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Religious Freedom in the Courts: The 1996–1997 Term of the United States Supreme Court

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DEVELOPMENTS IN THE LAW OF RELIGIOUS LIBERTY IN THE UNITED STATES: THE 1996-97 TERM OF THE UNITED STATES SUPREME COURT

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The United States Supreme Court decided two significant religious liberty cases during its 1996 October Term (October, 1996 through July, 1997): *Boerne, Texas v. Flores*[1] (*Boerne*) and *Agostini v. Felton*[2] (*Agostini*). Both cases involve the constitutionality of legislation adopted by Congress and designed to foster greater religious liberty among the American people. In *Boerne*, the Court invalidated the "Religious Freedom Restoration Act of 1993". In *Agostini* the Court reversed one of its own decisions, *Aguilar v. Felton*, a 1985 case in which the Court held that Congress violated the First Amendment when it permitted public school teachers to provide supplemental and remedial education programs on the premises of church-related schools.

The only firm conclusion that can be drawn by reading the cases together is that the Court views itself as being firmly committed to judicial enforcement of the religious liberty norms embodied in the United States Constitution, but that it is very badly divided over their meaning.

I. THE SCOPE OF CONGRESSIONAL AUTHORITY TO PROTECT RELIGIOUS LIBERTY

By far, the most significant development in the federal constitutional law of religious liberty occurred in the Supreme Court's decision in *Boerne, Texas v. Flores*[3]. Although the case is essentially a land-use controversy between the Bishop of San Antonio, Texas and local authorities who wish to preserve an historic local church located in the town center

[1] — U.S. —, — S.Ct. —, 65 U.S.L.W. 4612 (U.S., June 25, 1997).
[2] — U.S. —, — S.Ct. —, 65 U.S.L.W. 4524 (U.S., June 23, 1997).
[3] — U.S. —, — S.Ct. —, 65 U.S.L.W. 4612 (U.S., June 24, 1997).

of the small town of Boerne, Texas, the issue presented to the Supreme Court was one of national significance. At issue in *Flores* was the constitutionality of the Religious Freedom Restoration Act[4] [RFRA], a federal statute adopted by the United States Congress in 1993 as a response to a 1990 decision of the United States Supreme Court, *Employment Division, Department of Human Resources of Oregon v. Smith*[5].

The *Flores* case raises important and exceedingly complex questions concerning the power of Congress to protect religious liberty by statute. Two "structural" issues were addressed: the separation of powers between the Congress and the United States Supreme Court, and the division of power between the States and the federal government to protect individual rights within the scope of the First Amendment.

Because the issues are complex, and because they are so relevant to efforts in Europe and elsewhere to protect religious liberty through the twin mechanisms of "federal" legislation and judicial decrees interpreting relevant human rights norms, it will be necessary to provide some factual and legal background before turning to a discussion of the specific matters resolved in *Flores*.

1. The Structure of the Constitution's Religious Liberty Guarantees

By all criteria relevant to constitutional analysis, the preservation of religious liberty is an important concern under the United States Constitution. Though there was some dispute in 1787 concerning the extent to which the enumerated powers of the federal government could be utilized to set national policy respecting establishments of religion and religious liberty, there was little dispute at the Constitutional Convention about the core of the matter: the powers granted to the federal government did not include a specific supervisory jurisdiction over either religious matters generally, or the relationship of religion and religious institutions to the political communities of the Nation[6].

[4] Pub. Law 103-141, codified at 42 U.S.C. §2000bb, *et seq.* (1995).

[5] 494 U.S. 872, 110 S.Ct. 1595 (1990), *rev'g* Smith v. Employment Div., 307 Or. 68, 763 P.2d 146, on remand from, Employment Division, Department of Human Resources of Oregon v. Smith, 485 U.S. 660 (1988).

