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Challenging the Scope of Free Exercise

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The Supreme Court's recent invalidation in City of **Boerne v. P.F. Flores** of the Religious Freedom Restoration Act Puts everyone on notice that the Court will not tolerate different voices expanding the free exercise of religion. Because a divided Court in **Employment Division v. Smith**[1] stated that the free exercise clause, contrary to decades of interpretation, protects against only state acts that have as their **purpose** an interference with free exercise, Congress' attempt in the Religious Freedom Restoration Act to restore, at a compelling state interest level, protection for state acts that also have the **effect** of burdening free exercise violates the principles of both federalism and separation of powers.

Facts

The facts of CITY OF BOERNE V. P.F. FLORES present a less than compelling free exercise claim. Bishop Flores, Archbishop of San Antonio, in 1991 decided that the parish of St. Peter Catholic Church located on a hill in the city of Boeme, Texas, had outgrown their existing facility. However, Archbishop Flores' permission to the parish to enlarge the building ran into conflict with the decision of the local zoning authorities, who invoked their power under a historic preservation ordinance, to deny the church's building permit. Archbishop Flores filed suit seeking a judicial declaration that the City ordinance was both an unconstitutional violation of free exercise rights and violated the Religious Freedom Restoration Act.[2] The church sought injunctive relief and attorneys' fees. The city defended on the ground that the zoning ordinance did not violate the free exercise rights of the St. Peter's parishioners and the Religious Freedom Restoration Act (RFRA) was unconstitutional.

The Case

District Judge Bunton held the RFRA was a facially invalid violation of separation of powers because Congress, in seeking to overturn the Supreme Court's **Employment Division v. Smith**, had infringed on the authority of the judiciary "to say what the law is. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)."[3]

The Fifth Circuit Court of Appeals reversed,[4] holding that Congress had properly invoked its authority under Section Five of the Fourteenth Amendment to protect against real, although not intended, infringements of free exercise claims.

The Supreme Court reversed the Fifth Circuit holding RFRA unconstitutional in a 6/3 vote. Justice Kennedy, writing for the majority, held that RFRA violated the principles of federalism and separation of powers.

Majority Opinion

The federalism argument turned on a narrow interpretation of Congress' authority under Section Five of the Fourteenth Amendment. While Section Five empowered Congress to remedy constitutional violations, Congress must keep in mind that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[5] Because the Court in **Smith** had narrowed the scope of free exercise protection to cases of invidious discrimination, Congress' reenactment of the Court's previous "compelling state interest" standard had "altered" the meaning of free exercise and, therefore, had passed beyond what would be permissibly remedial to improperly substantive. The separation of powers argument follows from the premise that if Congress could reinterpret constitutional provisions "no longer would the Constitution be superior paramount law, unchangeable by ordinary means."[6]

Dissenting Opinions

Justices O'Connor, Breyer and Souter each wrote separate dissents. While agreeing with the majority that Congress' authority under Section Five is limited to "remedial" protection of constitutional violations, the dissenters questioned whether the impoverished notion of free exercise first announced in **Employment Division v. Smith** properly captures the meaning of the free exercise clause.

Critique

The **City of Boerne** case is disturbing on the basis of the federalism and separation of powers arguments raised therein.

Federalism

The narrow federalism argument, which apparently all the justices agreed upon, is not as unassailable as the justices would suggest. Certainly Congress' power is limited by the plain language, reinforced by the legislative history, of Section 5 of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." However, if Congress under Section 5 can only "remedy" those constitutional violations previously identified by the courts, then Section 5 legislation would always be either redundant or nugatory.

The majority acknowledged that the Court when previously interpreting Section 5 has held that Congress may prohibit conduct that is not unconstitutional and which may intrude into the sphere of state rights.[7] Under these principles the Court further acknowledged that under **Katzenbach v. Morgan**,[8] Congress could legislate against nascent or potentially disguised violations of free exercise, and the Court found that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."[9]

However, this comment and conclusion is confusing for several reasons. First, the Court fails to take judicial notice of its own opinion in **Church of the Lukumi Babalu Aye, Inc. v. Hialeah**,[10] where the Court expressly found that the City of Hialeah had passed legislation neutral on its face which intentionally targeted the religious practice of animal sacrifices of the Santeria religion. Second, the Court assumes, without explanation, that Congress may not enact "disparate impact" legislation to protect against nascent or disguised free exercise violations, while validating "disparate impact" legislation in other areas of prohibited discrimination.

Separation of Powers

Perhaps the most serious flaw of the **City of Boerne** is the Court's separation of powers argument. In enacting RFRA a unanimous House and a 97 to 3 Senate expressed the belief that the free exercise clause protects against more than intentional discrimination against religion (a protection provided separately by the equal protection clause). The Supreme Court held that under the principle of separation of power, constitutional interpretation is the exclusive domain of the Court. However, the Court does not explain why Congress cannot participate in independent constitutional interpretation. Indeed, where Congress enacts legislation under Section 5 that is not redundant of established constitutional violations, Congress necessarily has to become involved in constitutional interpretation. In other contexts the Court has always given Congress' interpretive reading of the Constitution a presumption of constitutionality. Why should RFRA be treated so differently?

Indeed, the three dissenting justices highlight valid reasons why the Court's interpretation of the free exercise clause in **Smith** should not preclude Congress reexamining the issue. **Smith** overruled, without the benefit of any briefing or oral argument on the subject, decades of precedent establishing the "compelling state interest" test which Congress restored as a statutory right in RFRA. Why should a 5/4 opinion of the Court, which violates the principle of **stare decisis** without the benefit of oral argument or briefing, provide the exclusive, unchallengeable interpretation of not only the Constitution, but the scope of statutory remedial rights? Why should we fear democratic majorities when they limit their own power and nudge the courts toward enhanced

respect for core individual rights? Is the Court really protecting democratic principles, as the majority suggests, or simply its raw power to block any discussion of civil liberties that do not fit the majority's then-existing interpretation of the Constitution?

Endnotes:

[1] 494 U.S. 872, 881-82 (1990).

[2] 42 U.S.C. 2000BB at seq.

[3] 877 F.Supp 355, 356-57 (1995).

[4] 73 f.3d. 1352 (1996).

[5] 117 S.Ct. at 2164.

[6] 117 S.Ct. at 2168.

[7] Boerne, 117 S.Ct. at 2163, quoting Fitzpatrick v. Bitter, 427 U.S. 445, 455 (1976).

[8] 384 U.S. 641 (1966).

[9] Boeme, 117 S.Ct. 2157, 2168.

[10] 508 U.S. 520, 533 (1993).