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Jay Wexler
Boston Univeristy School of Law

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The primary source of protection for religion in American law is the First Amendment to the U.S. Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The so-called "Free Exercise Clause" of the First Amendment protects, to some degree, the rights of individuals to practice their religion without interference, while the so-called "Establishment Clause" prevents the government from providing too much support for religion or overly involving itself with religious institutions. The chief interpreter of the First Amendment is the U.S. Supreme Court, which has had a mixed record in protecting religious freedom, particularly for those whose beliefs are in the minority. Some of the Court's decisions—such as its decisions banning school prayer[1]—are very sensitive to the interests of religious minorities, while other decisions—such as its decision to allow the government to indirectly burden the religious beliefs and practices of individuals through general laws[2]—are not nearly so sensitive.

Although the First Amendment provides some protection for religious believers, the U.S. Congress has at times found it necessary to supplement this protection through legislation. For example, the "Equal Access Act" prevents public schools from discriminating against religious groups that wish to hold after-school meetings on school grounds. Many federal laws, including the federal income tax law, provide religious believers with specific exemptions from various burdens and obligations. The "Civil Rights Act of 1964" (particularly Title VII of that statute) prevents certain private employers from discriminating against employees on the basis of their religion. The "Religious Land Use and Institutionalized Persons Act" (RLUIPA) prevents local zoning authorities and prisons from burdening the beliefs and practices of religious believers without a compelling reason. And the "Religious Freedom Restoration Act" (RFRA) prevents the federal government from doing the same.

As with the First Amendment, Congress's success in protecting religion through statute has been mixed. Sometimes, as with the Equal Access Act and arguably RFRA (at least as it applies to the federal government), Congress has provided religion with a significant amount of protection. Other attempts,

Jay Wexler is Associate Professor of Law at the Boston University School of Law. His research and teaching interests include law and religion, administrative law, and environmental law. He is currently writing a book about church-state relations in the U.S. This article was first presented at the CFIA co-sponsored conference "Law and Religion in Transitional Societies: Comparative Approaches to the Rule of Law," held December 2-3, 2006 in Oslo, Norway. For the full conference proceedings visit www.cfia.org.

however, such as Title VII's prohibition on discrimination by employers, have been less successful. What factors explain the difference? Since the primary interpreters of statutes in the United States are the Justices of the Supreme Court, clearly the inclinations of those Justices might have something to do with explaining the differences. But the specific language and textual structure that the legislature chooses to employ also turns out to have very important implications for how well the statutes promote religious liberty.

In this article I will briefly recount the successes and failures of RFRA and Title VII and then conclude with some thoughts about what lessons the various legislatures of the United States (federal, state, and otherwise) and the legislatures of other countries might take from the U.S. Congress's mixed record of protecting religious freedom through statute.

The Religious Freedom Restoration Act

Prior to 1990, the Supreme Court had held on numerous occasions that under the Free Exercise Clause, the government (whether it be federal, state, or local) could only burden the religious practices of individuals through general laws (such as generally applicable criminal prohibitions) if it had a compelling reason and used the narrowest means possible. Although the Court had diluted this so-called "strict scrutiny" to some degree by creating a variety of exceptions to the general rule,[3] the Supreme Court's approach in this area provided a significant amount of protection to religious believers. For example, in a series of cases beginning with *Sherbert v. Verner*,[4] the Court held that the government could not deny unemployment compensation to an employee fired for refusing to work on a specific day for religious reasons. Likewise, in the case of *Wisconsin v. Yoder*,[5] the Court found that the state of Wisconsin lacked any compelling reason to require Amish teenagers to attend school in violation of their religious beliefs or those of their parents.

In 1990, however, the Supreme Court reversed course when it decided the case of *Employment Division v. Smith*,[6] which held that the government is free to impose burdens on religious believers so long as it does so through general laws that do not single out religion or any particular religious practice for discriminatory treatment. The case involved a Native American who sought unemployment compensation after being fired for using a controlled substance known as peyote during a religious ritual. When the state of Oregon denied his claim, he sued the state for violating his First Amendment rights, citing *Sherbert* and *Yoder*. The Court, however, rejected his claim and issued a new statement of the law: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes … conduct that his religion prescribes."[7]

The Court's decision proved very unpopular with both religious groups and political leaders, and Congress acted quickly to remedy the situation. It passed the Religious Freedom Restoration Act of 1993 (RFRA) to re-establish the pre-*Smith* rule. Specifically, the statute provides that:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[8]

Under U.S. law, Congress must act under a power given to it by the Constitution in order to enact a valid statute. The Constitution, for example, gives Congress the power to pass laws to protect interstate commerce, to implement the nation's treaty agreements, and to enforce the due process and equal protection requirements of the Fourteenth Amendment. In passing RFRA, Congress justified the statute as an exercise of its power to enforce the Fourteenth Amendment. For reasons not important here, the Supreme Court in 1995 held that this constitutional power did not authorize Congress to apply RFRA to state and local governments;[9] as of this date, however, there seems to be little doubt that RFRA validly applies to the federal government.

