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WHY NOW IS NOT THE TIME FOR CONSTITUTIONAL AMENDMENT: THE LIMITED REACH OF *CITY OF BOERNE V. FLORES*

KENT GREENAWALT*

I. INTRODUCTION

When the Supreme Court eviscerated the protection of the Free Exercise Clause in *Employment Division v. Smith*,¹ religious groups and individuals dismayed by the decision chose to pursue statutory relief rather than a constitutional amendment. Now that the Supreme Court has decided in *City of Boerne v. Flores*² that the resulting statute, the Religious Freedom Restoration Act³ (RFRA or the "Act"), cannot be justified as a congressional exercise of power under the Fourteenth Amendment, many who care deeply about religious liberty may turn to the amendment process as an alternative. Although disappointed by the *Flores* decision, I believe it is premature to seek a constitutional amendment that would explicitly protect religious conduct from the operation of neutral, valid laws. The Supreme Court has not ruled out effective statutory relief. Until it does so, that course is preferable to amendment.

In this essay, I do not address whether the Court was justified in its conclusion about Congress's power under the Fourteenth Amendment.⁴ Nor do I analyze the merits of other constitutional arguments against RFRA, which I have previously urged are unconvincing.⁵ This essay explores the implications of what has been said and not said by the Court, with an eye

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1. 494 U.S. 872 (1990).

2. 117 S. Ct. 2157 (1997).

3. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

4. For a discussion of this topic, see Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 342-50.

5. See *id.* at 337-42.

to what opponents of *Smith* should now do.

II. THE BASES FOR *EMPLOYMENT DIVISION V. SMITH* AND *CITY OF BOERNE V. FLORES*

If one puts aside the surprising analysis of prior constitutional law, the heart of the Court's opinion in *Smith* was that courts cannot effectively apply a constitutional standard that requires assessment of individual claims that neutral laws seriously and unjustifiably burden religious exercise.⁶ No intelligent observer can doubt the Court's observation that such inquiries are often difficult; those who disagree with the Court believe that the value of religious freedom is great enough to justify the inquiries nonetheless.

The Court in *Smith* indicated clearly that some legislative accommodations for religious exercise are definitely acceptable. For example, a state legislature may permit members of a religious group to use peyote in worship services.⁷ The Court impliedly endorsed some other such accommodations that state and federal legislatures have accorded.⁸ Justice Stevens has a different view about accommodations. His brief opinion in *Flores* concluded that RFRA was an invalid establishment of religion because religious claimants should not receive benefits unavailable to nonreligious claimants.⁹ Justice Stevens is the only member of the Court who has taken the position that uneven benefits make an accommodation unconstitutional. According to existing constitutional law, specific legislative accommodations to religious exercise are generally acceptable.¹⁰

6. The Court said, for example, that leaving exemptions to the political process "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Smith*, 494 U.S. at 890.

7. *See id.*

8. *See id.* (stating that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well").

9. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (Stevens, J., concurring).

10. *See, e.g., Smith*, 494 U.S. at 890 (discussing legislative exceptions for peyote use in Arizona, Colorado, and New Mexico).

If a legislature can make a specific accommodation, can it also make a general one? That is, rather than itself deciding when religious claimants should be exempted from ordinary legal requirements, can a legislature enact a broadly worded privilege for religious exercise that courts apply on a case-by-case basis? This issue is not resolved by either *Smith* or *Flores*. *Smith* asserted that courts have great difficulty applying a broad constitutional standard for religious exemptions.¹¹ But *Smith* did not say that if a legislature instructed courts to apply a broadly worded standard, the standard would be so unwieldy that it would impose an unconstitutional burden on the courts. Some scholars, defending *Smith* and criticizing RFRA, have argued that such legislative instruction would violate the separation of powers between the legislative and judicial branches because it imposes a burden that courts are not fit to bear.¹² *Smith* itself, however, does not go that far.

