COUNTING HEADS ON RFRA

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The Supreme Court has granted certiorari to decide the constitutionality of "RFRA"—the Religious Freedom Restoration Act.[1] What will they decide? The issue is of great interest and importance for many reasons (including the fact that I have a public wager with Professor Chip Lupu on it).[2] My prediction: RFRA will be upheld, without a doubt. In fact—though this is going out on a limb—there is a decent likelihood that RFRA will be *unanimously* upheld. To be safe, though, I will predict 7-2 (or better) for affirmance of the Fifth Circuit's decision upholding RFRA.

This is not a "should" argument; it is pure nose-counting. (I also think that RFRA *ought* to be upheld on the merits, but that is, in the main, a different question. No one would be foolish enough to think that just because a particular argument is sound it will be accepted by the justices, or that the justices' acceptance of an argument makes it sound.) What follows is a *description* of how the justices (probably) will reason, and why they will rule for RFRA. The analysis is presented in (roughly) the order of most likely to least likely votes for upholding the statute.

I. START WITH THE MIDDLE

The constitutionality of RFRA is one of those rare cases that could make for a strange-bedfellows, both-ends-against-the-middle coalition striking down the statute, on a combination of grounds each of which is rejected by a firm majority of the Court. For the uninitiated: The Religious Freedom Restoration Act "restores" the "strict scrutiny" test for government action that im-

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1. *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996) (upholding RFRA against several constitutional challenges), cert. granted sub nom. *City of Boerne v. Flores*, 117 S. Ct. 293 (1996).

2. See Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 293 n.120 (1995).

poses a substantial burden on the free exercise of religion, even where the governmental action is facially and formally neutral with respect to religion. The Supreme Court initially embraced this test in 1963 as the correct interpretation of the Free Exercise Clause of the Constitution, in the case of *Sherbert v. Verner*.[3] The Court applied that standard inconsistently for a quarter century, then abandoned it (for the most part) in 1990, in a controversial opinion for the Court authored by Justice Scalia (and joined by Rehnquist, White, Stevens, and Kennedy), in *Employment Divison v. Smith*.[4] RFRA "restores" the *Sherbert* test as a matter of federal statutory law—a civil rights statute—and mandates that that test be applied to *all* governmental action, including state governmental action, that results in a substantial burden on religious exercise.

The conventional thinking of the RFRA nay-sayers is that Scalia and the "conservatives" (Rehnquist, Thomas, and maybe Kennedy) hate both free exercise exemptions (that is, the *Sherbert* view rejected in *Smith*) and the so-called "*Morgan* Power" of Congress to enact legislation under section five of the Fourteenth Amendment that goes beyond what the Court has said are the minimum judicially-enforceable mandates of section one of the Amendment.[5] They thus count three sure (Scalia, Rehnquist, Thomas) and two probable (Kennedy and O'Connor) votes against RFRA on this ground, with the remainder to be made up from the hard *left* of the Court—Ginsburg and Stevens, and maybe Breyer—who might tend to think that any discretionary accommodation of religious exercise violates the Establishment Clause.

As I explain later, I think that both sets of arguments are mistaken, as a matter of prognostication. The "conservative" core of the *Smith* majority (excluding the since-retired Justice Byron White) does not consist of religion-haters or *Morgan*-baiters so much as deferentialists who would prefer to let legislators draft accommodation statutes. The liberal bloc may fear religious establishment unduly, but probably not so much as to topple RFRA.

Still, the nay-sayers' arguments are not ludicrous, and one could imagine a public choice nightmare under which three justices vote to strike down RFRA as in excess of Congress' power

3. 374 U.S. 398 (1963).

4. 494 U.S. 872 (1990).

5. The "*Morgan* Power" derives its name from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the leading modern case involving interpretation of the scope of Congress' legislative power under section five of the Fourteenth Amendment.

under section five (with six disagreeing with such a view), three justices vote to strike down RFRA as an Establishment Clause violation (with six disagreeing), but only three thinking it clears both hurdles. The holding of the Court becomes the composite of two different positions each of which is rejected by a (different) solid majority of six. Come to think of it, I've witnessed this nightmare in real life, more than a couple of times. I was in the courtroom the day our collective geniuses handed down *County of Allegheny v. ACLU*.[6] Four justices thought that public seasonal display of either a creche or a menorah was constitutionally permissible. Three Justices thought that display of either was *un*constitutional. Two (Blackmun and O'Connor) thought the creche was unconstitutional but the menorah wasn't. Thus, the holding of the Court was the two-justice view, rejected in principle by the seven who thought that different treatment of the two religious symbols was the one answer that couldn't possibly be right. Even stranger things have happened.[7]

In any event, it certainly makes sense to start my nose-counting with the three most solid votes for RFRA—those who will think it clears both the section five and the Establishment Clause hurdles. They are (in order) O'Connor, Souter, and Kennedy, the infamous *Casey* troika.[8]

O'Connor's the easy one. She concurred in the judgment only in *Smith*, harshly criticizing the majority's abandonment of the *Sherbert* test.[9] She adhered to this position in *Church of the Lukumi Babalu Aye v. City of Hialeah*, joining Justice Blackmun's separate concurrence refusing to accept the *Smith* rule.[10]

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6. 492 U.S. 573 (1989).

