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RFRA-VOTE GAMBLING: WHY PAULSEN IS WRONG, AS USUAL

*Suzanna Sherry**

Supreme Court currents are no less treacherous to navigators than are river currents—and, as Michael Paulsen himself has previously pointed out, RFRA shares more than a linguistic resonance with a river.¹ Unfortunately, this time Paulsen has let himself be fooled by the prevailing political winds into believing that there will be smooth sailing for his favorite statute despite the swirling eddies ahead. He is altogether too confident of a favorable result.

Although I have no wagers, public or private (and I am shocked—shocked!—to find gambling in this establishment) on the outcome of *Boerne v. Flores*, I want to use my editorial prerogative to take issue with my colleague's predictions. Indeed, he seems to have things exactly backward.

I start with the liberal wing of the Court, and the Justice Paulsen seems to be most doubtful of: Justices Ginsburg and Breyer. Together with Justice Souter, they would support RFRA for at least two independent reasons. First, I am more confident than Paulsen that all three would vote to overturn *Smith*; they believe that RFRA incorporates a correct interpretation of the Free Exercise Clause. This is a good bet from the outset: *Smith* supporters are few and far between. Among religion law scholars, for example, opposition to *Smith* is one of the few issues on which the left and the right generally agree. RFRA itself passed Congress by an overwhelming (and strongly bi-partisan) margin. Accommodation of religion can be viewed as either protective of religion (in which case it appeals to many conservatives) or protective of individual liberty (in which case it appeals

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

to many liberals). The combination is almost unbeatable: only a few iconoclasts like me find *Smith* persuasive.²

Moreover, all three liberal Justices are likely to support a reasonably broad *Morgan* power, and thus to allow Congress some discretion even were *Smith* correctly decided. In particular, they would likely support RFRA as a prophylactic measure designed merely to prevent intentional religious discrimination, which is banned by the First Amendment. They thus need not reach the interesting question that Justice O'Connor might have to consider about whose view of the Fourteenth Amendment Congress is entitled to consult. (I'll get to that question later.) I would count them as three sure votes to affirm.

Paulsen is too sure of the votes of the three conservative Justices, however. He argues that any attack on RFRA would require them to launch a jihad against *Morgan*. But these three Justices have already launched their jihad against congressional power, and destroying *Morgan* would fit right in. In *United States v. Lopez*,³ in *New York v. United States*,⁴ and in *Seminole Tribe v. Florida*,⁵ they abandoned prior precedent in order to keep Congress within strict bounds. Add to this their support (or, in the case of Justice Thomas, presumptive support) for the result in *Smith*, and it seems highly unlikely that any of them will vote to uphold the congressional attempt to nullify it. Paulsen's ingenious suggestions on how to uphold RFRA while simultaneously distinguishing *Smith*, and still keeping the section five power within bounds, are just a little too clever for these straight-forward federalists. Count three votes to reverse the lower court and invalidate RFRA.

And what of the middle? Paulsen is right to waffle on Justice Stevens, and he is right about the reasons. Justice Stevens thinks *Smith* is rightly decided, and seems to think that accommodation is affirmatively unconstitutional under the Establishment Clause. He may be especially concerned to the extent that RFRA protects religious organizations, as such, rather than individual believers. Nevertheless, he also seems, at least these days, to support a very broad power under *Morgan*. (He was not always so sanguine about congressional power: his concurrence in *Fitz-*

2. See Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 S. Ct. Rev. 123; William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991).

3. 115 S. Ct. 1624 (1995).

4. 505 U.S. 144 (1992).

5. 116 S. Ct. 1114 (1996).

patrick v. Bitzer suggested pretty strict limits on Congress's power to redefine rights using section five.⁶)

So what's a Justice to do? The only error in Paulsen's analysis is that in Justice Stevens' view, Congress hasn't just done something "manifestly stupid," it may have done something actually unconstitutional. But the "may have done" is the rub for me: I'm no more certain than Paulsen that Justice Stevens will actually find RFRA unconstitutional as an Establishment Clause violation. Chalk up a probable but not certain vote to reverse the lower court.

