Congress, the Supreme Court, and the Battle to Protect Religious Liberty

Beau T. Underwood

Eureka College

bunderwood@eureka.edu

Abstract: Out of the Supreme Court's ruling in *Employment Division v. Smith*, which struck down previous standards established in *Sherbert v. Verner* used to enforce the Free Exercise Clause, erupted a battle between the legislative branch and the judicial branch. The response by Congress to the *Smith* decision was to create the Religious Freedom Restoration Act, which sole purpose was to reestablish the pre-*Smith* (i.e. *Sherbert)* standard. The Court also struck down this legislation in *City of Boerne v. Flores*, noting their displeasure with the actions of Congress. Congress responded by creating the Religious Liberty Protection Act, held up in the Senate over civil rights questions, and the Religious Land Use and Institutionalized Persons Act, enacted in 2000. This paper describes the history of this battle, examines the consequences of it, and raises questions about the future interaction of religion and politics

Religious practice is deeply imbedded within many facets of Americana, and citizens value the right to freely practice their religious beliefs. These rights were threatened when the Supreme Court struck down a long-standing legal standard in a landmark 1990 decision. After the ruling, the United States Congress, supported by a variety of advocacy groups and individuals, responded through legislation to restore the protection of these rights. What ensued was a decade long battle between the judicial and legislative branches over several constitutional rights and the importance of religious liberty in American society. For any individual interested in the way politics and religion interact in American Government, an understanding of this political and legal tug-of-war is necessary.

Within the context of American politics exists a debate over the proper influence of religion in the public arena and the degree to which those who craft public policy in this arena should legislate the rights of individuals to practice their religious beliefs. The history of the United States of America shares a profound relationship with the religiosity of the American citizenry as events throughout the country's history often involve religious values, have religious undertones, and are motivated by religious beliefs. Though the intensity and specific religious beliefs vary widely from both time and place, those who have called America home, both past and present, have had strongly held religious beliefs. Founded, in part, by religious dissidents, the United States of America holds a high amount of respect for the rights of individuals to practice their religious beliefs without government interference or discrimination from other members of society. Jefferson's *Virginia Statute of Religious Freedom*, written in 1770, cites the importance of the government not involving itself with one particular church or national religion,

while many political leaders, past and present, would also affirm the need for government to base decisions on sound public policy, not religious statutes or doctrine. Individuals have the right to hold and practice their own religious beliefs free from government intervention, while the government cannot support or proclaim a nation religion the populace must follow. The root of this argument, based upon Constitutional principles, forms the basis of the role Congress has had in legislating "religious freedom" in recent decades.

Before discussing the various aspects of the argument, one needs an understanding of the Constitutional principles invoked in this debate. The first amendment to the United States Constitution partially states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The idea of separation between church and state stems from the first portion of this statement, known as the "establishment clause," which holds that the federal government cannot establish a national religion nor undertake other excessive involvement with religion (Wilson 323). In determining whether a law or piece of legislation violates the establishment clause, the Supreme Court has traditionally used tests from *Lemon v. Kurtzman* (1971). This standard, known as the *Lemon* test, holds that a law must meet three criteria: serving a primarily secular purpose, having primarily secular consequences, and not excessively entangling church and state (Wald 94). The second portion of the previously cited sentence in the first amendment prevents the government from purposely inhibiting an individual's right to practice religious beliefs and is known as the "free-exercise clause." The Supreme Court's standard in applying this law historically came from the 1963 case, *Sherbert v. Verner***.** The *Sherbert* test required any law that infringes

on the rights of an individual or group to practice their religious beliefs to have resulted from a compelling government interest and to be the only practical means through which the legislation's ends can be achieved (Wald 99-100). If the government fails to demonstrate a compelling interest or the goals the law pursues are achievable through different, less intrusive, means, then the law violates the free-exercise clause, under the standards established in *Sherbert.*

