

RELIGION IN CONGRESS AND THE COURTS: ISSUES OF INSTITUTIONAL COMPETENCE

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This essay examines the tension between Congress and the Supreme Court over the constitutional issues surrounding the Religious Freedom Restoration Act of 1993 ("RFRA").¹ Congress enacted RFRA in direct response to the Court's decision in *Employment Division v. Smith*,² in which the Court refused to find that the Constitution required an exception to a generally applicable law that burdened religious exercise.³ RFRA invalidated any act of government that substantially burdens an individual's free exercise of religion unless that law employs the least restrictive means of furthering a compelling governmental interest.⁴ In turn, the Court struck in *City of Boerne v. Flores*⁵ and declared RFRA unconstitutional, finding that Congress exceeded its enforcement power under Section 5 of the Fourteenth Amendment.⁶ This essay explores the relative institutional competence of Congress and the Supreme Court to decide these close constitutional issues and examines how *Boerne*, which is often considered a judge-centered decision, actually takes sensitive deliberations about religious freedom from courts and places them in the hands of local political institutions.

Section 5 of the Fourteenth Amendment has been a lightning rod for structural controversies between the Court and Congress and between state and federal governments. Despite these controversies, the Court and Congress have had few

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1. 42 U.S.C. § 2000bb (1994).

2. 494 U.S. 872 (1990).

3. *See id.* at 873.

4. *See* RFRA, 42 U.S.C. § 2000bb-1 (1994).

5. 117 S. Ct. 2157 (1997).

6. *See id.* at 2172 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

direct confrontations over the breadth and scope of Section 5.⁷ The paucity of cases arises not from Congress's timidity about extending its constitutional power, but rather from its cunningness in doing so. Instead of openly throwing down the constitutional gauntlet by exercising its Fourteenth Amendment enforcement power, Congress has stretched constitutional boundaries via the Commerce Clause.⁸ For example, Congress enacted the Public Accommodations section of the Civil Rights Act of 1964⁹ pursuant to its commerce power rather than to Section 5 of the Fourteenth Amendment, even though Section 5 seems to contain the proper moral locus of congressional authority. Congress used the Commerce Clause as the basis for its action in part because of fear that the Court would strike the Act down if it purported to rest on the Fourteenth Amendment. Congress desired that the Act rest on a secure constitutional foundation.

Despite Congressional reluctance to rely on it in the past, Section 5 has achieved celebrity status in the debate over the meaning of the First Amendment's guarantee of the free exercise of religion. The debate began with *Smith*,¹⁰ followed with RFRA,¹¹ and culminated with the invalidation of RFRA in *Boerne*.¹² The Court assumed primary responsibility for constitutional interpretation in both *Smith* and *Boerne*, but the result of neither case has received universal acclaim. Although the decisions can hardly be called shocking, the *Smith* Court reached farther than expected when it held that the Constitution does not mandate exemptions from neutral, generally applicable laws that burden and sometimes forbid certain forms of religious exercise.¹³ But *Smith* did not dictate a substantial change in actual legal outcomes. Free exercise cases before *Smith* represent uniquely consistent examples of Supreme Court review that the Court described as strict but

7. See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Ex Parte Virginia*, 100 U.S. 339 (1879).

8. U.S. CONST. art. I, § 8, cl. 3.

9. 42 U.S.C.A. § 2000a, *et seq.* (West Supp. 1998).

10. 494 U.S. 872.

11. 42 U.S.C. § 2000bb.

12. 117 S. Ct. at 2172.

13. See *Smith*, 494 U.S. at 878-79.

implemented leniently. In these cases, the Court purported to apply strict scrutiny and compelling governmental interest tests to laws burdening religious freedom, but it seldom struck such laws down.¹⁴ RFRA, therefore, did not restore an actual pre-*Smith* status quo with respect to religious freedom and religious liberty, especially if one took seriously RFRA's command that every claim of religious free exercise prevail unless the government can demonstrate that its law furthers a compelling governmental interest using the least restrictive means.¹⁵ RFRA went beyond restoring the status quo ante because it mandated strict scrutiny in every challenge to religious exercise.