Interestingly, Congress might have been able to apply RFRA to the states and local governments through its constitutional power to implement the nation's treaty obligations. As Columbia Law School Professor Gerald Neuman has argued, Congress might have been able to justify RFRA as a vehicle for implementing U.S. obligations under Article 18 of the International Covenant on Civil and Political Rights.[10] That Article purports to give every person the right "to manifest his religion or belief in worship, observance, practice and teaching," and limits the government's right to infringe on that right only when "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Although Article 18 is in some ways more protective of individual freedom than RFRA (it protects nonreligious as well as religious beliefs) and in some ways less so (RFRA's compelling interest standard is likely more stringent than Article 18's "necessary" standard), Neuman argues that "Congress could have justified RFRA itself as a means of effectuating Article 18," since it "could reasonably find that the traditional categories of religious exercise and compelling interest provided an appropriate mechanism for protecting the manifestation of religious beliefs in practice within the legal system of the United States."[11]

Until last year, the Supreme Court had not yet decided how much protection RFRA provides to religious believers from the burdens imposed on them by federal law. In the 2006 case of *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,[12] however, the Court held that the statute provides quite a bit of protection. The case involved a small American branch of a Brazilian Christian Spiritist sect that uses a sacramental tea called hoasca in one of its major ceremonies. Because this tea contains a hallucinogenic drug that is illegal under U.S. law, the U.S. Customs Service intercepted a shipment of it and threatened the group with prosecution. The sect sued the government, arguing that seizing the tea and prosecuting the group for possession or use of the tea would violate its rights under RFRA.

The Court, in a unanimous 8-0 opinion,[13] agreed with the sect that the government had violated its religious freedom rights under the statute. The government conceded that prohibiting the group from using the drug would "substantially burden" the group's religious exercise, but it argued that this burden was justified by a variety of compelling interests, most notably the government's interest in the uniform application of its laws governing controlled substances. The Court rejected this argument. Focusing on the specific language of RFRA and looking back to its earlier decisions in *Sherbert* and *Yoder* for guidance, it concluded that the Court should "loo[k] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants."[14] The Court then analyzed the likely effect of granting an exception from the Controlled Substances Act to the sect itself and found that the government had not provided any compelling interest to justify burdening the sect's religious practice by prohibiting its use of the hoasca. Importantly, the Court looked to the federal government's long-standing practice of exempting Native Americans' use of peyote from the same drug laws as evidence that granting another small exemption would not undermine any compelling state interest.

Although the *Gonzales* case made clear that the government must shoulder a significant burden before directly regulating religious activity under its criminal laws, a more recent case from the courts of appeals demonstrates that RFRA's protective scope outside this scenario remains uncertain. What if instead of directly regulating religious activity, the federal government merely *approves* of a state or local activity that significantly burdens someone's religious practice? That was the issue considered by the D.C. Circuit Court of Appeals in *Village of Bensenville v. Federal Aviation Administration* last year.[15] There, the Federal Aviation Administration (FAA) agreed to fund (under specific standards set out by federal law) a plan by the City of Chicago to expand O'Hare International Airport. Plaintiffs argued that the FAA's approval of the project violated their rights under RFRA because the expansion plan would require the relocation of a church cemetery. The issue of whether RFRA covers burdens imposed by state and local projects that require federal approval is a very important question because under the U.S. system of federalism, a great many state and local projects must obtain federal approval or permitting or funding to proceed. Under an important environmental statute called the National Environmental Policy Act (NEPA), for example, courts have held that such federal approvals can sometimes be considered "federal actions," thus requiring the federal agencies to consider the environmental impacts of the state or local projects they plan to approve.