In addition to the previously mentioned principles, the scope of the material this paper covers requires an understanding of the "equal-protection clause" of the fourteenth amendment. This clause, which says that no state shall "deny to any person within its jurisdiction the equal protection of the laws," ensures that each person is guaranteed equality under the rule of law, and laws cannot be selectively applied to certain groups or individuals. This has come into play when certain laws are enacted purposefully to restrict a specific religious group from engaging in their religious rituals. This issue was decided in *Lukumi Babalu Aye v. City of Hialeah* where, as Marci Hamilton notes:

> …the City of Hialeah, Florida had criminalized animal "sacrifice," a practice central to Santerian worship. Evidence suggested that the law was passed specifically to drive the Santerians out of Hialeah. The Court applied strict scrutiny and struck down Hialeah's ordinance on the ground that it was hostile to a particular religious group. (par. 9).

Any discussion of legislation involving religion must be understood in the context of these constitutional principles, understanding the government must, within reason, treat all religious people equally, not establish a government supported religion, and cannot

pass legislation solely to prevent a specific group of individuals from practicing their religious beliefs.

An attempt to maintain legal equality concerning individual religious practice, without government sponsorship of one particular belief system, demonstrated a balanced and fair approach towards people of faith until a monumental decision by the nation's highest court in 1990. The case, *Employment Division of the Oregon Department of Human Resources, v. Smith*, involved two Native Americans employed by the State of Oregon who used hallucinogens as part of a religious ritual and were subsequently fired, then denied unemployment benefits. The workers sued for the benefits, citing a violation of the Free Exercise Clause, and the case went all the way to the United States Supreme Court.

In the ruling, the Supreme Court drastically altered the previous legal paradigm regarding the rights of an individual to practice his or her religious beliefs and set into motion a battle between the legislative and judicial branch over which government body had the right to define such rights. With the decision the Court, as Paisner notes:

> Held that neutral, generally applicable laws, the enforcement of which incidentally burden a person's religious freedom, do not violate the Free Exercise Clause, and that the refusal to grant special accommodations to those so burdened is not subject to strict scrutiny review. (539).

In doing so, the Court stated that laws being applied to the public at large, which by nature are indifferent to the religious practices of all individuals, do not merit special consideration even though religious issues are involved. This ruling effectively nullified the standard put forth in *Sherbert* because, as Wald notes:

> …the Court could simply have decided that Oregon had a compelling purpose in prohibiting illegal drug use and could find no way of accomplishing that purpose without overriding the religious rights of the two employees. Instead, the majority opinion abandoned the compelling-interest test altogether. In the future, the government only had to show that it had some rational basis for passing the law…and that the law did not expressly target a religion for hardship. If that was done, no group could claim its free-exercise rights were abridged. (108).

The Court specifically and purposefully handed down the ruling without using the previous standard, thereby easing the standard required of a law to avoid a violation of the Free Exercise Clause. Thereafter, if the law served a specific and useful purpose, without imposing unfairly or discriminately on religious groups, then the law was constitutional.

The ruling in *Smith* also set another precedent in the way the Court viewed religious liberty. The *Sherbert* standard forced the Court to view religious liberty as a "preferred freedom," which are "liberties necessary to the democratic process" (Ducat E12). In order to protect these liberties, Courts had applied a doctrine of "strict scrutiny" to any case where the government wished to burden them. The strict scrutiny approach assumes any law inhibiting such freedoms to be unconstitutional and places the burden of proving otherwise on the government, while the government must demonstrate a compelling interest for the legislation and must ensure the legislation serves a specific purpose, which is not imperious in nature (Ducat E13). These criteria gave preferred freedoms a higher status level, placing the burden of proof on the government. The

Court's ruling in *Smith* removed this status level of preferred freedom to religious liberties, thus indicating a change in the importance given to such liberties by the Court.

This change is unfortunate because of the growing need for the protection of religious freedom in a society becoming more religiously pluralistic and increasingly secular. As the population of the United States becomes more religiously diverse, individuals need guarantees that the religious beliefs and practices that shape their lives garner the appropriate respect and will not cause them to be the victims of discrimination legally or in the workplace. The *Sherbet* standard helped to ensure this and the Court's action in the *Smith* ruling appeared to be a step in the wrong direction.