Justice Kennedy's opinion for the Court in *Flores* repeated some of the language in *Smith*: "[C]laims that a law substantially burdens someone's exercise of religion will often be difficult to contest."¹³ But Justice Kennedy came no closer than did *Smith* to saying that a broad legislative accommodation is necessarily unconstitutional. *Flores* was fundamentally about Congress's power vis-à-vis the states, not about Congress's power vis-à-vis its own enactments, nor about state legislative power vis-à-vis state enactments. *Flores* does not tell us whether Congress can qualify past and future federal legislation by RFRA-like language. *Flores* does not tell us whether a state legislature can similarly qualify its own past and future legislation. What I mean by "qualifying its legislation" is creating an exemption for religious exercise cast in broad language that applies both to statutes already enacted and to any new statutes.¹⁴ We do not

11. See *id.* at 886-87.

12. See, e.g., Joanne C. Brandt, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994).

13. *Flores*, 117 S. Ct. at 2171 (citing *Smith*, 494 U.S. at 887).

14. Because new legislation takes priority over old, the same legislature that has enacted a provision like RFRA could provide specifically for its inapplicability in

know whether the present Court, or any future Court, would accept such broad statutory accommodations.

III. *FLORES* AND THE MISSING FEDERAL GOVERNMENT

Flores involved a local historic preservation ordinance under which a Roman Catholic bishop was denied a permit to enlarge a church.¹⁵ Under the Fourteenth Amendment, Congress's power is the same with respect to state and local governments.¹⁶ The decision in *Flores* covered RFRA as it applied to all state and local governments. The Act was held invalid in that application. But what of RFRA's application to the federal government? What of the Act's application to past and future acts of Congress and the federal executive? The Court never discussed that directly, but the second and third sentences of the opinion read: "The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power."¹⁷ That language reads as if the statute is unconstitutional across the board. Other language in the opinion is similar; for example, the Court emphasized the broad sweep of RFRA, highlighting its application to government at every level.¹⁸ Moreover, the Court later remanded a case involving federal bankruptcy law for reconsideration in light of *Flores*.¹⁹ The remand does not prove that the Court thought that *Flores* resolved the federal case, but if the Court

some future enactment.

15. See *Flores*, 117 S. Ct. at 2160.

16. See, e.g., *Avery v. Midland County*, 390 U.S. 474, 479-80 (1968) (finding that the Fourteenth Amendment's Equal Protection Clause applies equally to states and localities).

17. *Flores*, 117 S. Ct. at 2160.

18. See *id.* at 2162 (citing examples of RFRA's "universal coverage").

19. See *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997). In *Christians*, debtors transferred \$13,450 to a church less than a year prior to filing a bankruptcy petition under federal law. See *id.* at 1410. The trustee was successful in an attempt to recover the contribution from the church. See *id.* On appeal, the Court of Appeals for the Eighth Circuit held that the contribution was an avoidable transfer and could be recovered by the trustee under 11 U.S.C. § 548(a)(2). See *id.* at 1416. But the Court applied RFRA and held that the church did not have to return the contribution because the burden on religious exercise was not supported by a compelling government interest. See *id.* at 1420. The Supreme Court vacated and remanded in light of the *Flores* decision. See *Christians*, 117 S. Ct. at 2502.

concluded that *Flores* had no bearing on the case, keeping the case for a Supreme Court decision might have made more sense than a remand. How are we to understand the Court's position on RFRA's application to the federal government?

A. *Inattention*

One way to understand *Flores* is as an opinion implicitly directed to the statute's application to states and localities. That was precisely the question raised by the Fourteenth Amendment argument in *Flores*,²⁰ and perhaps we should not suppose the Court meant anything more. This understanding is mildly supported by a sentence in the opinion that reads: "Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States."²¹

The difficulty with this understanding is the Court's plain language about the statute's invalidity.²² The Justices were aware of arguments against RFRA—establishment and separation-of-power arguments—that had direct relevance to the law's federal applications.²³ If they decided on Fourteenth Amendment grounds, then why did they not explicitly say that their decision resolved only the validity of applications against state and local laws? Of course, inattention is always a possibility, but the opinion could not likely have survived without any Justice or law clerk noticing this issue. Compromise over language is a more probable explanation. In any event, passages in the opinion read as if RFRA is invalid in all its applications, although the Court's Fourteenth Amendment theory definitely does not cover applications against federal laws.

