create more than a mere directive against discrimination. The Clause does not say that the government may not single out religion, nor that the government may not discriminate against an individual on the basis of religion. It seems to create a substantive right to the free exercise of religion, rather than a mere guarantee of equal treatment.

11. *See id.* at 1603.
12. *See id.* at 1606.
13. *See supra* note 1.
14. U.S. CONST. amend. I.

Although it is possible to read "prohibiting the free exercise of religion" to mean "directed to" or "singling out," that is not the most natural way of reading the text. An analogy can be made to a situation involving a zoning ordinance that requires that a particular area be restricted to residential uses. If a client asks a lawyer, "Am I prohibited from operating an ice cream store in this area?", the lawyer would read the ordinance and most likely reply: "Yes, the ordinance does prohibit ice cream stores." It would not matter that the ordinance was not *directed* at ice cream stores or that the drafters of the zoning ordinance never *thought about* ice cream stores; the ordinance, by creating a residential zone, prohibits ice cream stores. The crucial issue in free exercise cases is not whether the legislature was concerned with or thought about religion when it enacted a statute, but whether the law in fact prohibits a religious practice.

Moreover, a broad construction of the language of the First Amendment represents the better of two plausible understandings of neutrality toward religion. The narrower view, facial neutrality, simply prevents governmental hostility towards religion. Although that alone is an important constitutional protection that is not respected by every nation,[15] the broader interpretation treats the First Amendment as a true limitation on governmental power. The First Amendment is more than a safeguard against manipulation or abuse; it is a prohibition against the exercise of governmental power in an area that Americans historically have believed should be reserved to the individual conscience. From the point of view of religious believers, it does not really matter whether a law is directed at them; the injury to their religious practice is the same regardless of the legislators' motivation. If constitutional provisions such as the Free Exercise Clause are viewed as limiting governmental power, the broader interpretation is the better one.

A broad interpretation of the First Amendment is also supported, although not unequivocally, by the historical evidence. The Free Exercise Clause was patterned after the various free exercise and freedom of conscience provisions in then-existing state constitutions.[16] At the time of the ratification of the Bill of

15. For example, only recently has Mexico permitted churches to own property or to run schools. *See* Tim Golden, *Mexico Ending Church Restraints After 70 Years of Official Hostility*, N. Y. TIMES, Dec. 20, 1991, at A1.

16. *See, e.g.*, GA. CONST. art. LVI (1777).

Rights, twelve of the thirteen states had such provisions.[17] Of those twelve, nine either explicitly or implicitly expressed the following belief: The free exercise of religion is protected unless it endangers the public's peace and safety.[18] The exact wording varied from state to state, but the basic point of such statutes was the same. This formulation was a precursor to the compelling-interest test and implies that the free exercise of religion was understood to include an exemption from generally applicable laws. If the Clause were merely intended to prevent hostility toward religions, and (therefore) religious believers were required to follow all generally applicable laws, no peace and safety provisos would be necessary. Only where the right to the free exercise of religion creates an exemption from following general laws is it necessary to limit that right by prohibiting disruptions of the peace and safety of the state.

When religious conscience came into conflict with a generally applicable law prior to the enactment of the First Amendment, it was not unusual for the colonies and the states to allow exemptions from these laws.[19] The most notable accommodation occurred when the Continental Congress created an exemption from military conscription for adherents to faiths that forbade participation in war.[20]

Finally, the Free Exercise Clause should be given a broad reading because a narrow reading gives a decided advantage to "majority" religions, that is, religions that have a substantial number of followers or which for some other reason command a great deal of respect in society.[21] These religions, because

17. The one exception, Connecticut, was an exception only because it had not revised its constitution and was operating under a royal charter granted in the 1640s. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 276-78 (1969).

18. Article LVI of Georgia's 1777 Constitution is typical: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 383 (Ben P. Poore ed., Gov't Printing Office, 2d ed. 1878).

19. *See* Michael W. McConnell, *The Origins and Original Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466-73 (1990).

20. The Congress's resolution stated: "As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles." Resolution of July 18, 1775, *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS at 187, 189 (1905).

21. Interestingly, the Court in *Smith* acknowledges that this will be one result of its

their numbers give them substantial political influence, will be able to enter and win protection in the political arena. In addition, their members are often involved in the drafting of legislation, and they generally design the laws (consciously or unconsciously) in light of their religious mores. The religions that suffer under the narrow interpretation of the Free Exercise Clause are the unpopular, the unknown, and the unconventional. If we believe that the principle of freedom of religion exists to ensure that different manifestations of conscience are to be treated equally, a broad interpretation of the Free Exercise Clause is preferable.

If the Supreme Court was wrong to narrow the protections for religious exercise in *Smith*, the next question must be whether it is proper for Congress to enact a statutory remedy. A broad-based coalition in Congress has proposed a so-called Religious Freedom Restoration Act,[22] which would create a statutory cause of action for interferences with religious exercise under the legal standard that prevailed before *Smith*, the compelling-interest test.

Under a broad interpretation of the Free Exercise Clause, the power of Congress to require religious exemptions from generally applicable laws is not controversial. If citizens have the right to practice their religion subject only to the government's overriding need to protect peace and safety, then Congress can use Section Five of the Fourteenth Amendment to enforce that right.[23] A federal law requiring state and local governments to accommodate religion would be a straightforward application of Congressional powers under the Fourteenth Amendment.