[6] The dissenting members of the Pennsylvania ratifying convention were perhaps the most explicit on this point. Twenty-one of the twenty-three members of the minority signed a dissenting address which appeared in the *Pennsylvania Packet and Daily Advertiser* on December 18, 1787, six days after Pennsylvania's convention had voted (46-23) to ratify. The first of its "propositions to the convention" reads as follows:

> "1. The right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter,

However this is the point where agreement ends and the debate over constitutional interpretation begins. We know for certain from the text of the Constitution that the three branches of the federal government (Congress, the Executive, and the Judiciary) have been granted powers which, by their nature, are conducive to the preservation of the general welfare[7]. Pursuant to Articles I and IV, for example, Congress has the power to lay and collect taxes, to provide for the common defense and general welfare of the United States, and to establish uniform rules on matters relating to the growth and development of the Nation and its economy[8]. There is, however, no express grant of authority for Congress to make laws respecting establishments of religion, or which would permit it to adopt laws designed to inhibit religious exercise. Even if it could be argued that it would be in the best interest of the nation to eliminate religious establishments in the States, or that the public interest required federal laws limiting the ability of certain religious groups to organize (such as recently occurred in Russia), the power to pass such laws simply does not exist at the federal level. Legislation requiring a religious test "as a Qualification to any Office or public Trust under the United States" is expressly forbidden[9].

The Bill of Rights, adopted in 1791, embodies the same assumptions. At the time the Constitution was submitted for ratification in 1787, the States were concerned that the federal government would use its broad legislative powers to assert authority over topics that were not expressly within the scope of federal authority[10]. Viewed in light of the

abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion."
"The Address and Reasons of Dissent of the Minority of the convention of Pennsylvania to their Constituents" (December 18, 1787) (attributed to Samuel Bryan, the author of "Centinel"), in: KETCHAM, R. (ed.), *The Anti-Federalist Papers and the Constitutional Convention Debates,* Mentor, 1986, 239.

7 U.S. Const. Arts. I, IV, V.

8 *See* U.S. Const. Art. I, §8, cl. (1-18), §§9-10; Art. IV.

9 U.S. Const. Art. VI, cl. 3.

10 *See* McCullough v. Maryland, 4 Wheat. (17 U.S.) 306 (1819). The debate over whether the Congress had the authority to "establish" a national religion or church is not unlike the question of whether Congress had the power to establish the Bank of the United States. Congressional power was given broad berth in *McCullough*, where the Court held that Congress "would have some choice of means, [and] might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional". *Id.*, 17 U.S. at 418. Given the federalist reading of the Constitution, both at the time of the Convention and in practice once it had been ratified, there is (or should be) little doubt that a plausible case could be (and was) made by the Anti-federalists that the prohibition with respect to matters of religion needed to be explicit.

federalism concerns of the States, the text of the First, Ninth and Tenth Amendments makes it clear that Congress has no power to infringe upon either the religious liberty of individuals, or the power of States to set policy concerning the scope of religious liberty and the proper boundaries between church and state.[11] Those amendments provide:

> *Amendment I:* Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
> *Amendment IX*: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
> *Amendment X*: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Because the power of the federal government is unitary, but divided among three branches, precisely the same constraints apply to the Executive (the President) and Judicial Branches. Posed as a question, the issue is: *How much power to define the content of religious liberty (or speech, press, assembly, and petition) was each branch of the federal government granted by the Constitution, and how much was reserved to the States and the people ?*[12]

With respect to the executive powers of the President, the answer is an easy one. The President does not make laws, but the Executive Branch does interpret and enforce them. As a result, the constitutional constraint rules governing the President's executive powers are the same as those governing Congress. The President cannot execute laws that Congress has no authority to make.

[11] See AMAR, A.R., *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1198-1203 (1992) (discussing the relationship between the general prohibitions of Art. I, §9, and the specific prohibitions of the Art. I, §10 (binding the States), and the First Amendment (binding Congress alone) [hereafter, AMAR, *The Fourteenth Amendment*]; AMAR, A.R., *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1138-1141, 1146-62 (1991) (discussing the Federalist and Anti-Federalist critiques of the Constitution, as well as the federalism components of the proposals which evolved into the First Amendment as we know it today) [hereafter, AMAR, *The Bill of Rights*].