7. Everyone has his particular favorite. The classic example is, of course, *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). The question was whether the District of Columbia is a "state" for purposes of diversity jurisdiction. The judgment of the Court upheld jurisdiction, though every rationale for the judgment was rejected by a clear majority of justices. Three justices said that the District was not a "state" within the meaning of the diversity clause of Article III but that Congress had power, under the seat of government clause of Article I, to create federal jurisdiction anyway. Id. at 583-604 (opinion of Jackson, J.). (Six justices disagreed.) Two justices said that the District could be considered a "state" for purposes of the diversity clause of Article III. Id. at 604-26 (Rutledge, J., concurring). (Seven justices disagreed.) The four dissenters also split 2-2.

For an argument that such public choice nightmares are inherent in the operation of a multi-member court, where multiple issues are presented in a single case or where issues come to the court in an essentially random order, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 813-31 (1982).

8. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Joint Opinion of Justices O'Connor, Kennedy, & Souter).

9. *Smith*, 494 U.S. at 891-907 (O'Connor, J., concurring in the judgment).

10. *Church of the Lukumi Babalu Aye v. City of Hialeah* 113 S. Ct. 2217, 2250 (1993) (Blackmun, J., concurring in the judgment).

For O'Connor to find RFRA unconstitutional would be almost inconceivable, as she would have to conclude that it is unconstitutional for Congress to adopt, by statute, under section five, the same substantive rule that she thinks is required by section one properly construed. I have seen the argument, advanced most prominently by Professor Dan Conkle, that the Court should (1) strike down RFRA; and then (2) overrule *Smith*.[11] But this has never made much sense to me, and I doubt if it would to O'Connor. On what principled ground can one strike down RFRA as *invalid* if it is legislation "enforcing the requirements of" section one of the Amendment as the justice(s) is (are) now about to construe that amendment in the next section of the opinion? The necessary premise of any holding that RFRA exceeds Congress' section five power is that this is not a statute to "*enforce*" the provisions of section one because it enforces a rule that is "bigger" than the actual meaning of the prohibition of section one. For RFRA, that means saying that Congress cannot pass this statute under its enforcement power because this restricts state power more than *Smith* does. That *necessarily* entails a determination that *Smith* is rightly decided. A necessary premise of RFRA's invalidity is that it legislates a rule that is inconsistent with (too much "bigger" than) the "correct" constitutional interpretation of section one. Thus, if the compelling interest test is the correct reading of the Free Exercise Clause, there can be no plausible argument that RFRA is unconstitutional. It would be positively weird for O'Connor (or Souter) to vote to strike down RFRA and, in the next breath, reiterate that *Smith* was wrongly decided and should be overruled in a proper case.

Of course, we will all do seemingly weird things if we think it is necessary to vindicate some larger principle. A homey example: My four-year-old son is required to ask permission before going outside to play in the back yard. Once last summer—at *least* once—he went out without asking. I brought him in and placed him in the naughty chair for reiteration of the standing rule. After I was sure he understood that he needed to ask permission, he proceeded to ask permission, which I gave. My young formalist gave me a perplexed look and asked why I had punished him for doing what I was prepared to let him do anyway.

To vindicate authority, of course (and to enforce the advance-permission rule)! The only plausible argument for

11. Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of An Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995).

O'Connor invalidating RFRA is precisely this sort of hyper-judicial supremacist opinion, that seeks to vindicate courts' authority to say what the law is even when they don't disagree with what the legislature has said it is. There are shades of this in the Joint Opinion in *Casey*, but I doubt that any of the *Casey* three would go this far.[12] O'Connor, for one, does not have a hostile reading of the section five power to begin with, as her opinion in *Croson* makes fairly clear.[13] Count O'Connor as a solid vote to affirm the Fifth Circuit's upholding of RFRA, which vindicates O'Connor's position in *Smith*.

Count David Souter, too. Souter is also on record, in his separate concurrence in *Church of the Lukumi Babalu Aye v. City of Hialeah*,[14] as doubting the correctness of *Smith* and, moreover, as saying that principles of stare decisis should not require the Court to adhere to it—an especially significant factor for the *Casey* troika. The significance lies in the fact that O'Connor, Souter, and Kennedy placed huge reliance on a grand doctrine of stare decisis in order to justify their votes in *Casey*—votes which, for some of them, involved pretty clear flip-flops from their earlier positions.[15] For Souter, the Harvard legal process school protégé and the probable moving force behind the *Casey* Three's invocation of stare decisis, to say that *Smith* is nonetheless fair game, virtually makes it so. At least, it gives the green light to O'Connor and Kennedy; and, of course, it clearly signals Souter's willingness to repudiate *Smith*. (O'Connor, too, has labored mightily to distinguish *Casey*'s high-church version of stare decisis in subsequent cases. Her opinion in *Adarand Con-*

12. It seems to me *quite* unlikely that Justice O'Connor would simultaneously (i) continue to insist that *Smith* is wrong; and (ii) defer to the majority's contrary view as a basis for a further holding that RFRA exceeds Congress' power. Again, though, such madness is not unprecedented. Federal courts/sovereign immunity buffs will recognize this as Justice White's slightly ludicrous position in *Pennsylvania v. Union Gas*, 491 U.S. 1, 56-57 (1989) (White, J., concurring and dissenting). To paraphrase (and I exaggerate only slightly): "I don't think that this statute purports to abrogate state sovereign immunity, but because the majority disagrees with me, I reach the question of whether Congress has power to do what I think it did not do, and agree that they have such power. Therefore, I join the judgment that they could and did exercise such power, even though I really think they could and *did not* exercise such power." Got that?

13. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) ("The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.") (citing and quoting *Katzenbach v. Morgan*, 384 U.S. 641 (1966), with approval).

14. 113 S. Ct. at 2240 (Souter, J., concurring in part and concurring in the judgment).

15. See generally, Michael Stokes Paulsen, Book Review, 10 Const. Comm. 221, 232 (1993) (reviewing Robert A. Burt, *The Constitution in Conflict* (1992)).

structors, Inc., v. Pena,[16] overruling *Metro Broadcasting, Inc. v. FCC*,[17] takes pains to rationalize and reconcile the interment of *Metro* with the respect accorded *Roe*. Interestingly, that portion of O'Connor's *Adarand* opinion was joined only by Justice Kennedy.[18] Notwithstanding *Casey*, stare decisis alone surely will not be enough to keep Souter, or O'Connor—or anyone else for that matter—from upholding RFRA in the face of *Smith*.[19])

Stare decisis in fact works very strongly in *favor* of RFRA. And here is where Anthony Kennedy becomes the clear third vote to uphold. The *Morgan* Power accounts for a significant body of law, and a long series of decisions recognizes it. Consider the following statutes, upheld by the Supreme Court, that can only be accounted for by *Morgan*: the nationwide ban on literacy tests (*Oregon v. Mitchell*);[20] the power of Congress under section five to abrogate state sovereign immunity principles (*Fitzpatrick v. Bitzer*);[21] big chunks of the Voting Rights statutes, including the power to ban at-large districts with racially disparate impact (*City of Rome*);[22] the Pregnancy Discrimination Act;[23] and much, much more. Kennedy vote to overrule all these cases and strike down these statutes (or call them into doubt with a significant narrowing of the *Morgan* power)? It ain't gonna happen. Put more eloquently, it is fair to observe that asserted stare decisis interests—reliance, stability, perceptions of judicial integrity, and the like—should and will attach more strongly to the *Morgan* rule than to *Smith*'s seven-year half-life.

Moreover, Kennedy is not all that attached to *Smith*—and is clearly not joined-at-the-hip to Scalia. (Their voting alignment patterns were much different in 1990 than they have been since.)[24] True, Kennedy was part of Scalia's *Smith* five. But his

16. 115 S. Ct. 2097 (1995).
17. 497 U.S. 547 (1990).
18. *Adarand*, 115 S. Ct. at 2114-17.
19. For Souter, perhaps even more clearly than for O'Connor, the argument for simple vindication of judicial power is not reason enough to invalidate a statute that proceeds from *correct* (to Souter and O'Connor) premises about the meaning of the Free Exercise Clause.
20. 400 U.S. 112 (1970).
21. 427 U.S. 445, 456 (1976).
22. 446 U.S. 156 (1980).
23. 42 U.S.C. § 2000e(k) (1994). Compare *Geduldig v. Aiello*, 417 U.S. 484 (1974).
24. The *Harvard Law Review's* annual statistics show Kennedy voting with Scalia in 83.1%, 85.0%, and 84.1% of the cases in the 1987, 1988, and 1989 Terms (*Employment Division v. Smith* being decided during the 1989 Term). After that, the Scalia-Kennedy axis is weaker: 72.4% (1990 Term), 62.3% (1991 Term—the year of *Planned Parenthood v. Casey*), 81.6% (the biggest rebound, for the 1992 Term), 75.9% (1993 Term), 75.3% (1994 Term), 73.4% (1995 Term). In general, Kennedy aligns with Scalia 75% of the time these days, as opposed to 85% of the time his first three Terms. See the Supreme Court Voting

opinion for the Court in *Hialeah*, while it adheres to *Smith*, shows a much more tempered attitude. It is respectful toward religious liberty and treats harshly government efforts to suppress religion under the guise (a very thin disguise, in *Hialeah*) of formal neutrality. The *Hialeah* case holds, in effect, that government is often *not* neutral toward religion even when it purports to adopt facially "neutral" rules. Perhaps more significantly, *Hialeah* is an example of what hostile government bodies could do (or attempt to do) to religious exercise, armed with the rule of *Smith*—and thus is an example of the type of situation Congress could look at and conclude that there is a need for a "prophylactic" rule to enforce the core guarantees of religious free exercise. (There is ample legislative history supporting the view that Congress acted, in whole or in part, out of this concern, as the Fifth Circuit's opinion in *Flores* makes clear.[25])

In short, Kennedy will be respectful of the *Morgan* precedent and the results that have followed in its wake; he will be respectful of the need to protect religious free exercise; he will be mindful of the limitations of the *Smith* rule of formal neutrality; and he will be inclined to defer to legislative accommodations of free exercise, so long as they do not coerce nonadherents to engage in religious practices. This is more than enough to overcome his vote in *Smith* (which can readily be distinguished, as I explain below) and whatever mild doubts he might have about a broad section five power. Upholding RFRA is the moderate, sensible, "statesmanlike" thing to do.

