CONGRESS AS PARTNER / CONGRESS AS ADVERSARY

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Our discussion of Congress's power under Section 5 of the Fourteenth Amendment[1] labors under a certain disability, because tacit disagreements among us on matters of substance are leaching into or even motivating arguments about structure. In a sense, we are talking about Hamlet without the prince. The reader's understanding of the nature of the disparity between Congress's and the Court's judgments of constitutional substance will inevitably drive the evaluation of a case like *City of Boerne v. Flores*.[2] To take the measure of *Boerne*, we must understand the degree to which Congress's model of religious liberty is at odds with that of the Court. We may even need to go further and choose sides, but that discussion is for another day and another venue.

But let me make my view clear at the outset–a fundamental and critical gap exists between the conception of religious liberty announced by the Court in *Employment Division v. Smith*[3] and the conception that Congress adopted, without much care or reflection, when it enacted the Religious Freedom Restoration Act (RFRA).[4] Although neither conception is the best available, the Court's view is certainly the better of the

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1. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

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

3. 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause did not give an individual a right to an exemption from neutrally-applicable laws that incidentally burden their religious practice. *Id.*

4. 42 U.S.C. § 2000bb (1988 & Supp. V 1994) (declared unconstitutional in *Boerne*). RFRA codified the test enunciated in *Sherbert v. Verner*. This test exempts an individual from a law that substantially burdens his religious practice unless the government can demonstrate both that it has a compelling interest in burdening the individual's religious exercise and that it has employed the least restrictive means available in drafting the statute or regulation. *See* Sherbert v. Verner, 374 U.S. 398, 406-08 (1963).

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Even with the important and unsettled question of religious liberty lurking in the wings, we can make some progress toward an understanding of *Boerne* and the structure of Congress' civil rights enforcement authority. Let us begin with the following foundational principle: Congress has an important and generous role to play as the Court's *partner* in enforcing constitutional rights, but Congress is not entitled to make itself the Court's *adversary*.[5] What does it mean for Congress to act as the Court's partner or its adversary? James Bradley Thayer approached the question of institutional structure by imagining a legislator who opposes a measure on the grounds that it is unconstitutional and who later becomes a judge.[6] In Thayer's view, the judiciary was obliged to defer broadly to legislative enactments. Accordingly, the former legislator's new role as judge might well require her to find the legislation constitutional. If we turn Thayer's institutional parable inside-out, we can capture in heuristic terms the distinction between Congress's acting as partner and as adversary.

Imagine that a member of the Supreme Court resigns and is elected to Congress. Further, imagine pending legislation that constitutes a controversial exercise of Congress's Section 5 authority. The current member of Congress and former Justice should ask herself the following question: "As a Justice who voted with the majority when the Court considered this issue, and given that I have changed only my role, not my mind, can I in good conscience support this legislation?" If our justice-turned-congresswoman could not support the legislation, even given her change of role, then Congress would be acting as the Court's adversary, not its partner. *Boerne* surely exhibits this type of adversarial situation–no member of the *Smith* majority could have supported RFRA.

But before we revisit *Smith*, we need to connect this general, heuristic understanding of Congress's authority to the structure of the *Boerne* decision. The *Boerne* Court distinguished between Congress's broad authority to fashion

5. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 461-65 (1994).

6. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-52 (1894).

constitutional remedies and its utter lack of authority to disagree with the Court about the shape or scope of constitutional rights.[7] The distinction between constitutional rights and constitutional remedies is at best obscure, but we can make some sense of it. Constitutional rights are essential to what the Court regards as constitutionally mandated states of affairs. Constitutional remedies, in contrast, are merely instrumental to the achievement of constitutionally mandated states of affairs.

With this understanding of the *Boerne* Court's conceptual vocabulary in hand, we can identify some kinds of disagreements between Congress and the Court that put Congress in the prohibited role of the Court's adversary.[8] First, if Congress mandates a state of affairs that is inconsistent with what the Court sees as a state of affairs mandated by the Constitution, Congress has acted unconstitutionally. This is the sharpest form of a disagreement about the shape or scope of constitutional rights. At least one member of the *Boerne* Court saw RFRA as just such a radical disagreement–Justice Stevens would have held that RFRA itself was an establishment of religion.[9]

Second, if Congress enacts legislation that relates perversely to a constitutionally mandated state of affairs–legislation that retards rather than promotes the achievement of what the Constitution requires–then Congress has assumed the role of adversary. Thus, legislation that deprives the judiciary of the capacity to craft remedies that the Court thinks constitutionally vital would not pass constitutional muster.