The Court's ruling in *Smith* caused an uproar within many religious circles and was disliked strongly by the American public. This resulted in the passage by Congress of the Religious Freedom Restoration Act (RFRA) of 1993 (Wald 109). This act specifically states the intention of restoring the *Sherbert* standard and openly stated the displeasure Congress had with the Court's ruling in Smith. Congress was not sheepish in declaring their dislike for the ruling of the Court and attempted through RFRA to reverse the Court's decision through the legislative process.

In discussing the Religious Freedom Restoration Act, it is important to examine how the law came into existence. Amongst the various religious groups and individuals that compose the American religious landscape there is a wide spectrum of beliefs concerning the role of government in legislating religion and a large divide over issues concerning separation of church and state. This religious-political divide disappeared with regards to RFRA. The legislation enjoyed broad support from the vast majority of religious groups including mainline protestant denominations, conservative evangelicals

and fundamentalists, Jewish organizations, Muslim groups, and even some secular organizations concerned with civil liberties; the groups united over a shared concern for the protection of religious liberty (Fowler et al. 115). This coalition, which at other times, concerning other issues, are often diametrically opposed to each other, provided an unprecedented voice and provided a strong base of support for the passage of RFRA amongst faith organizations.

The uniform voice from religious groups of all varieties and the other civil liberties organizations demonstrated the overwhelming concern for the protection of religious liberty and transcended ideology and traditional labels such as "liberal" and "conservative." This is an especially interesting development. The current American political landscape is a very polarized one, with political parties framing many of their arguments within the context of morals, values, and religious traditions. On most any issue, a concerned political spectator does not have to look far to find people of faith on both the "liberal" and "conservative" side, yet the issue of protecting religious freedom brought together groups on all sides (Fowler et al. 227). While there are many reasons so many groups, which often opposed each other, suddenly found themselves allies on this issue, the idea that religious liberty and the right of an individuals to practice their own beliefs (or not practice a religious belief at all), without facing discrimination is a fundamental right, protected by the First Amendment, and necessary to democracy would alone suffice as reason for such unique unity on this issue. In other words, these groups recognized that religious liberty is a "preferred freedom" and sought to ensure the government continued to recognize it as so.

These efforts, though encouraging, would prove ultimately unsuccessful. Despite the strong support amongst the various religious and secular circles, the overwhelming support of American citizens, and the bipartisan support of Congress the Religious Freedom Restoration Act proved unable to withstand the scrutiny of the Supreme Court. As previously noted, Congress used the legislation to effectively reverse a ruling by the Court, an action not looked upon fondly by the top level of the judiciary. The Court received a chance to rule on RFRA in *City of Boerne v. Flores*, a case that came before the Court in 1997. The Court's ruling in the case, which involved a dispute between the Catholic Archbishop of San Antonio and the City of Boerne, TX over the denial of a building permit, struck down the Religious Freedom Restoration Act. The Court, according to Paisner, asserted that:

> Congress had used its Section 5 powers without demonstrating RFRA's connection to an appropriate remedial purpose and in a manner so overly broad and sweeping that it was clearly not directed at preventing unconstitutional conduct. (541).

In passing RFRA, Congress was claiming jurisdiction under its article five powers of the fourteenth amendment to enforce the Equal Protection Clause, but the legislation, due to its broadness, lacked an enforceable mandate and did not adequately prevent unconstitutional conduct. Congress overstepped its bounds by reinterpreting the definition of the Free Exercise Clause through legislation, as opposed to taking remedial action as necessary. This ruling was certainly specific and devastating in nature to Congress and the proponents of the legislation, but the Court went even further by

evincing “palpable displeasure at the fact that Congress demonstrated such a lack of respect for judicial authority” (Paisner 541).

The Court did not appreciate the attempt by Congress to reverse the previous ruling in *Smith* through legislative means and regarded the actions by Congress as an encroachment on a pillar of American Government--the separation of powers between the three government branches. Indeed, the Court used another of these pillars, that of checks and balances, in striking down RFRA by checking the power of Congress to dictate the definition of constitutionality. In the ruling, the Court stated that “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” (521 U.S. 507 (1997). In passing RFRA, Congress was not only trying to reverse a decision by the Court, but Congress was trying to do so through altering the constitutional definition of the Free Exercise Clause, instead of simply enforcing the established definition as their Article Five powers allow.