The count now stands at 4:3 to reverse, and the outcome hinges on the very center of the Court. What makes this situation especially interesting is that Justices Kennedy and O'Connor are each in their own way pivotal votes. A recent game theoretic analysis of Supreme Court voting behavior over the past two terms has shown that Justice Kennedy is the most powerful Justice.⁷ Justice O'Connor—somewhat surprisingly—did not fare as well under this analysis, but her tendency to write opinions that split the difference among her colleagues makes her worth watching on this one. Moreover, these two Justices don't seem to be as determined to cripple Congress as their more conservative brethren: they concurred separately in *Lopez*, adopting a much milder tone. On the other hand, Justice O'Connor wrote (and Kennedy joined) the majority opinion in *New York v. United States*. She might view RFRA as a similar attempt by Congress to force states to "govern according to Congress' instructions,"⁸ because it requires states to modify state laws. We might gain some useful information when we see how they vote in *Printz v. United States*,⁹ challenging the Brady Bill.

Thus on the question of congressional power, Justices Kennedy and O'Connor are hard to predict. The best hope for supporters of RFRA is that these two Justices will try to avoid confronting the section five question, and instead finesse it by going along with the argument that RFRA is a prophylactic measure. The problem with that argument, for Justices Kennedy and O'Connor, is that there are no congressional findings to that effect. Their opinion in *Lopez* seems to suggest that at the very least, Congress must contemporaneously justify its use of ques-

6. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Stevens, J., concurring).

7. Paul H. Edelman and Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. Cal. L. Rev. ____ (forthcoming 1997).

8. *New York v. United States*, 505 U.S. 144, 162 (1992).

9. 66 F.3d 1025 (9th Cir. 1995), cert. granted 64 U.S.L.W. 2169 (Sept. 26, 1995) (No. 94-16940).

tionable powers with empirical evidence.¹⁰ It is not implausible that Justice Kennedy might author an opinion striking down RFRA with an implicit invitation to repass it with more extensive congressional findings about the likelihood of religious discrimination. Nor is it implausible that he would uphold it as a prophylactic matter despite the lack of congressional findings. He could go either way: let's call it at fifty-fifty.

As I mentioned earlier, Justice O'Connor faces one final interesting dilemma not faced by any other Justice. She alone simultaneously leans toward cabining congressional power but overruling *Smith*. Assuming that there are not five votes to overrule *Smith*, she must answer the following question: if Congress is limited to implementing the rights actually contained in the Fourteenth Amendment, should those rights be defined by the Court as a whole or by each individual Justice? To put it another way, Justice O'Connor agrees that the congressional interpretation of free exercise rights is the constitutionally correct one, even though a majority of the Court disagrees. As far as Justice O'Connor is concerned, then, is Congress bound by the latter view or may it rely on the former? I think a conscientious Justice can answer either way. Cases from *Cooper v. Aaron*¹¹ to *Plaut v. Spendthrift Farm*¹² suggest that the judiciary is a unified entity whose ultimate voice is that of five or more Justices of the Supreme Court. On that view, Justice O'Connor should judge Congress against the voice of the judiciary, not against her own view of the Constitution. On the other hand, of course, section five gives Congress the power to enforce *the Fourteenth Amendment*, not the Court's interpretation of the Fourteenth Amendment. Thus if in Justice O'Connor's view Congress correctly interpreted the Fourteenth Amendment, there is no problem.

I think this is in fact the hardest and most interesting question raised by *Flores*, largely because it revisits the *Cooper* issues. But Supreme Court Justices usually try to avoid hard and interesting questions, and I suspect that Justice O'Connor will do exactly that. She therefore has an added incentive, beyond the uncertainty about *Morgan* that she shares with Justice Kennedy, to go the prophylactic route. Count her as a probable affirmance.

10. See Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 Case W. Res. L. Rev. 757, 762 n.30 (1996).

11. 358 U.S. 1 (1958).

12. 115 S. Ct. 1447 (1995).

So we have one probable and three sure votes to reverse, and the same number to affirm. It's all up to Justice Kennedy. He truly is, as the game theorists have labelled him, The Most Dangerous Justice. Either way, this is going to be a 5:4 nailbiter, not a 7:2 blow-out. And, more important, even if Justice Kennedy votes to affirm, Paulsen is going to win another wager only by narrowly construing the terms of the bet.¹³ Chip, you should have learned from my mistake.

13. See Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 797 (1993). Paulsen describes in *Lemon is Dead* his wager (with me) that the Court in *Lee v. Weisman*, 505 U.S. 577 (1992) would not overrule *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Although he concedes that *Lemon* is dead, he refuses to pay up because the Court did not technically overrule it.