Finally, the Fifth Circuit decision under review, *Flores v. City of Boerne*,[26] is a Patrick Higginbotham opinion. Higginbotham and Kennedy are of similar judicial temperament and styles. There is much in the Fifth Circuit opinion that is congenial to Kennedy's approach. Take the name off of the Fifth Circuit opinion, read it behind a veil of ignorance, and one might have guessed it was written by Anthony Kennedy. (A side bet: Kennedy will write the opinion for the Court affirming the Fifth Circuit, and it will look a lot like Higginbotham's opinion.)

The middle three are solid for RFRA.

Alignment tables as published in every November issue of the *Harvard Law Review* beginning with 102 Harv. L. Rev. 351 (1988) and ending with 110 Harv. L. Rev. 368 (1996).

25. *Flores*, 73 F.3d at 1355-56.

26. 73 F.3d 1352 (5th Cir. 1996).

II. TRY OUT THE LEFT

The remaining votes are less sure things, but Justice Breyer is probably a solid Vote Number Four for RFRA. Breyer is a liberal and also something of a legal process proceduralist. To the extent he has more "conservative" impulses than his other left-leaning colleagues (Stevens and Ginsburg), those impulses are in the direction of deference toward established precedent and deference toward congressional or agency policy. Given this constellation of attitudes and preferences, it seems highly unlikely that he would vote to overrule or significantly cripple *Morgan*. Too much good liberal public policy is at stake (*i.e.*, voting rights); too much precedent would need to be overruled; and it is too hard to make the argument that RFRA's policy choice for strict judicial scrutiny is outside the bounds of what the Fourteenth Amendment permits. It is not clear whether Breyer would embrace the William Brennan/*Sherbert v. Verner* reading of the Free Exercise Clause as an original matter, but far be it from him to say that such an interpretation—advanced by the courts for a quarter century—is outside the bounds of Congress' range of choice under section five, especially given the breadth of discretion *Morgan* has given Congress.

Some of the same things can be said for Justice Ruth Bader Ginsburg. There is no way that Ginsburg votes to overrule, cripple, or significantly restrict *Morgan*. (If nothing else, she would feel the need to leave it open for Congress to pass something like the Freedom of Choice Act ("FOCA"), an early-90's congressinal proposal to entrench and extend *Roe v. Wade*, in the event the Court were ever again to come close to overruling the abortion right created in that case.) Breyer is a more solid vote to uphold RFRA than is Ginsburg, however, for the simple reason that Breyer has something resembling a sensible understanding of the Establishment Clause. To be sure, Breyer joined the dissenters in *Rosenberger v. Rector & Visitors of the University of Virginia*,[27] but his vote can be explained by the fact that that case involved *funding* of religious organizations' religious activities. The majority held (correctly) that exclusion of a student religious newspaper from eligibility for funding by a state university (on the same basis as other student publications) violates the Free Speech and Free Exercise clauses, and that the Establishment

27. 115 S. Ct. 2510 (1995). For criticism of the dissenters' position, see Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 660 n.23 (1996).

Clause does not authorize such discrimination. The dissenters' view—that the Establishment Clause's history and purposes demonstrate a specific intent to bar funding of religious organizations' religious functions—is wrong as an historical and textual matter, but not so crazy as to be dismissed as lunacy. After all, the Court had embraced exactly such a position as its central animating principle for Establishment Clause adjudication for the better part of forty years. Breyer may be forgiven for going along. (If anything, the unwillingness to depart from Warren Court orthodoxy confirms that Breyer is likely to support *Morgan*.)

More telling is that Breyer joined the concurrences in the judgment in *Pinette v. Capitol Square Review and Advisory Board*.[28] *Pinette* involved an Establishment Clause challenge to the Ku Klux Klan's posting of a cross in the park in front of the Ohio state capitol. The state had a policy of permitting privately-sponsored displays in the park, which should have made the case an easy one: the Free Speech Clause does not permit content-based discrimination against privately-sponsored speech in a public forum or limited public forum. Discrimination against expression because of its religious nature or elements (though one chokes at the idea that the Klan's use of the Cross was "religious")[29] is no different. The issue in *Pinette* was whether a religious display—especially an *unattended* religious display—was different, because of Establishment Clause concerns about "message of endorsement." A seven-member majority of the Court correctly said no, with Justice Scalia writing a categorical "private speech is private speech" plurality opinion, not-so-subtly taking issue with the soundness of O'Connor's pet contribution to the Establishment Clause mess.[30] O'Connor, Souter, and Breyer concurred in the judgment, preferring to leave the en-

28. 115 S. Ct. 2440, 2451 (1995) (O'Connor, J., concurring in part and concurring in the judgment); id. at 2457 (Souter, J., concurring in part and concurring in the judgment).