Difficulties with such Congressional action arise only if the Supreme Court, when confronted with such a law, adheres to the narrow interpretation of the First Amendment it developed

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decision, but states that it is an "unavoidable consequence of democratic government" and "must be preferred to a system in which each conscience is a law unto itself." 110 S.Ct. 1595, 1606 (1990).

22. *See* H.R. No. 5377, 101st Cong., 2d Sess. (1990) (introduced by Congressman Stephen Solarz).

23. The Fourteenth Amendment provides in pertinent part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section Five of that Amendment broadly empowers the Congress "to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

in *Smith*. If citizens do *not* have an inherent right to have their religious beliefs accommodated, then the power of Congress to make such a law is less clear. Under the *Smith* interpretation of the Free Exercise Clause, the extent of Congressional power becomes a critical issue. If the courts will not give broad protection to the freedom of religion, Congress may be called upon to do so.

As discussed earlier, there are strong policy arguments in favor of protecting free exercise rights. A civilized, tolerant, and pluralistic society should strive to protect the rights of religious minorities to the fullest extent possible. If these minorities cannot get such protection through the courts, then Congress may be the institution best suited for providing that protection. The question that such Congressional action raises, however, is whether this would overstep the bounds of Congressional authority and usurp the power of the judiciary and the States. Determining whether Congress has the power to protect free exercise rights requires an examination of both separation of powers doctrine and the meaning of Section Five of the Fourteenth Amendment.

In one sense, Congressional action is even more appropriate than judicial action. One plausible argument against the broad interpretation of the Free Exercise Clause is that it invests the courts with the power to weigh constitutional interests against other governmental interests without any guidance from the legislature or constitutional warrant. When unelected judges take it upon themselves to overturn the decisions of representative bodies without objective criteria for judgment, they appear to exceed the bounds of the judicial function.

When Congress is making laws to protect religious liberty, the problem of judicial authority is eliminated. There is no fear of power being seized by unrepresentative and unaccountable judges. Instead, Congress, the representative branch of government, is taking the initiative and advancing an activist interpretation of the Fourteenth Amendment. This activism may give rise to federalism concerns, but given the history of the Fourteenth Amendment, those concerns should not be an impediment to Congressional action.

The Fourteenth Amendment was understood and intended to nationalize the issues of race and of the privileges and immu-

nities of citizenship.[24] Initially these matters were left to the States, but in the years leading up to the Civil War it became apparent that the States were not as protective of the interests and liberties of their citizens as our Founding Fathers had predicted. Therefore, these issues were federalized by the Reconstruction Amendments.[25]

What is often forgotten, in what has become a judge-centered view of constitutional law, is that Congress was understood to be the branch of the federal government most immediately responsible for protecting the rights arising out of those Amendments. The original drafts of the Fourteenth Amendment began differently than the current version does. They began by stating "Congress shall have the power to . . ."[26] and then proceeded to address the matter at hand. In one of the first interpretations of the Fourteenth Amendment, the Supreme Court in *Ex parte Virginia*[27] said that the effect of the Fourteenth Amendment was not to enlarge the power of the judiciary but to enlarge the power of Congress.[28] The various Reconstruction Congresses took a similar view of the Amendment. In a series of civil rights acts, Congress delineated the privileges and immunities of citizenship.[29] Senator Charles Sumner, the quintessential Reconstruction Era legal theorist of the Congress, followed the strategy of beginning with non-con-

24. The Fourteenth Amendment's "main purpose doubtless was, as has often been recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott* . . . ; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States." United States v. Wong Kim Ark, 169 U.S. 649, 676 (1898). *See also* Colgate v. Harvey, 296 U.S. 404 (1935) (concluding that a "[s]tate cannot abridge privileges of a citizen of the United States, even though he is a resident of a state which undertakes to do so."); Baldwin v. Franks, 120 U.S. 690 (1887) (determining that "[i]n the Constitution . . . the word 'citizen' is generally, if not always, used in a political sense, to designate one who has the rights and privileges of a citizen . . . of the United States, and it is so used in this clause.").

25. U.S. CONST. amend. XIII (abolishing slavery in the United States and any place subject to its jurisdiction, and empowering Congress to enforce its provisions with appropriate legislation); U.S. CONST. amend. XIV (ensuring due process and equal protection of the laws to all United States citizens regardless of state residence, and empowering Congress to enforce its provisions with appropriate legislation); U.S. CONST. amend. XV (ensuring to all United States citizens the right to vote regardless of race or color).

26. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 49 (1988).

27. 100 U.S. 339 (1880).

28. *See id.* at 345.

29. *See* Civil Rights Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866); Civil Rights Act of May 31, 1870, ch. 114, 16 Stat. 433 (1870); Civil Rights Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871); Civil Rights Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871); Civil Rights Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (1875).

troversial rights (to own and sell property, sue and be sued, to make contracts, and so forth) and then expanding them to protect other rights by federal law as it became politically feasible. As demonstrated by the debates over these Acts of Congress, he believed that he was using the Congressional forum to decide the privileges and immunities of citizenship.[30]

The Reconstruction Congresses did not pay much attention to the issue of free exercise of religion, but that does not prevent today's Congress from taking action. To the extent that Congress passes laws that protect the religious liberties of citizens, it is performing precisely the constitutional function that it was expected to perform under the Fourteenth Amendment. Indeed, it may be a positive development for this country if Congress began to take seriously its responsibility and authority to enforce the Constitution, rather than continuing to leave that duty to an unrepresentative and unaccountable group of nine.

30. *See generally*, ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS DEBATES (1967).