Finally, when Congress enacts legislation that is at deep conceptual odds with the Court's foundational understandings

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7. *See Boerne*, 117 S. Ct. at 2168 (discussing the implications of allowing Congress to overrule the Court with ordinary legislation).

8. For a more thorough discussion of the disagreement between Congress and the Court over the meaning of the Free Exercise Clause, see Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79.

9. *See Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring) ("Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute 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.").

of the Constitution, even if it does not violate a constitutionally mandated state of affairs, Congress has made itself the Court's adversary. Here, we need to remember that Justice Brennan's broad description of Congress's civil rights enforcement power in *Katzenbach v. Morgan*[10] was not without limits. Justice Brennan insisted that Congress act in a manner consistent with both the letter and the spirit of the Constitution.[11] This third form of prohibited disagreement puts slightly harder edges on the unsurprising idea that Congress is obliged to respect the spirit of the Constitution.

Now we need to pull Hamlet on-stage for a moment. At the heart of the Religious Freedom Restoration Act lies a striking view of religious liberty in which religious persons are sovereigns among us, entitled to create micro-environments of law shaped to accommodate their religious beliefs. And liberty, on this view, is selectively distributed–the religious soup kitchen, the religious landlord, the religious artist, and the religious parent all have rights to defy legal rules that their secular equivalents must obey. The Court paid lip service to this vision of religious liberty for some years, but it could never actually live with the results. The Court in *Smith* characterized this vision of religious liberty as a "constitutional anomaly"[12] and rejected it as inconsistent with at least the spirit of the Constitution. And it was this vision of religious liberty in Congress's hands that led the Court in *Boerne* to see Congress as its adversary rather than its partner.[13]

RFRA in fact suffers another structural vice of a related, but more exotic, form. The Supreme Court will not allow itself to be conscripted by another branch of government in a constitutional charade. It will not allow the federal judiciary to be put in the position of saying that the Constitution means one

10. 384 U.S. 641 (1966) (upholding Voting Rights Act of 1965 and invalidating New York law requiring English literacy as condition of voting).

11. *See Katzenbach*, 384 U.S. at 650 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, J.)) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

12. *See Smith*, 494 U.S. at 886.

13. *See Boerne*, 117 S. Ct. at 1261, 2172 (noting that although Congress has the power to pass legislation necessary to enforce the Fourteenth Amendment, and although Congressional decisions are entitled to deference by the judiciary, the courts retain the power to determine when Congress has exceeded the scope of its power).

thing while believing that in fact it means something altogether different. That concern is the often misunderstood point of the Court's decision in *United States v. Klein*.[14] *Klein* invalidated the Abandoned and Captured Property Act of 1861, which would have required the Court to treat presidential pardons in a fashion diametrically inconsistent with its actual understanding of the constitutional status of such pardons. That the Court would not do.

RFRA, remarkably, places the Court in much the same position. RFRA's title and preamble announce that it restores constitutionally mandated religious liberty, liberty that the Court deformed and depreciated in *Smith*. RFRA's stipulated preconditions are expressed in constitutional terms, and its mandated test is the exquisitely constitutional compelling-state-interest test. Just as the Abandoned and Captured Property Act of 1861 would have required the Court to act as though a presidential pardon had radically different consequences than the Court thought it had,[15] RFRA requires the Supreme Court to act as though constitutional religious liberty has a radically different shape than the Court justifiably believes it to have.[16]

The villain here is Congress, not the Court. RFRA expressed a hasty and ill-considered legislative response to a poorly understood judicial decision, although in fairness the Court's somewhat intemperate language in *Smith* may have invited some misunderstanding.[17] *Boerne*, correctly understood, enforces a plausible boundary between the authority of the Court and that of Congress. After *Boerne*, as before, Congress has an important and generous role to play as the Court's

14. 80 U.S. (13 Wall.) 128 (1871) (invalidating congressional redefinition of the presidential pardon power).

15. *See id.* at 147.

16. For a further discussion of this point, see Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2532-34 (1998) (emphasizing that Congress may neither amend the Constitution by "legislative fiat" nor force the judiciary to accept its view of Constitutional interpretation).

17. *Compare Smith*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.") *with Sherbert*, 374 U.S. at 403 ("If . . . [denying Sherbert unemployment compensation] is to withstand . . . constitutional challenge, it must be either because her disqualification . . . represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest within the State's constitutional power to regulate . . . .'") (citation omitted).

partner in realizing the ambitions of the civil rights amendments, but Congress's license does not permit it to act as the adversary of the Court or of the Constitution. RFRA made it both.