The D.C. Circuit Court of Appeals, in a 2-1 decision, rejected the argument that RFRA covered the FAA's approval of Chicago's project. Although the court was willing to assume that moving the church cemetery would significantly burden the plaintiffs' religious exercise rights, the court was not convinced that the federal government was responsible for this burden. Rejecting the analogy to NEPA, the Court pointed out that unlike the regulations enforcing NEPA, which make it clear that the statute applies to any "actions … which are potentially subject to Federal control and responsibility,"[16] the language of RFRA failed to demonstrate that Congress intended to reach into "the far reaches of government activities," such as federal funding or approval of state or local projects.[17] The court looked back to the pre-*Smith* free exercise standard that RFRA intended to resurrect and found no evidence in the relevant cases to show that such tangential federal action had ever triggered any special protection. The dissent, on the other hand, believed that both the pre-*Smith* free exercise law and the plain language of RFRA clearly covered the FAA's funding decision, a decision that it characterized as "a federal agency's intense involvement in a plan that substantially burdens religious exercise."[18] Because the court that decided *Village of Bensenville* is a lower court with a limited (albeit important) jurisdiction, the question of whether RFRA applies to funding and approval decisions of the federal government outside of that jurisdiction remains an open one.

> THE STATUTE ON ITS FACE COULD REQUIRE EMPLOYERS TO ACCOMMODATE RELIGION IN NEARLY ALL CIRCUMSTANCES, IN SOME CIRCUMSTANCES, OR IN NEARLY NO CIRCUMSTANCES AT ALL

Title VII of the Civil Rights Act

Congress passed the Civil Rights Act of 1964 to combat certain types of discrimination on the basis of race, gender, ethnicity, and religion. Various Chapters (or "Titles") of the Act focus on different forms of discrimination. For example, Title II prohibits places of public accommodation such as hotels, restaurants, and theaters from engaging in discrimination; Title VI prohibits federal agencies from discriminating. Most important for purposes of this essay, Title VII of the Civil Rights Act prohibits employers with more than fifteen employees from discriminating against any employee with regard to any employment-related decision (hiring,

firing, demotion, etc.) on the basis of race, gender, ethnicity, or religion. Specifically, section 703 of Title VII provides that:

> (a) It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

In a 1972 amendment, Congress attempted to clear up some confusion about the statute's meaning by adding section 701(j), which purports to define "religion":

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observances without undue hardship on the conduct of the employer's business.

Because the statute does not further define the critical phrases "reasonably accommodate" and "undue hardship," however, it is ambiguous as to how much protection is actually provided to religion in the workplace. Depending on the meaning of these phrases, the statute on its face could require employers to accommodate religion in nearly all circumstances, in some circumstances, or in nearly no circumstances at all. Through its use of vague and undefined terms, Congress left to the courts, and especially to the Supreme Court, the critical decision of how much protection the statute would provide. As the Court itself recognized when it addressed the issue five years after the amendment was added: "[T]he statute provides no guidance for determining the degree of accommodation that is required of an employer."[19]

The Court addressed the scope of Title VII, as it relates to religious discrimination, in two cases: *Trans World Airlines v. Hardison*,[20] decided in 1977, and *Ansonia Board of Education v. Philbrook*[21] in 1986. In these two cases, the Court made it clear that the statute provides very little protection to religious employees who allege that their employers have discriminated against them on the basis of their religious beliefs or practices.

In *Hardison*, the plaintiff claimed that his religious beliefs prohibited him from working on Saturdays and asked his employer to excuse him from working on that day. An agreement between the employer and the labor union representing the employees prohibited the employer from forcing an employee with more seniority than the plaintiff to switch working days with the plaintiff, and the employer refused to violate that agreement. The employer also refused to allow the plaintiff to work a four-day week. When the plaintiff refused to come to work on Saturdays, the employer fired him, and the plaintiff then sued the employer for violating his rights under Title VII.

In a 7-2 decision, the Supreme Court rejected the plaintiff's claim. The Court thought that the only way to satisfy the plaintiff's demand to stay home on Saturdays would be to force another employee to work on that day, which would amount to discrimination against the other employee. The Court did not think that the statute required such discrimination. Specifically, it wrote: "As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. *In the absence of clear statutory language or legislative history to the contrary*, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[22] In reaching this decision, the Court announced a very lenient standard for measuring whether an employer has complied with the anti-discrimination requirements of the statute: "To require [an employer] to bear more than a *de minimis* cost in order to give [a plaintiff] Saturdays off is an undue hardship."[23] This standard

renders the statute almost entirely useless in protecting religious employees. If an accommodation would cost the employer any significant amount at all, the employer does not have to accommodate the employee. Only if the accommodation would be basically costless does the employer have an obligation under the statute to accommodate the religious believer.