The Court’s decision in *Boerne* reflected a disagreement over the constitutional definition of the Article Five powers in the Fourteenth Amendment, which is a disagreement Congress sought to correct. Congress attempted this correction in the Religious Liberty Protection Act of 2000. The House Report on the bill blatantly states this as a purpose for the legislation, and Congress worked to establish the RLPA on constitutional grounds so it would stand the scrutiny of a legal challenge (Paisner 541). Indeed, according to Paisner:

> RLPA essentially transposed the strict scrutiny language from RFRA; however, instead of relying on Section 5, RLPA situated congressional power in an

> amalgam of remedial powers under Section 5 and Congress's Article I powers, namely the Commerce and Spending Clauses. (541).

With regards to the RLPA, Congress simply legislated the same ends but changed the means. The act stipulates that any program or activity that is operated by the government and receives government funds, along with any case where the burden of religious freedom affects commerce, violates the Free Exercise Clause. The Court's problem with RFRA was the Congressional usurpation of power through its Section Five powers of the Fourteenth Amendment and their attempt to redefine the Free Exercise Clause. RLPA addressed these problems by placing the protection of religious exercise within the bounds of the Commerce and Spending Clauses, changing the approach of Congress and reframing the debate. Paisner asserts that:

> RLPA's location of congressional power in the Commerce and Spending Clauses was openly and consciously reactive to the limitations established in *Boerne*, and in light of the limits on Section 5's reach established in *Boerne*, the commerce and spending powers do all of the heavy lifting to the extent that these powers reach the challenged action and to the extent that RLPA creates new substantive rights. (542).

It would seem this ingenious legislative maneuver would inevitably lead to a constitutional success by the Congress to secure the protection of religious liberty, but the legislation stalled within Congress itself.

The bill became held up in the Senate when, as cited by Paisner, concerns over the effects the bill's passage would have on a state's ability to enforce civil rights statutes (542). Congress had achieved the means to protect religious liberty, but the unintended

consequence was a bill that left many other civil liberties in doubt. The American Civil Liberties Union, which had supported RFRA, withdrew their support for RLPA, as noted by ACLU Legislative Counsel:

> because we could not ignore the potentially severe consequences that it may have on state and local civil rights laws. Although we believe that courts should find civil rights laws compelling and uniform enforcement of those civil rights laws the least restrictive means, we know that at least several courts have already rejected that position. (pgh. 4).

The ACLU, other interested parties, and congressional representatives feared that passing RLPA would provide a legal loophole for individuals seeking to violate previously enacted civil rights legislation. Thus, RLPA stalled in the Senate and another bill, the Religious Land Use and Institutionalized Persons Act (RLUIPA) was created.

The Religious Land Use and Institutionalized Persons Act states that, the "no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person," unless the government can demonstrate that imposing such a burden has "a compelling government interest" and "is the least restrictive means of furthering that compelling government interest." In addition, the Act specifically states that these standards apply even when "the burden results from a rule of general applicability." Thus, RLUIPA creates an exception for religious liberty, with respect to land use and institutionalized persons, from laws neutral to religious practice. The legislation establishes the same standards struck down with the *Smith* decision, but restricts those standards to land use and institutionalized persons. This, as Paisner writes:

> was a political compromise solution to the problem posed by *Smith.* The limited scope of the Act enabled the rapid acquiescence of those senators concerned with civil rights implications, and its supporters contended that through its primary reliance on Congress's Article I powers, the Act avoided the separation of powers and federalism flaws the Court had identified in RFRA. (545).