29. Justice Thomas rightly expressed horror at this sacrilege, but recognized that the religious content of the cross was the only premise under which the proposed censorship was sought to be justified before the Court, and joined the Court in rejecting that premise. *Pinette*, 115 S. Ct. at 2450-51 (Thomas, J., concurring).

30. The "message of endorsement" inquiry originated in Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). The test has had a checkered history, at times appearing to gain the support of a majority of the Court, cf. *Grand Rapids School District v. Ball*, 473 U.S. 373, 389 (1985), yet now appearing to have been abandoned as doctrine even by Justice O'Connor herself. See *Board of Educ. of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481, 2495, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment). For criticism of the text, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987).

dorsement question open and noting that, in any event, a mistaken message of endorsement could be corrected through means less restrictive of free expression than a content-based discrimination against religious expression in a public forum (disclaimers, for example).

The concern about Ginsburg is that she actually dissented (along with Stevens) in *Pinette*, preferring to suppress religious expression than to tolerate it on an equal basis. Moreover, in *Board of Education of Kiryas Joel Village School District*,[31] Ginsburg joined the Stevens position that it is unconstitutional (or at least constitutionally suspect) to allow members of the same faith to serve together on a politically elected school board, though she was not alone in this grievous mistake—in fact, it appears that a majority of the Court accepted this proposition.[32]

Again, however, even if Ginsburg is generally separationist in her instincts, that does not necessarily bode ill for RFRA. It was, after all, the liberal icon William Brennan who was the champion of *Sherbert*. He somehow managed to maintain this position notwithstanding his strict separationist view of the Establishment Clause, perhaps by keeping the two positions in separate analytical boxes. For Brennan (and it could be that Ginsburg's position will end up replicating Brennan's), protecting private free exercise, through the device of exemptions from laws of general applicability that nonetheless uniquely burden a religious adherent's individual conduct, is hugely different from anything having to do with (i) direct government funding benefiting religion; and (ii) public religious displays. *Rosenberger* and *Pinette*, even if wrong, are clearly distinguishable. *Kiryas Joel* is too: it was a sect-specific accommodation involving a religion-conscious political gerrymander, decided in the wake of the Court's invalidation of racial gerrymanders in *Shaw v. Reno*.[33] RFRA is an across-the-board restoration of a religion-sympathetic test. Only if one thinks that *any* voluntary accommodation of religion by government violates the Establishment Clause is there cause for concern about RFRA on establishment grounds. I doubt that Justice Ginsburg will find RFRA's core *test*—William Brennan's old *Sherbert* test—to violate the Establishment

31. 114 S. Ct. 2481 (1994).

32. The law at issue was deemed to be a delegation of governmental authority to a religious group, because all the school board members were members of the Satmar sect and because the school district boundaries coincided with those of a village drawn along religious lines. Id. at 2488-90 (plurality opinion); id. at 2503-05 (Kennedy, J., concurring in the judgment).

33. 113 S. Ct. 2816 (1993).

Clause as an overbroad accommodation of religion. In fact, its very breadth helps. The fact that RFRA is a truly *general* and reliably *neutral* accommodation statute, rather than a here's-one-for-the-Satmar statute, is sufficient to distinguish her *Kiryas Joel* position.

Moreover, the fact that *Flores* is basically positioned as presenting a question of the *facial* constitutionality of RFRA makes it much harder to muster an Establishment Clause argument against it *in this case*. If *Flores* were a prisoner case involving a born again Christian fundamentalist demanding the right to evangelize his fellow prisoners, or a claim by Sikhs that their children must be permitted to wear ceremonial religious knives to school (in the face of a flat no-weapons rule),[34] I would be more worried about Ginsburg. But even if the grant of certiorari required consideration of the application of RFRA to the facts in *Flores* (which it does not), it is hard to see how allowing a Catholic church to enlarge its sanctuary (notwithstanding a facially "neutral" landmarking statute) is a preferential accommodation of the sort deemed uniquely suspect in *Kiryas Joel*. I doubt that even Justice Ginsburg will think that RFRA is unconstitutional on its face or in any but its most extreme (and probably erroneous) applications. That's Vote Five.

The real concern would be that Ginsburg may have aligned herself with Justice John Paul Stevens on religion cases—*Kiryas Joel* in 1994 and both *Rosenberger* and *Pinette* in 1995. Stevens, of course, is implacably hostile to religion, in a way that seems to go beyond jurisprudence. Religion always loses on the Establishment Clause side, on a strict separationist protection-of-secular-society-from-religion view. And religion always loses on the Free Exercise side, on a what-a-mess-this-gets-us-into-and-what-makes-religion-so-special-anyway view.[35] Stevens even thinks that the existence of religious motivations for enacting a law should be sufficient reason for invalidating it.[36] There seems to be more to Stevens' consistently anti-religion opinions than a particular view of the Establishment Clause combined with a particular view of the Free Exercise Clause; rather, there is evidence that Stevens simply thinks religion is narrow-minded, suspicious, a troubling way for people to view the world (if not affirmatively stupid and dangerous), and certainly not something to be accom-

34. The latter is an actual case. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

35. See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982) (Stevens, J., concurring); *Goldman v. Weinberger*, 475 U.S. 503, 510-13 (1986) (Stevens, J., concurring).