In *Philbrook*, the Court further made it clear that if more than one possible accommodation exists, the employer can choose which accommodation to offer rather than giving the employee his preferred accommodation. In that case, a teacher requested six days off per year to celebrate his religion's holy days. Because the labor agreement between the school board and the teachers' union provided for only three days of (paid) leave per year for religious purposes, the teacher asked if he could use his allotted "personal business" days (also paid) for the other three days or if he could pay himself for the cost of a substitute teacher for those three days while receiving his full salary. The school board rejected both requests and instead allowed the teacher to take unpaid leave for the three days in question, a policy that undoubtedly constituted a reasonable accommodation under the statute. Claiming that his proposed accommodations would also be reasonable (i.e., basically costless to the school), the teacher sued, arguing that the board should have given him his preferred reasonable accommodation rather than the board's own preferred reasonable accommodation.

ONLY IF THE ACCOMMODATION WOULD BE BASICALLY COSTLESS DOES THE EMPLOYER HAVE AN OBLIGATION UNDER THE STATUTE TO ACCOMMODATE THE RELIGIOUS BELIEVER

Once again, the Court sided with the employer. As in the *Hardison* case, the Court pointed to the lack of any direction in the statute or its legislative history that would require employers to offer the specific accommodation sought by the employee rather than some other accommodation. The Court explained:

> We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.... Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.[24]

The combination of the Court's opinions in *Hardison* and *Philbrook* has resulted in Title VII providing very few safeguards for religion. As one commentator has put it, "With these two leading decisions, Title VII has been rendered largely meaningless as a source of protection for the religiously observant employee of the secular employer."[25]

Lessons and Comparisons

Does an analysis of these two statutes provide any lessons as to how legislatures might best go about protecting religious freedom through statute? Surely, caveats are in order. These are only two statutes, and it may not be proper to generalize from such a small set of examples. Moreover, turnover at the Supreme Court has meant that different judicial panels have been involved in interpreting the two statutes, so it might be the case that any differences in how the laws have been applied can be traced merely to differences in Court personnel. And finally, of course, it is by no means clear that lessons learned in one legal system are necessarily translatable to other legal systems, at least in any direct fashion. Nonetheless, I would like to cautiously suggest five possible lessons that interested actors could choose to take from the U.S. Congress's mixed success in protecting religion through statute.

First, it would seem unwise for legislatures to rely upon courts to interpret ambiguous or

unclear statutes in a way that would provide strong protection for religion. Too many interests are involved in cases that touch on religious freedom to assume that courts will necessarily promote the interest in religious freedom over other important interests. For example, the Title VII cases indicate that the U.S. Supreme Court was quite concerned with the effects that protecting religious workers would have not only on their employers, but also on other employees. Promoting the interests of the religious employees to have an extra day off would require some other employee—perhaps one with more seniority—to work on that day against his or her wishes. Without a statute that unambiguously directed the Court to favor the religious interest over other comparable interests, the Court was not willing to take that step itself.

The second lesson is closely related to the first: If a legislature wants religious rights or interests to trump other rights or interests, it must draft the relevant statute to make this unambiguously clear. The legislature's failure to do this is quite evident in the case of Title VII. Instead of indicating that the courts should always or nearly always find in favor of religious freedom over the practical concerns of employers and other employees, the Congress provided that religious interests would prevail unless the employer could not provide a "reasonable" accommodation without imposing an "undue hardship" on its business. Ambiguous and malleable terms such as "reasonable" and "undue" are not the kinds of words that a legislature should choose if it wants to ensure a high level of protection for religion.

Third, to ensure that courts do apply a high level of protection for religion, legislatures can choose a standard that may on its face be ambiguous, so long as it clear from past practice, practices in other areas of law, or some other source external to the statute itself, that the standard is in fact a strict one. RFRA, for example, uses the word "compelling" to describe the high level of interest the government must have before substantially burdening religion. On its face, without knowing how this word has been used in other contexts by the Supreme Court, one might read the word as providing only an ambiguous amount of protection, much like the words "reasonable" or "undue" in Title VII. However, it is quite clear to anyone with some knowledge of U.S. constitutional law that this phrase (as well as the "least restrictive means" requirement of section (b)(2) of the statute) means that the government must meet a very high burden before regulating religion. The "compelling interest" test is one that the Supreme Court has used in a variety of contexts to signal the most exacting scrutiny, and indeed it even used it in Free Exercise Clause cases prior to 1990.