Defenders of RFRA argued that Congress was merely enforcing the Fourteenth Amendment, which incorporates the Free Exercise Clause and applies it to the States.¹⁶ Despite this argument, a constitutional challenge to RFRA was mounted on several grounds, including the claim that Congress exceeded its Section 5 power by engaging in substantive constitutional interpretation rather than mere remedial action.¹⁷ RFRA was problematic because it essentially overruled the Court's view of "what the law is."¹⁸ The decision in *Boerne* simply reaffirmed the Court's view of the law in *Smith* and invalidated RFRA

14. See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989) (rejecting claim for income tax deductibility of certain religious payments); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that the Free Exercise Clause does not prohibit the government from permitting timber harvesting and road construction in an area of a national forest traditionally used by Indians for religious purposes); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (holding that prison officials do not have a duty to conform prison work schedules to Muslim inmates' religious observances); *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that requiring Native American parents to provide a state welfare agency with a social security number for their daughter in violation of their religious beliefs does not violate the Free Exercise Clause); *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (rejecting free exercise challenge to Air Force uniform regulations by Orthodox Jew barred from wearing a yarmulke); *United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting claim to exemption from social security taxes by Amish farmers whose religious tenets would not permit them to participate in the program); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (rejecting religious exemption from conscription for a claimant who was not opposed to fighting in all wars).

15. See 42 U.S.C. § 2000bb-1.

16. See, e.g., Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

17. See *Boerne*, 117 S. Ct. at 2164 (1997).

18. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

because it “enforced” an altogether different interpretation of the First Amendment.¹⁹ The Court’s decision in *Boerne*, therefore, was hardly unexpected.

Boerne has been controversial. My fellow panelists, Professors Laycock and Sager, are not the only legal academics unhappy with the Court’s decision. For example, Professor Michael McConnell has offered a powerful criticism, arguing that the free exercise question decided in *Smith* is a close issue on the merits and that “[i]t is precisely in a close case that the independent judgment of Congress on a constitutional question should make a difference.”²⁰ McConnell weighs the comparative institutional competence of Congress and the Court and concludes that Congress is institutionally in a better position than the Court to resolve the *kind* of issue that *Smith* raised, and thus, the *Boerne* Court should have upheld RFRA.²¹

My argument is precisely to the opposite. My argument is that while *Smith* indeed presents a paradigmatic close case, RFRA represents a kind of independent congressional “judgment” that makes *Boerne*, if not unequivocally right, at least very defensible. The rest of this essay briefly elaborates on this argument.

Smith and *Boerne* are both close constitutional cases, the result being a significant policy decision that purports to bind every governmental actor in the entire nation. Such cases always raise a variety of issues. From the point of view of the topic of this Symposium, one of the most important issues is the structural one of comparative institutional competence as between Congress and the Court. My argument that *Boerne* is at least defensible, even if it is not assuredly correct, rests on the premise that the issue of institutional competence that it resolved requires us to choose between a rock and a hard place. When we talk about the institutional competence of either the Court or Congress, we must remember that we are talking about an “as compared to what” question. Institutional competence is relative. The question is whether the Court is as

19. See *Boerne*, 117 S. Ct. at 2164 (“Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”).

20. McConnell, *supra* note 16, at 155.

21. See *id.* at 156.

good as, better than, or much worse than Congress at getting this issue or this *kind* of issue right in case after case. "Nirvana," the situation in which we get the right institutional actor to reach the right outcome every time, is, unfortunately, not an option. A perfect, reliable institutional actor does not exist. Indeed, sometimes it seems as if we have only bad choices about which actor ought to enforce the Constitution.²²

The Court's institutional reliability is hobbled by its lack of accountability, by its more than occasional detachment from rule-of-law constraints such as a sense of being bound by the meaning of the text, and by its incredible hubris regarding the Judiciary's entitlement to interpretative hegemony. Congress, however, is not the institutional panacea of democratic accountability touted by RFRA's supporters, because it is also institutionally hobbled. Public choice theory suggests that it is unlikely that Congress possesses the collective ability to deliberate in a serious, reflective, non-politicized way about the "nature and importance of religious freedom."²³ The fact that RFRA passed almost unanimously signifies little about Congress's commitment to religious freedom, but it does suggest a lot about the political strength of the coalition of religious groups that lobbied hard for the law's passage. A look at the groups that dominated the legislative hearings confirms this suggestion.²⁴

22. I am reminded of a Federalist Society debate at the University of Virginia Law School. The topic was how best to enforce constitutional norms of police behavior in arresting and prosecuting criminals. The focus of the discussion was whether we should retain the exclusionary rule or whether a damages remedy would better serve our purposes. Akhil Amar was present to defend his conclusion that damages are the preferable remedy for police misfeasance. Cf. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) (arguing that tort remedies should be used to hold the government accountable under the Fourth Amendment). My colleague, John Jeffries, has studied both the exclusionary rule and damages in depth. See generally PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES* (2d ed. 1994). He observed that choosing between the exclusionary rule and damages seemed to turn on one's point of view: from the point of view of the exclusionary rule, damages appear to offer a better remedy, but from the point of view of the damages remedy, the exclusionary rule seems superior.