36. *Webster v. Reproductive Health Services*, 492 U.S. 490, 560-72 (1989) (Stevens, J., concurring and dissenting).

modated. This made Stevens a strange fifth vote for *Smith*, because the others in the majority (Scalia, Rehnquist, White, and Kennedy) had always been consistent accommodationists on the Establishment Clause side of things.

The tendency is to think that Stevens will certainly vote thumbs-down on RFRA. But Stevens is no opponent of the *Morgan* Power. What will he do? It is hard to say, and I would never bet the ranch on Stevens' favorable vote in any case involving religion. Still, it is not inconceivable that he could vote to uphold RFRA, on the theory that Congress has sufficient latitude under section five even to do things that are manifestly stupid, like accommodate religion in ways not required by the Free Exercise Clause. The fact that RFRA explicitly defines "religion" to mean whatever it means in the First Amendment, and specifically notes that RFRA leaves the Establishment Clause unaffected (as if Congress could trump the Establishment Clause if it chose to), makes it hard for even as determined an anti-accommodationist as Stevens to find RFRA to be an establishment of religion on its face. But I wouldn't put it past him.

As we leave the center and left and look right, I count 3 solid votes for RFRA, one near-solid (Breyer), and one probable (Ginsburg), for a 5-1 lean. Still, that five is not firm. Could Stevens and Ginsburg lead the three solid conservatives into an unholy alliance to strike down RFRA?

III. WHY THE RIGHT WILL GET RFRA RIGHT

Are you ready for the surprise? Remember, you heard it here first: Justice Antonin Scalia, the unrepentant author of *Smith*, will vote to uphold the constitutionality of RFRA. In fact, he may turn out to be one of the *strongest* votes to uphold RFRA. The reasons can be found in a careful reading of *Smith* itself and in Scalia's general jurisprudence.

First, *Smith* is a deference-to-the-legislature opinion. Scalia does *not* argue that the mandatory exemptions view is beyond the pale of plausible interpretations of the Free Exercise Clause. Scalia's argument is, instead, a somewhat more nuanced one:

> As a textual matter, we do not think the words *must* be given that meaning. . . . It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a gener-

> ally applicable and otherwise valid provision, the First Amendment has not been offended.[37]

To be sure, Scalia notes (surely disingenuously) that "[o]ur decisions reveal that the latter reading is the correct one,"[38] but he goes on to invite legislatively-granted religious exemptions from laws of general applicability:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitious of that value in its legislation as well. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.[39]

Smith, for Scalia, fundamentally rests on the principle that the mandatory-exemptions view is *too strong* a reading of the ambiguous language of the Free Exercise Clause *for judges to adopt and apply on their own as a basis for invalidating state and federal statutes duly adopted by democratic bodies.* Moreover, the judicially-created "compelling interest" escape hatch to the judicially-embraced strong reading of the clause has a hydraulic tendency, in free exercise cases, to degenerate into pure judicial ad hoc balancing of the importance of government policies against the importance of religious beliefs to their adherents—the worst of all worlds both because of the Great Satan (for Scalia) of balancing tests generally and because the idea of judges weighing the importance of religious beliefs should be anathema to serious religious adherents (like Scalia).

But if the *legislature* wants to impose such a policy, wholesale or retail, Scalia will let it do so. (We'll get to the federal-versus-state-legislature issue in a moment.) Even if it's a dumb idea to have balancing tests, and even if the dumb balancing test adopted by RFRA parallels the Court's huge mistake in the *Sherbert* line, the legislature, in Scalia's world, can adopt whatever foolish policies it likes as long as the policy falls within

37. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990) (emphasis added).
38. Id.
39. Id. at 890.

the range of the legislature's constitutional authority to legislate. The task of the judge, assuming a foolish statute is constitutional, is to enforce those foolish legislative policies to the letter, yea, to enforce them *with a vengeance*. (Watch for Scalia to become the most agressive enforcer on the Court of an un-watered-down compelling interest test under RFRA, even when—and perhaps *especially* when—it requires the courts to reach seemingly perverse results. "If Congress wants to pass a stupid law, by golly we're going to let them, and we're sure not going to save them from their own stupidity.")[40]

For Scalia, the whole issue is whether RFRA is within the scope of Congress' authority to legislate. And that is an *entirely different question* from the authority of the courts to create judicial balancing tests out of an ambiguous text. *Congress* may have the power to rush in where the *courts* should fear to tread. Indeed, I would not be terribly surprised if Scalia wrote the Opinion of the Court (or at least a concurrence) that said (in essence):

> See? I was right. *Smith* was rightly decided and the democratic process is free to grant legislative accommodations, just like I said. RFRA is such a statute. And all of those academic critics who belittled my argument that the legislature could protect Bill of Rights freedoms have been proved wrong.