Fourth, legislatures ought to think seriously about how broadly they wish their religion-protective statute to apply, and they should explicitly address this issue in the legislation itself. In other words, legislatures should think about what questions might arise with regard to the potential scope of the statute, and make sure to answer those questions explicitly either positively or negatively. Moreover, in doing so, they should look to other statutes, including statutes in other areas of law, for possible issues that could arise in the application of the legislation. The example of RFRA in the United States points out the importance of this issue. Although the question of whether federal approvals of state and local projects should be considered action under the statute is one that Congress could have anticipated if it had looked to NEPA for guidance, the legislature failed to address that important question in RFRA itself. As a result, at least one court has already had to grapple with the issue, and others will probably do so in the future. This imposes unnecessary costs on courts and litigants, and creates unnecessary uncertainty for all parties possibly affected by the law. In addition, it may also result in courts creating a rule of law that the legislature would not have agreed with, had it considered the issue explicitly itself.

Finally, comparing the text and structure of RFRA and Title VII reveals some possible lessons about how legislatures should draft and structure statutes to protect religious freedom. RFRA is drafted very clearly and in simple

language. Its structure is also quite straightforward. The statute has two parts: a blanket prohibition, and a single exception to that prohibition. The prohibition and the exception are in separate sections, and the prohibition makes it clear that it will apply unless and only if the exception applies. Moreover, the statute covers only one topic—burdening of religious exercise—rather than addressing several topics. The limited focus of the statute, along with its clear text and structure, has certainly made it easier for courts to interpret its meaning and to apply it in a way that has provided significant protection for religious freedom.

Title VII, by contrast, is neither clear nor limited in focus. The original statute applies a clear prohibition to various sorts of discrimination, but because discrimination on the basis of religion is different in some respects from discrimination on the basis of race, color, sex, and national origin, Congress was forced to amend the statute later on to clarify its meaning with regard to religion. This illustrates that drafters might consider the benefits of drafting statutes which isolate religion and treat it specially, rather than grouping it with other types of attributes.

Moreover, when Congress did amend the statute by defining "religion," it did so in a very unclear fashion. Several problems exist with the added language. For one thing, it includes the substantive standard for accommodation (reasonable, without undue hardship on the employer) as part of its definition of "religion," which makes little sense and is simply confusing. Second, as noted above, the standard for accommodation is stated in very vague and ambiguous language. Finally, although the statute is basically an anti-discrimination statute, the exception added by the new language (no discrimination unless not discriminating would cause hardship on the employer) at least arguably appears to completely undo the anti-discrimination mandate of the original statute. It is no surprise that courts have not known what to do with the statute, since it seems self-contradictory. Unlike RFRA, which imposes a blanket prohibition subject to a single limited exception, Title VII as it applies to religion imposes a blanket prohibition subject to a near complete exception. This is a strange way to draft a statute to protect religion, and legislatures seeking to learn something from the U.S. experience might be wise to avoid copying this example.

Conclusion

It is never easy to write a statute, and when religion is involved, the task becomes even harder. The decision to protect religion inevitably raises a host of difficult questions: How much protection to provide? How should competing concerns be balanced? How does one even define religion? Moreover, the enacting body is unlikely to be able to predict all of the issues that could possibly arise under the statute over time.

Nations that are choosing now to begin struggling with these questions can benefit from looking to examples from other countries. Of course, legal systems differ tremendously, and every nation has its own unique religious culture, but some general lessons likely transcend these differences. As illustrated above, the United States provides a number of examples for other nations to look to in this regard. The mixed case of protecting religion through statute in the United States suggests that transitional legal systems can learn a lot from the U.S. about what to do—and what not to do—to give religion the protection it deserves. ❖

1. See e.g., *Engel v. Vitale*, 370 U.S. 421 (1962).
2. See *Employment Division v. Smith*, 494 U.S. 872 (1990).
3. For example, see *Goldman v. Weinberger*, 475 U.S. 534 (1986); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).
4. 374 U.S. 398 (1963).
5. 406 U.S. 205 (1972).
6. 494 U.S. 872 (1990).
7. Id. at 879 (internal quotations omitted).
8. 42 U.S.C. § 2000bb-1.
9. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

10. See Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Constitutional Commentary 33 (1997).
11. Id. at 50.
12. 126 S.Ct. 1211 (2006).
13. Newly confirmed Justice Alito did not take part in the decision.
14. Id. at 1220.
15. 457 F.3d 52 (D.C. Cir. 2006).
16. 40 C.F.R. § 1508.18.
17. *Village of Bensenville*, 457 F.3d at 62.
18. Id. at 77 (Griffiths, J., concurring in part and dissenting in part).
19. *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977).
20. Id.
21. 479 U.S. 60 (1986).
22. Id. at 85 (emphasis added).
23. Id. at 84.
24. Id. at 68.
25. David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 Mont. L. Rev. 119, 127 (1995).