B. *Nonseverability*

Some Justices might have reasoned in the following manner: Congress wanted to create a broad religious exercise exemption

20. See *Flores*, 117 S. Ct. at 2162.

21. *Id.*

22. See *id.* at 2160, 2162, 2172.

23. See Transcript of Oral Argument, *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (No. 95-2074), available in 1997 WL 87109, at *17, *32-33.

that would apply to all agencies of the government in the United States. Unfortunately, it had no power to adopt such a law in respect to most of those agencies. We cannot know whether Congress would have wanted such a law for the federal government had it realized it lacked such power for states and localities.²⁴ Therefore, the provisions of RFRA are not separable insofar as they reach various branches of government. If the Act is invalid for state laws, then it is invalid for federal laws.

Such an argument is not persuasive. Given what Congress actually did, it seems more plausible to suppose that it wished all the coverage it could get. The issue of congressional power vis-à-vis federal laws has yet to be addressed, and it requires separate evaluation.

Even if the argument of nonseverability were sound or, more importantly, if it persuaded the Justices, its logic would not preclude fresh congressional legislation, similar to RFRA, that applies only to federal laws and executive acts.

C. *Wrong Theory*

Some Justices might have adopted a variation of the preceding argument, believing that Congress acted upon an assumed power to remedy constitutional violations and to expand Court-announced definitions of constitutional rights. The enforcement power of the Fourteenth Amendment does not allow legislative redefinition of rights established or rejected by the Court;²⁵ and RFRA was not really designed, and was not suitable, to remedy and prevent violations of the rights the Court had declared. Any congressional power to enforce the First Amendment against the federal government is similarly limited; therefore, Congress lacked the only basis it imagined it had for the Act, and, without that basis, the Act would be invalid in its entirety.

This is a puzzling argument as it applies to the Act's applications against the federal government. Congress can qualify the

24. My language here, and at some other places, is "mentalist" about Congress. For those who regard notions of what Congress wanted or intended as fictions, or as inappropriate guides for courts, the points could be reformulated in terms of the apparent objectives of the language Congress adopted.

25. See Greenawalt, *supra* note 4, at 342-50.

coverage of its own acts and acts of the federal executive in any way it chooses, so long as its qualifications do not violate constitutional provisions.²⁶ Congress does not need any independent constitutional base to excuse people from conformity with ordinary federal standards. It could, for example, exempt from taxation people who have reached a certain age or who suffer physical disabilities, so long as the exemptions do not create constitutionally invalid categories.²⁷ Similarly, Congress can create exemptions based on religious exercise if they do not violate constitutional restrictions. The scope of Section 5 of the Fourteenth Amendment, therefore, has no bearing on the power of Congress to enact RFRA as it applies to the federal government.

If Congress does not need a separate constitutional base to qualify federal legislation, then what should be the effect of what the Court regards as congressional misunderstanding of the Fourteenth Amendment? Congress enacted a standard it regarded as desirable. Even if the constitutional ground for that legislation—the Fourteenth Amendment—was misconceived, then Congress would still have enacted the legislation within its plenary power over prior and future federal legislation. In brief, any difference of view between members of Congress and the Court over the Fourteenth Amendment should have no relevance for the law's federal applications.

Even if the "wrong theory" argument has more force than I acknowledge and has influenced some Justices, its logic no more precludes fresh RFRA legislation that applies only against the federal government than does the logic of nonseverability.

D. Separation-of-Powers Defect

Some Justices may believe that RFRA violated separation of powers as it applied to the federal government. No such argument is adopted in *Flores*, but it may be lurking in the background. How should one assess this possibility? Justices

26. See *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (acknowledging Congress's plenary authority in the areas of its legislative jurisdiction subject to constitutional restrictions).

27. See 26 U.S.C. § 63(f) (1994) (providing additional exemption amounts for the aged and blind).

O'Connor and Souter almost certainly would overrule the holding of *Smith*.²⁸ They believe a standard of evaluation like RFRA's does not violate separation of powers because they suppose such a standard is constitutionally required. Justice Breyer joined in their call for a review of *Smith*, indicating that he has serious doubts about the validity of the rule of that case.²⁹ Justice Stevens asserted that any broad accommodation to religious exercise is unconstitutional.³⁰ The separation-of-powers objection to RFRA will probably command the balance of the Court *only* if four of the five remaining Justices endorse it. Justice Kennedy's opinion for the Court in *Flores* hardly affords a confident basis to conclude that they will do so.

