Religious Freedoom: Fundamental Liberty, Statutory Right or Less?

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

George Washington

1. Introduction

In order to maintain an appropriate barrier between church and state and insure the propagation of religious freedom, the First Amendment to the U.S. Constitution specifically limits the federal government's authority to legislate in regards to religion. As such it is commonly understood and accepted that Congress may not make laws that have the specific intent of either supporting or hindering religious groups. However, if a law of general applicability (one which does not single out religion as a category for intentional treatment or mistreatment) does have the effect of incidentally burdening religious practice, its legitimacy is less certain. Most argue that if these laws do in fact hinder the practice of religion and thus violate a basic constitutional right, then they should at least be heavily scrutinized, if not automatically ruled as unconstitutional.

Recently, however, that understanding has failed to capture a majority in the honorable opinions of the Supreme Court. In June 1998, both houses of Congress proposed legislation intending to afford a greater protection of religious liberties. Supported by a diverse coalition of more than sixty religious and civil liberties groups, the Religious Liberty Protection Act (RLPA) seeks to remedy the burdens of these generally applicable laws upon religious practices left otherwise exposed by the Supreme Court's decision in City of Boerne v. Flores (City of Boerne v. Flores 1997, 2157). This is not a new battle for Congress. In wake of the Court's decision in Employment Division v. Smith (Employment Division v. Smith 1990, 872), Congress similarly responded with the Religious Freedom Restoration Act (RFRA) in 1993. Pasing with overwhelming support, Court observers thought that this put an end to the issue. However, the Flores decision effectively nullified RFRA as unconstitutional, thus prompting supporters to regroup and try again with RLPA.

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

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

2. A Legal Understanding

A. From Lochner to Smith

Any time the Supreme Court reviews a law to determine its constitutionality, it can employ one of two basic tests. The majority of cases are subject to a simple rational basis test which only requires the government to demonstrate that the law in question is “rationally related to a legitimate government purpose” (qtd. in Stone et al. 1996, 573). Other times the court has seen fit to subject laws to a more heightened scrutiny. This test requires government to assume the burden of proving that a given law is "narrowly tailored" to serve a "compelling" state interest. This more stringent review has been applied (and arguably misapplied) in various types of cases throughout constitutional history. For example, during the early part of this century, a very laissez-faire minded Court liberally applied strict scrutiny to any case of economic concern, effectively usurping legislative power by over-
turning many state and federal statutory laws. This trend, beginning as it did with the case of Lochner v. New York (Lochner v. New York 1905, 45), became known as the Lochner era. Under pressure from legal scholars and the other branches of government, the Court began to limit its use of this test and “rather firmly established that it will afford heightened or strict scrutiny where the law under review either contains a suspect classification or impacts a fundamental right” (Lee 1993, 80).

This is probably as it should be. As discussed below in Part III, a respect for democracy should prompt the courts to adopt an attitude of deference toward the legislatures in general, while still protecting the fundamental rights of minorities who do not as easily gain access to the political process. The obvious difficulty, then, is determining which rights are “fundamental” and thus subject to strict scrutiny. After all, the Constitution neither explicitly nor implicitly denotes a hierarchy of rights. Historically, fundamental rights have been defined as those which fall under the Fourteenth Amendment’s Equal Protection Clause as determined by the courts. Yet, whatever the list may include, we can assume that religious liberty is numbered among them, at least since Cantwell v. Connecticut (Cantwell v. Connecticut 1940, 296). In this case the Court determined that “the fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment” (Cantwell v. Connecticut 1940, 303). This, of course, includes the Free Exercise Clause. Accordingly, this principle of applying strict scrutiny to laws which infringe upon the free exercise of religion (even if only incidentally) became established at least by the time of Sherbert v. Verner (Sherbert v. Verner 1963, 398), and further strengthened by Wisconsin v. Yoder (Wisconsin v. Yoder 1972, 205). In both of these cases, a generally applicable law had the effect of hindering the free exercise of religion. In both cases, the court recognized the need to protect this fundamental right and judged the respective
statutes according to the strictest scrutiny. Writing for the Court, Chief Justice Burger reemphasized the basic principle: “[O]nly those interests of the highest order and those not otherwise served can overbalance the legitimate claims of free exercise of religion” (qtd. in Stone et al. 1996, 1593, emphasis added). It seemed that the standard was set.

