The result is equal protection, but not substantive protection, for religious exercise.[344] The Court's approach also accords less protection to religiously based conduct than is accorded expressive conduct that implicates speech but not religious values.[345] On the practical side, relegation of free exercise claims to the political process may, as concurring Justice O'Connor warned, result in less protection for small, unpopular religious sects.[346]

It does appear that, despite *Smith*, the Court is still inclined to void the application of generally applicable laws to religious conduct when the prohibited activity is engaged in, not by an individual adherant, but by a religious institution. For instance, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[347] the Court established a "ministerial exception" that precludes the application of employment discrimination laws[348] to claims arising out of an employment relationship between a religious institution and its ministers.[349] The Court found that even where such law is a "valid and neutral law of general applicability," and even if the basis for the employment decision is not religious doctrine, the Free Exercise Clause prohibits the application of an employment discrimination law, since enforcement of such law would involve "government interference with an internal church decision that affects the faith and mission of the church itself."[350]

Because of the broad ramifications of *Smith*, the political processes were soon used in an attempt to provide additional legislative protection for religious exercise. In the Religious Freedom Restoration Act of 1993 (RFRA),[351] Congress sought to supersede *Smith* and substitute a statutory rule of decision for free exercise cases.

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[344] Justice O'Connor, concurring in *Smith*, argued that "the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause." 494 U.S. at 901.

[345] Although neutral laws affecting expressive conduct are not measured by a "compelling interest" test, they are "subject to a balancing, rather than categorical, approach." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[346] 494 U.S. at 902–03.

[347] 565 U.S. ___, No. 10–553, slip op. (2012).

[348] In this case, the employee, who suffered from narcolepsy, alleged that she had been fired in retaliation for threatening to bring a legal action against the church under the Americans with Disabilities Act, 104 Stat. 327, 42 U.S.C. § 12101 *et seq*.

[349] An important issue in the case was determining when an employee of a religious institution was a "minister." The Court declined to create a uniform standard, but suggested deference to the position of the religious institution in making such a determinination. In this case, a "called" elementary school teacher (as opposed to a "contract" teacher) was found to be a "minister" based on her title, the religious education qualifications required for the position, how the church and the employee represented her position to others, and the religious functions performed by the employee as part of her job responsibilities. 565 U.S. ___, No. 10–553, slip op. at 15–20.

[350] 565 U.S. ___, No. 10–553, slip op. at 15.

[351] Pub. L. 103–141, 107 Stat. 1488 (1993); 42 U.S.C. §§ 2000bb to 2000bb–4.