In enacting RLUPIA, Congress passed legislation with far less reaching consequences than RFRA and RLPA, but did so within the context of the body's own constitutional powers. The Supreme Court upheld a legal challenge to RLUIPA on several different grounds, including the Establishment Clause, thus ending, at least for now, the debate on this issue (*000 U.S. 03-9877 (2005)*. The case, Cutter et al. v Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al, reversed

With the success of RLUIPA, the question becomes: What next? RLUIPA achieved specific and restricted ends, but does not provide the breadth of religious liberty protection that existed prior to the *Smith* ruling and which RFRA and RLPA attempted to restore. Paisner writes "that sustained pressure from Congress on the religious freedom issue demands some judicial movement" (582). While Congress has dealt with the most recent issues concerning the legal area of religious liberty, future questions are sure to arise. As they do, each will be surrounded in different historical circumstances and provide different constitutional questions. Will a prolonged, intensive debate between the judiciary and the legislature be necessary in each case? On the opposite side of the previous question, does the debate that ensued following *Smith* demonstrate the efficacy of American Democracy? These might be questions only time will answer. Obviously the various branches of government cannot afford to give years of consideration to every

issue, but the complexity and consequences of some issues dictate such lengthy consideration and this appears to have been one of those cases.

Several conclusions can be drawn by examining the attempts by Congress to protect the rights of an individual to practice religion. Through the constructing of legislation, such as the Religious Freedom Restoration Act, the Religious Liberty Protection Act, and the Religious Land Use and Institutionalized Persons Act, the idea that Congress holds religious liberty as a basic civil right becomes obvious. Writing legislation that receives bipartisan support from Congress, lobbyists, and advocacy groups is hard to do. In this case, Congress not only did so but also worked extremely hard to create such protections despite the need to overcome various legal obstacles.

Outraged over the Supreme Court's decision in *Smith*, Congress crafted RFRA to blatantly reverse the Court's decision, and was ultimately struck down by the Court because of the attempt by Congress to create a new definition of the Free Exercise Clause. The United State's legislative body would not admit defeat though and diligently pursued the ends of RFRA through RLPA, but change the constitutional means used to do so. The result in this instance was not as positive though, with legitimate civil rights concerns arising from the changes in the legislation, and prudence dictating the need to table the bill. The end result of this process is the Religious Land Use and Institutionalized Persons Act. While this bill does not achieve a full restoration of the standards established in *Sherbert* that were struck down in *Smith*, it does offer protections that no longer existed after the Court's decision. Congress deserves credit for the willingness to tackle the issue of religious liberty and RLUIPA cannot be judged in comparison to RFRA and RLPA, but must be evaluated on its own terms. It is a

legislative victory because it does provide legal protection of religious groups and individuals, though these changes may not be as broad and sweeping as those in previous attempts at this type of legislation, the bill does not derive its value from comparative analysis but from the substantive content within its text.

America will continue to remain a religious country for the foreseeable future, albeit an increasing pluralistic one. A belief in God and the importance of religious observance is something many Americans hold dear and believe to be imbedded in the nation's founding. While the country's citizens value the freedom not to have a government dictating religious practice, they also desire a country where religion is not inhibited by government. Indeed, as Lois Artis, president of the Church Finance Council of the Christian Church (Disciples of Christ) states, "freedom gives people the ability to use their own God-given gifts to solve their own problems" (19). The outcry for the protection of religious liberty is a call for government to continue to protect religious freedom so individuals can practice their faith as they face their own problems in life.

This is where the government, specifically the legislative and judicial branch, face many future challenges. The government must continue to protect, within reason, the Free-Exercise Clause that allows each person to faithfully follow the deeply held beliefs about the Divine they harbor. These protections must ensure religious liberty without infringing on other liberties or putting religious concerns in conflict. As the United States becomes more pluralistic and in some senses increasingly secular, the ability of Congress to legislate laws that respect all citizens without infringing on some citizens will be stretched.

The previously cited legislative history shows that Congress has made genuine attempts at doing so. The *Smith* decision, which resulted in the Religious Freedom Restoration Act, involved members of a Native American community and a faith practice outside the confines of mainstream religion. The actions taken by Congress as a result of the *Smith* ruling were the result of concerns raised from a case involving a minority group. The sincerity Congress demonstrated in these efforts and their motivations in doing so offer hope for each citizen that values their right to practice their religion and values the liberty in which they are allowed to do so.

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