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

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

This notion is silly for two reasons. First, historically the Supreme Court has been asked to review few laws that specifically target religion; it simply has not been a considerable problem. The most common and controversial cases dealing with the Free Exercise Clause are those which are generally applicable. As Justice O'Connor's concurring opinion points out: Generally applicable laws are [not] “one large step” removed from laws aimed at specific religious practices. The First Amendment...does not distinguish between laws that are generally applicable and laws that target particular religious practices... Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice (qtd. in Stone et al. 1996, 1603, emphasis added). Second, to declare that religious liberty is not burdened if the effect is only incidental is preposterous. Indeed, Yoder clarifies that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability...

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

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

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

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

According to the bill itself, Congress derives constitutional authority from Section Five of the Fourteenth Amendment. Granting Congress the power “to enforce by appropriate legislation, the provisions of this article” (qtd. in Lee 1993, 90), and recognizing that First Amendment rights are adopted as part of the “fundamental liberties” of the Fourteenth Amendment (Cantwell v. Connecticut 1940, 303), RFRA is asserted as such “appropriate legislation.” This is legitimized by at least three Supreme Court decisions. First in Ex Parte Virginia, the court held that whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited is brought within the domain of Congressional power (Ex Parte Virginia 1880, 345-346, emphasis added).

Second, in Katzenbach v. Morgan the Court reaffirmed that Section Five is “a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment” (Katzenbach v. Morgan 1966, 651). The Court has dubbed this power “remedial” in that it can enforce Fourteenth Amendment protections and guarantees, though it cannot declare its constitutional substance. Finally, both of these previous cases were reaffirmed in the more recent case of City of Richmond v. J.A. Croson, Co. (City of Richmond v. J.A. Croson, Co 1989, 469). In her majority opinion, Justice O’Connor even quotes Ex Parte Virginia in stating that both the Thirteenth and Fourteenth Amendment “were intended to be what they really are, limitations of the powers of the States and enlargements of the power of Congress.” (qtd. in Stone et al. 653). Besides, the type of legislation that has historically been most suspect and thus most adamantly scrutinized by the Court, is that which limits or narrows minority rights. Why? Because legislation often has the effect of hindering some amount of liberty somewhere, and that hindrance will be felt most acutely by minority groups which cannot as readily protect their interests through the political process. It has then traditionally fallen to the courts to protect these rights and liberties. However, RFRA proposed just the opposite; Congress went out of its way to protect minority rights. As such, one would think that the Court would have readily accepted this legislation. Unfortunately, as discussed below it did not. Thus, the usual paradigm of Congress inhibiting minority rights and the Court defending these rights has been reversed in this past decade. We are left to wonder why the Court has taken this unnecessarily hostile stand against religion. As Rex Lee observes, “[f]rom the standpoint of constitutional policy, giving those within a suspect class [minority religions] a lesser, rather than a greater, protection is the ultimate perversion” (1993, 95).

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

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around the distinction of Congress's Section Five power as being remedial rather than substantive. Kennedy concedes the argument made above—that Section Five is indeed "a positive grant of legislative power"—but also warns, "that 'as broad as the congressional enforcement power is, it is not unlimited'" (U.S. Supreme Court 1997, 6). At its substance, his argument follows that Congress's authority is limited to simply enforcing provisions of the Fourteenth Amendment; it cannot define or interpret the constitutional substance. If such a violation of authority is demonstrable, then RFRA must be unconstitutional—first, for compromising principles of federalism and second, for violating the established structure of separation of powers.

To this extent, Kennedy follows a historical overview of the drafting of the Fourteenth Amendment, and a series of Supreme Court opinions supporting this remedial/substantive dichotomy. This is instructional, of course, but probably moot at best. He acknowledges that the respondents already recognize this distinction and simply claim "that RFRA is a proper exercise of Congress's remedial or preventative power ... [and] is a reasonable means of protecting the free exercise of religion as defined by Smith" (U.S. Supreme Court 1997, 10). Finally, he turns to considering whether or not this is so.