We're not quite home free with Scalia, though. There is still the question of whether RFRA is an appropriate accommodation statute for *Congress* to pass and impose on the states. Now, some observers think that Scalia will reject RFRA as contrary to separation-of-powers, and cite Scalia's opinion for the Court in *Plaut v. Spendthrift Farms*[41] as an illustration. But Scalia would never make such a sloppy analytical mistake. RFRA, in form (and form matters to a formalist), creates a statutory right where there used to be a constitutional right; it does not "overrule" a constitutional holding of the Supreme Court or (as in *Plaut*) legislatively reopen final judicial judgments of dismissal on the merits. Scalia, a good formalist, will recognize that there is absolutely no separation of powers problem in Congress adopting as its statutory standard a now-discarded judicial constitutional test. Nor does the fact that Congress, in its "findings" section, criticized *Smith* transform an otherwise constitutional statute into an improper attempt to "dictate" constitutional law

40. Compare Lon Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616, 631 (1949) (Opinion of Keen, J.).

41. 115 S. Ct. 1447 (1995).

to the judiciary. RFRA dictates statutory law to the judiciary, which is what Congress does.

The proper question is *federalism. Which* legislature has authority in this area? Does Congress' section five enforcement power permit it to legislate restrictions on state government that go beyond what section one of its own force gives the judiciary power to impose on its own? My intuition is that Scalia, despite reservations about the Court's prior reasoning in cases like *Morgan* and *Oregon v. Mitchell*, would not vote to overrule those cases—not because Scalia is unwilling to tear down doctrine he thinks wrong, but because RFRA, at least, can be seen as consistent with a fair construction of the proper scope of the section five power. If anything, RFRA is far easier to sustain under the *Morgan* power—in either its "remedial" or "substantive" variants—than were the statutes at issue in *Morgan* and *Oregon v. Mitchell* themselves. It is far less of a stretch to find that Congress may enforce the Free Exercise Clause by enacting legislation banning laws that impose substantial burdens on free exercise that are not justified by compelling governmental purposes than to find (for example) that a ban on English literacy tests is a "remedy" for denial of equal protection rights to government services.[42] Scalia, to the extent resistant to *Morgan*, might even find *Flores* an occasion for damage control.

All of the arguments why RFRA is constitutional under any reading of the *Morgan* line, broad or narrow, are fully set forth in the Fifth Circuit's well-reasoned opinion in *Flores*. To strike down RFRA, Scalia has to launch a jihad against *Morgan*. He doesn't have the votes (three, maybe four max) and there's no point in attempting to overthrow the existing regime if you're going to fall short—all that gets you is a six vote reaffirmation of *Morgan* and a result that invalidates RFRA because one or two zanies think it violates the Establishment Clause for government ever to accommodate religion. That is not a result Scalia wants.

Besides, it is not even clear to me that Scalia is a committed opponent of *Morgan*, or that he should be. A strong formalist, textualist, originalist case can be made that *Morgan* is correct on the theory that the Fourteenth Amendment's indeterminate constitutional language permits Congress to legislate, pursuant to section five, any rule not demonstrably inconsistent with the necessary meaning of section one (including an "incorporated" Free Exercise Clause). The same indeterminate language should mean that, in the *absence* of congressional action, the courts may

42. See *Morgan*, 384 U.S. at 652-53.

not strike down *state* legislative enactments unless they are demonstrably inconsistent with the necessary meaning of the text: thus the result in *Smith*. In short, there is a principled approach to *Morgan*—I might even venture to say the *correct* approach—that would permit Scalia to say (in effect): "*Smith* was right, *Morgan* was right, RFRA is all right, and I am always right."

That may be overstating things a bit, but it does turn on its head Scalia's critics' armchair psychoanalytical nonsense that Scalia will vote against RFRA because it is a slap in the face to his opinion in *Smith*. To the contrary, the habits of mind and characteristics of temperament that make Scalia so, well, *Scalia-like* are more likely to produce a bold, brilliant opinion explaining how *Smith* and RFRA can both be right. At any rate, tearing down *Morgan* does not appear to be one of Scalia's pet projects. The theory that Scalia is so committed to the anti-exemptions view of *Smith* that he will try to take down *Morgan* seems to rest on an overreading of *Smith* as hostile to religious liberty. In fact, however, *Smith* is hostile only to judicially-created balancing tests that rest on tendentious readings of ambiguous textual provisions, and that deploy such tests to upset democratic policy choices. *Morgan* and RFRA can (on this reading) be upheld in a way that vindicates and reaffirms this central principle of Scalia's jurisprudence. At least that's how I'm betting.

As goes Scalia, so goes Thomas. Or at least so goes the saying. With regard to RFRA, though, I think it's more accurate to say that if Scalia is a yes vote for RFRA, Thomas is *a fortiori* a yes vote for RFRA. The above line of reasoning, even if it doesn't persuade Scalia, should. For Scalia to reject RFRA would confirm the view that he is intensely committed to the no-exemptions view of *Smith*, and that this prevails over his general jurisprudential philosophy. Thomas, however, shares the same general jurisprudential philosophy as Scalia but is probably only weakly committed to *Smith*, if that. He became the sixth vote for *Smith* in *Hialeah*, but that does not necessarily signal strong agreement so much as acquiescence in a majority precedent, rejection of which was not necessary to reach the result in *Hialeah*. It is entirely possible that Thomas joined the majority opinion in *Hialeah* because it really was not a *Smith*-type statute, meaning that the *Smith* question really was not presented. And, as noted, even agreement with *Smith* does not necessarily imply rejection of RFRA.