23. McConnell, *supra* note 16, at 154. See also DANIEL FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (discussing public choice theory and its affect on legal issues such as constitutional law and statutory interpretation.). See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

24. The overwhelming majority of the testimony was from religiously affiliated groups. Noticeably absent were representatives of the state and local governments whose actions the Act would have so substantially constrained. See generally H.R. Rep.

I do not mean to suggest that Congress was necessarily wrong about the nature and importance of religious freedom in RFRA or about the balance that ought to be struck between claims of religious liberty and the pursuit of collective secular goals. I do mean to imply that if Congress was right in RFRA, and the Court was wrong in *Smith*, then Congress was right *despite* its institutional impediments to serious constitutional deliberation. If RFRA was right, it was *not* because Congress's institutional structure renders it more competent than the Court to determine this close constitutional question, and it was *not* because Congress is better at weighing religious liberty exemptions against the interests of local and state officials.

The issue presented by *Smith* and RFRA raises an important federalism point. From a structural point of view, it may have been correct for the Court to strike RFRA down. If the nature and importance of religious freedom is a close constitutional question, and if deciding the appropriateness and necessity of granting religious exemptions from otherwise neutral laws entails a difficult, sensitive, and sympathetic kind of balancing of competing claims, then it seems that RFRA selects the most divisive and least sensitive forum to engage in that balancing—the federal courthouse.²⁵ RFRA places the thumb of an overbearing giant on the religious claimant's side of the scales, whereas local and state governments have only the slightest chance of prevailing under the statute's literal terms. Professor McConnell believes that RFRA did not really mandate strict scrutiny.²⁶ He explains that its genius was simply that it required government officials to "think seriously about the feasibility of accommodations and gave aggrieved persons the right to a hearing on the accommodation issue from a more disinterested governmental figure, a judge."²⁷ This suggestion, however, ignores the statute's explicit terms as well as its implicit invitation to litigate claims to religious exemptions.

No. 103-88 (1993); S.Rep. No 103-11 (1993).

25. See 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").

26. See McConnell, *supra* note 16, at 195 (suggesting that the framers of the Fourteenth Amendment intended for Congress to be the primary agent of enforcement and thus granted Congress certain power to interpret the Constitution, but emphasizing that neither branch is completely constrained by the other's interpretations).

27. *Id.* at 157.

Moreover, the kinds of "accommodations" that the statute required of government officials are reminiscent of those required of grooms at shotgun weddings, or of law students subjected to cold calling.

If Congress thinks that religious exemptions from its own laws should be granted unless a federal judge determines that the law serves a compelling governmental interest using the least restrictive means, then Congress can place such exemptions in its own legislation. RFRA would hardly preclude that, and neither would *Boerne*.²⁸ If religious persons can exact wholesale concessions from Congress, what is to stop them from trying to exact them at retail from local and state officials as well? RFRA's supporters make no convincing case that state and local officials would necessarily be less sympathetic to such claims.

If decisions about what circumstances make exemptions appropriate are truly close questions whose answers will vary case by case, then *Boerne* may not be such a bad decision. Even RFRA's most ardent proponents do not claim that religious liberty should always be a trump. *Boerne* does more than assert judicial supremacy vis-à-vis Congress on matters of constitutional interpretation. Its vital federalism dimension also takes the federal courts out of the resolution of close and important issues and places trust in the overall decency and religiously-accommodating instincts of local political institutions across the country. This result may seem ironic given that it flows from a decision that scholars like Professor McConnell describe as having adopted the "most judge-centered view of constitutional law since *Cooper v. Aaron*."²⁹ In reality, however, RFRA was itself ultimately judge-centered in its proclamation that the only institutions capable of making case-by-case decisions about the proper scope of religious liberty were the federal courts.³⁰ From that point of view, *Boerne*, despite its ostensible appearance of judicial supremacy, is a good decision.

28. See *Boerne*, 117 S. Ct. at 2163 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'") (citing *Fitzpatrick*, 427 U.S. at 455 (1976)).

29. McConnell, *supra* note 16, at 163.

30. See 42 U.S.C. § 2000bb-1(c).