Providing a series of arguments that are no better than those found in Smith, the Court does conclude that RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections (U.S. Supreme Court 1997 11, emphasis added). Of course, the questionable reasoning as to how the majority arrives at this conclusion is not significant for this essay. At the very least we must accept that RFRA is uncon-
stitutional, if for no other reason than that the Court said so. The point is that if Congress now hopes to provide a legislative remedy through the Religious Liberty Protection Act (RLPA), they will need to find a new constitutional "hook," and be sure to satisfy the demands of federalism and separation of powers concerns as understood by the Court in Flores.

D. RLPA — Another chance?

On June 23, 1998, Professor Michael W. McConnell of the University of Utah School of Law addressed the Senate Judiciary Committee during hearings on the Religious Liberty Protection Act (RLPA). In this address, he clearly and convincingly defended RLPA as an appropriate and constitutionally sound remedy to the deficiencies of RFRA as outlined in Flores. Specifically, he responded to the three-part challenge of: (1) identifying an appropriate constitutional footing or "head of power" which will, (2) preserve the integrity of the structured separation of powers and, (3) satisfy the demands of federalism.

As recognized above, the danger of declaring Congressional authority from the Section Five enforcement power is that the Court always has the prerogative of declaring any statutory provision as having crossed the line from remedial enforcement to substantive interpretation. Such was the downfall RFRA. Congress viewed Smith as having minimized the protection afforded to religious liberty, but its response was invalidated because the Court saw it as an assumption of power beyond the authority of simply enforcing constitutional rights. Notice, however, what the Court did
not say: Flores did not suggest—and no other precedent of the Court suggests—that there is anything improper about the Congressional objective of protecting religious freedom beyond the constitutional minimum, so long as Congress does so through other constitutionally vested powers (McConnell 1998, 2, emphasis added).

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

A. America's Constitutional Democracy

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

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

3. The Political Game

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

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

B. Positive game theory analysis

One way to describe the interplay between the branches of government is with a game model. Professor William Eskridge Jr. offers such a model relating to this interaction over civil rights legislation (1991). In it he describes how certain legislative acts (especially the Civil Rights Act of 1990) have been implemented by Congress in attempts to overturn what they see as judicial misinterpretations. This has some readily apparent similarities to the situation we have discussed here. Indeed, smacking of RFRA both in name and language, the Civil Rights Restoration Act of 1987 declared that its purpose, is to reaffirm pre-Grove City College judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes (qtd. in Eskridge 1991, 636). Similarly the Civil Rights Act of 1990 declared that, in a series of recent decisions addressing employment discrimination claims under Federal Law the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protection. This bill responds to the Supreme Courts recent decisions by restoring the civil rights protections that were dramatically limited by those decisions (qtd. in Eskridge 1991, 638).

Notice, also, that by narrowly interpreting the statutes, the Court had effectively limited minority rights that Congress tried to strengthen, as in the RFRA-Flores situation. As mentioned above, this abandons and reverses the usual paradigm of Congress limiting, and the Court protecting such rights. Assuming, then, that we are dealing with similar circumstances (albeit with religious freedom rather that civil rights) we can try to apply this model.

The players of the game are the Supreme Court (C), the "legislative gatekeepers" (G), the Congress as a whole (M), and the President (P). The game begins with the Court's interpretation of a statute. It then flows in the pattern C → G → M → P → M in which each player decides how it will respond to the previous play within its scope and power (Eskridge 1991, 644). These responses are subject to and constrained by the following considerations and assumptions:

1. The game is played in the sequence outlined above.
2. Each of the players acts on complete information and knowledge of the other players' "future course of play"—turning by another player with the authority to do so.
3. Resulting from 1, 2, and 3, each player has an "indifference point" which is the point on the political spectrum that they like just as much as another point in the opposite direction.

4. The veto median (V) is the point that divides Congress with one-third on one side and two-thirds on the other side of the spectrum. This is obviously important for the President who is contemplating a potential veto (Eskridge 1991, 644-5). Played on a linear field from left (liberal) to right (conservative), the game exists within a political alignment that demonstrates the climate in which it will be played, and which should dictate the outcome. In the early to mid 1990's, the configuration would resemble.