Thomas's dissent from the denial of certiorari in *Swanner v. Anchorage Equal Rights Commission*[43] in 1994, seems a moderately strong signal of support for RFRA. *Swanner* presented a RFRA challenge to application of a marital status discrimination lawsuit against a landlord acting pursuant to sincere religious convictions. The decision below was adverse to the religious landlord, and Thomas suggested that review was appropriate in part because of the confusion of lower courts over the interpretation of RFRA and in part because Thomas was "quite skeptical" that Alaska's asserted interest would satisfy the "stringent standards" of RFRA.[44] Thomas, too, thinks an anti-accommodation reading of the religion clauses is nonsense. All of which leads me to think that Thomas will vote to uphold RFRA.

That brings the pro-RFRA count to seven. Will the Chief make it eight? On the face of it, Chief Justice William Rehnquist is the least likely vote for RFRA, if the criterion is prior opinions on similar legal issues. Rehnquist has *consistently*—early and often—opposed the pro-exemptions reading of the Free Exercise Clause. His lone dissent in *Thomas v. Review Board*, in 1981, charted the intellectual territory that led to the gradual acceptance of essentially the same view by a majority of the Court in 1990.[45] There is nothing in *Smith* (except for unpersuasive distinguishing of prior precedents) that Rehnquist hadn't already said, better, in dissent in *Thomas*. Rehnquist has also been a consistent *Morgan*-resister. He dissented in *City of Rome*.[46] He is a largely consistent pro-government, pro-*state* power conservative, who has never met a Free Exercise Clause claim he really likes or an exercise of the section five power that he thought didn't intrude on state or local governmental prerogatives. He is a consistent pro-state power federalist, as illustrated by his majority opinions in *National League of Cities* and *United States v. Lopez*.[47]

But Rehnquist has never been hobgoblined by a foolish consistency. He also, in recent years, has displayed a growing fondness for the swift, simple, cut-to-the-chase, don't-write-too-much, paper-over-the-differences, we-can-always-fix-it-later opinion. (Perhaps he misses Justice White a bit: Now *there* was a Justice who could crank out opinions in a quick, no-nonsense fashion!

43. 115 S. Ct. 460 (1994) (Thomas, J., dissenting from denial of certiorari).
44. Id. at 461.
45. *Thomas v. Review Board*, 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting).
46. 446 U.S. 156, 206 (1980) (Rehnquist, J., dissenting).
47. *National League of Cities v. Usery*, 426 U.S. 833 (1976); *United States v. Lopez*, 115 S. Ct. 1624 (1995).

And if the opinion didn't make entire sense out of an issue, or wrestle with the hard questions presented by the Court's resolution, tough.) I can easily see Rehnquist writing the opinion—brief, curt, near-unanimous, brushing aside the objections to RFRA with dispatch that says less than O'Connor and Souter would like about protection of the constitutional right of free religious exercise, less about how important and sensitive the Court is than Kennedy might prefer, less about the proper theory of *Morgan* than Scalia and Thomas might like, and, in general, that doesn't say much of anything terribly interesting at all (or that says some very interesting things in a rather casual manner). I envision an opinion that resembles in tone, length, and style (and in unanimity or near-unanimity) Rehnquist's opinions for the Court in *Hustler v. Falwell*[48] and *Wisconsin v. Mitchell*[49]: simple, straightforward, clear (so far as it goes), unambitious, not attempting a comprehensive review and clean-up of the law. It might simply apply "our precedents" without embracing them (and perhaps with a nudge toward reading them narrowly), leaving everyone happy (or unhappy) to fight their little doctrinal battles another day. But the opinion would at least resolve the question of RFRA's constitutionality so that we can move on with life. (Besides, we can always "fix" RFRA by reading the compelling interest test in a pro-government manner whenever we really want to, as the pre-*Smith* experience proved.[50])

That's eight votes, even putting Justice Stevens to one side (where he belongs) as either hopeless or hopelessly unpredictable. I can be wrong on one of the eight (and experience shows that I'll probably have missed the mark on at least one) and still make my 7-2 line. That gives me two justices to spare before I lose my wager with Professor Lupu, which was after all not on the exact head count but on whether RFRA would be upheld in the first Supreme Court case squarely addressing and resolving the issue. RFRA *will* be upheld.

The timing of this issue of *Constitutional Commentary* should be such that this prediction will be published before the Court's opinion in *Flores* is handed down (which, of course, won't be until the last two or three weeks of the Term, along with *Bill Clinton v. Paula Jones* and the other "biggies" of the Term). My editors have chained me to the mast of my pre-page proof predictions. So my prediction is just hanging out there for all to

48. 485 U.S. 46 (1988).

49. 113 S. Ct. 2194 (1993).

50. See generally Paulsen, 56 Mont. L. Rev. at 249 (cited in note 2).

see. If wrong, I will suffer the ignominy of my own publicly-displayed incompetence. If so, please, Chip, just try not to gloat too much.