Because federal constitutional law does not mandate strict separation of powers within the states,³¹ the Supreme Court might strike down a federal law that uses a standard like RFRA's for the federal government but permit a similar statute within a state. It is true that the separation-of-powers objection to RFRA approaches the related objection that a legislative directive to courts to apply an unmanageable standard for religious exercise amounts to an establishment of religion. If such a standard were thought to violate the Establishment Clause, neither Congress nor state legislatures could adopt it. But the establishment claim is not exactly the same as the separation-of-powers claim, and so the fate of one would not necessarily determine resolution of the other.

I am puzzled that the Court did not more carefully articulate the exact parameters of its holding of invalidity. Certainly one cannot glean from the opinion that the Court definitely embraced the separation-of-powers challenge to RFRA. The Fourteenth Amendment federalism argument has no direct bearing

28. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting); *id.* at 2185 (Souter, J., dissenting).

29. See *id.* at 2186 (Souter, J., dissenting).

30. See *id.* at 2172 (Stevens, J., concurring). Justice Stevens noted that RFRA "has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion as opposed to irreligion is forbidden by the First Amendment." *Id.* (Stevens, J., concurring).

31. See *Elrod v. Burns*, 427 U.S. 347, 352 (1976); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). *But see* *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

on the Act's application to federal laws, and the absence of congressional power under that amendment is the only constitutional defect the Court found.

IV. WHY AN AMENDMENT WOULD BE PREMATURE

Our country has never adopted a constitutional amendment to overturn a Supreme Court decision defining the scope of the Bill of Rights.³² I strongly believe the absence of such amendments has helped strengthen the symbolic force of the Bill of Rights. Any amendment to overturn an unpopular decision will make subsequent amendments of that kind easier to adopt. If the first such amendment overturns a decision someone does not like, then the next two or three may overturn decisions the same person favors. In recent history, there have been strong movements to amend the Constitution to permit prayer in public schools³³ and punishment of flag-burners.³⁴ These anti-civil-libertarian amendments might well have been adopted if they had been preceded by an amendment to create broad religious exemptions from neutral laws. One need not be rigidly against amendment of the Bill of Rights in all circumstances to think that this method to *correct* judicial decisions is very strong medicine that should be avoided when possible.

At this stage, we do not know if an amendment is the only way to undo *Smith*. Perhaps RFRA itself still validly applies to the federal government; or if RFRA does not, then perhaps Congress can enact valid legislation limited to that effect. States may be able to enact similar legislation.³⁵ Congress and the states should follow this course. To be on the safe side, Congress should reenact a form of RFRA limited to federal laws and executive acts. In order to rebut any assumption that Congress's new

32. There is an exception, if one counts the adoption of the Thirteenth Amendment as "overruling" the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), that slaves are property protected under the Fifth Amendment.

33. See Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823 (1983).

34. See Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991).

35. Moreover, state courts can adopt the compelling interest test as the proper approach to free exercise problems under their state constitutions.

legislation assumes the earlier act is wholly invalid, the new law should declare Congress's understanding that RFRA continues to be valid in its federal applications.

Friends of religious liberty should press state legislatures to adopt similar laws. Such efforts may be less spectacular, and more onerous, than a constitutional amendment, but, if attitudes in Congress are any guide, the great majority of state legislators will favor such laws. It is entirely possible that a combination of federal and state legislative action will achieve most of the protection of religious exercise that Congress designed RFRA to grant.³⁶ That will make a constitutional amendment unnecessary, and may help prepare for the day when a Supreme Court more protective of religious liberty will overrule *Smith*.

36. It is unlikely that every state will adopt such a law; protection in any state that fails to adopt such a law, and in which courts have not adopted a compelling interest test for a free exercise clause in their state constitution, will be less than it was under RFRA.