![Figure 1: Religious Liberty Preferences, 1990-97](image)

This simply means that during this era, the Court (C) has taken a more conservative stance on its religious freedom preferences than Congress (M) and the President (P), while the "gatekeepers" (G) are at least slightly more liberal than Congress as a whole. The indifference point (G (M)) is equidistant from G, in the opposite direction than M. Thus, when the game begins, the Court should abandon its policy preference and compromise on a stand at or just to the left of M. This is dictated by assumption #3 because, if the Court implements its own preferences (C) through interpretation...it will be overridden, because the gatekeepers will have an incentive to introducing overruling legislation (they prefer any x < C, and the ultimate result M < C), and Congress will vote for its preferred outcome over that of the Court (it prefers M to C) (Eskridge 1991, 650). Unfortunately, when RFRA came up for review in Flores this is exactly what did not occur. Rather than deferring to Congress and abandoning its Smith jurisprudence, the Court reaffirmed and took a strong stand at C. According to the model, this should not have happened. This, of course, is only going to invite a legislative override with complete support of the President, ultimately resulting in a loss for the Court. Why would the Court do that, and why does the model not account for it? The inconsistencies may be explicated by simply altering the model as Eskridge did when he found such anomalies in his case study. By amending the model with "informational assumptions," he assumes the game to be even more dynamic such that policy preferences are formed and determined during the game in response to the arguments of the other players (Eskridge 1991, 656). This leads to two alternative explanations in our example.

The first is called the "information variation" and declares that "the Court will stick to its preferences and try to persuade the gatekeepers and Congress of its views" (Eskridge 1991, 658). However, reading Flores one does not exactly feel like the Court was trying to persuade; it comes across more as
backlash at Congress for challenging its Smith holding. The second possibility—the “distributive variation”—asserts that the Court may have tried to shift leftward from its preference toward M, but “was simply mistaken about the congressional median” (Eskridge 1991, 658). This, too, fails in our example because with the broad (almost unanimous) and intense congressional support of RFRA, there could clearly be no mistake in judging M’s position. Besides, there is nothing to suggest that the Court shifted at all; on the contrary, it simply appears that they thumbed their noses at the legislative branch, openly inviting further challenges. According to the model (even after amending), this is a foolish move for the Court, because it will inevitably lead to a legislative override and thus allow Congress to win the game. Assuming that the justices possess good political savvy, we must admit that the model simply fails to explain this exchange for some reason or another.

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

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

4. Conclusion

First, RLPA might become law. If this happens, it does stand at least a fair chance of survival. Since it does not hinge on the questionable interpretation of the substantive/remedial powers of the Enforcement Clause, the Court should no longer perceive it as a threat to their judicial authority. However, if the Court is still determined to enforce its position, it might fight the bill on the issue of federalism in reviewing the Commerce Clause. Second, the question may simply have to remain at the state level. Indeed, many states have already adopted their own RFRA legislation. Third, Congress may seek to pass a

**Game Over**

Constitutional Amendment. This is, of course, unlikely given the difficulty and improbability of approving such an amendment let alone its ratification; right now they do not even have enough interest or support to pass it as a normal legislative act. Regardless of what happens, it is of great significance that the issue has presented itself for our consideration. Religious liberty is a fundamental right that we are guaranteed under our noble Constitution, yet if we fail to fully understand and protect that freedom, we may not recognize when it is taken from us. Worse yet, we may not care. Especially in the types of cases discussed herein, when the threat to religious freedom comes from benign, generally applicable laws, we must recognize that the effects are no less real or disastrous than if intentional. Thus, we cannot afford to be apathetic and simply go on living in the anticipation of peripheral concerns and problems with little concern for religious freedom issues. This is particularly true of our current preoccupation with Y2K and the end of the world. Of course, when that does occur and the Good Lord comes down to usher it all in, then as Rex Lee points out, “all laws should be generally applicable” (Lee 1993, 96).
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Brigham Young University
Religious Freedom: Fundamental Liberty, Statutory Right or Less?
Nathan Dullum 11 December 1998PISc 361 (Edwards)
“In my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.” George Washington