[12] These issues are discussed in detail in DESTRO, R.A., "The Structural Components of Religious Liberty", 11 J. *Law & Religion* (1995), and DESTRO, R.A., ""By What Right ?": The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion"", 29 *Indiana Law Review* 1 (1996). The theoretical significance of these issues is discussed in part in ARIENS, M.A. and DESTRO, R.A., *Religious Liberty in a Pluralistic Society*, Carolina Academic Press, 1996, Chapter 1 §A.

The answer with respect to the federal judiciary, however, is a complex one. Unlike the courts of general jurisdiction that are created by the laws of the States, the subject matter jurisdiction of the federal courts under Article III of the United States Constitution is limited to, among other things, the decision of "Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority", and to those cases in which the federal judiciary is to serve as the impartial arbiter of public or private law controversies which arise under the law of admiralty, or of a State, foreign nation, or the law of nations[13].

As long as the federal courts are applying otherwise constitutional statutes or regulations applicable to a given case or controversy, the constitutional standards governing the exercise of judicial discretion are identical to those that apply to Congress or the President. When the power to interpret the Constitution is considered, however, a very difficult conceptual problem arises: how to distinguish the power to *interpret* the Constitution from the power to *create* constitutional law.

The power to interpret the law of the Constitution is necessarily implied from Article III's grant of judicial power to decide cases, but it is limited structurally not only by the Constitution's grant of specific areas of legislative jurisdiction to Congress[14], but also by the Ninth and Tenth Amendments' reservation of all residual law-making power to the States and the People. The power of *constitution*-making was carefully reserved to the People themselves by the elaborate procedural mechanisms set forth in Article V.

Because the Constitution expressly states that all powers not explicitly granted to the federal government, including its Judicial Department, are reserved to the States and the People, the power of judicial review recognized in *Marbury v. Madison* does not include the power to prescribe substantive rules of law. From a structural perspective, it is simply the power to resolve competing claims of authority, whether they arise among the branches of the federal government, between the federal government and the States, among the States themselves, or between citizens and their government. When the power of judicial review is invoked, the ultimate issue is not so much the question "What shall the law be ?", but the question, "To what sovereign or branch does the Constitution allocate jurisdiction to prescribe the rule of decision ?".

[13] U.S. Const. Art. III §2.

[14] *See* U.S. Const. Art. I §§1; 8; Art. II, §1, cl. 4, §2; Art. III §§1-3; Art. IV §§1, 3; Art. V.

Without an explicit grant of authority somewhere in the Constitution to *make* national policy "respecting an establishment of religion or prohibiting the free exercise thereof", the federal courts have precisely the same amount of authority to make national policy on these subjects as Congress does: None at all. The function of judicial review under these circumstances is a simple one: to assure that Congress does not exceed its authority.

2. The Significance of the Fourteenth Amendment

The ratification of the Fourteenth Amendment in 1868 worked a fundamental change in the legislative jurisdiction of the federal government. Expressly designed to grant Congress the power to adopt legislation to protect the citizenship, liberty, and equality rights of those formerly held in the bondage of slavery, the Fourteenth Amendment has become the conduit through which many (though not all) of the provisions of the Bill of Rights have been made binding on the States. Sections One and Five of the Fourteenth Amendment are relevant to this discussion, and provide the constitutional basis for the controversy decided by the United States Supreme Court in *Boerne, Texas v. Flores.* In relevant part, they provide as follows:

> *Section 1*: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws.
> *Section 5*: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Viewed in structural (jurisdictional) terms, the Fourteenth Amendment raises a number of questions. For present purposes, the most important of these are:

1. Does the Fourteenth Amendment grant to any branch of the federal government authority to make national policies respecting any "establishment of religion" (however defined), or the power to define the permissible scope of the free exercise of religion ?
2. If so, to which branch of the federal government (Congress, Executive, or Judiciary) has that power been granted ?

For nearly sixty years, the United States Supreme Court has assumed that the Due Process Clause of the Fourteenth Amendment ["nor shall

any state deprive any person of life, liberty, or property, without due process of law"] permits the Court to recognize "fundamental" human rights. Though the Court has never explained why certain rights are "fundamental" and others are not, it has explained that "fundamental rights" are those it considers to be "implicit in the concept of ordered liberty". The Court's cases explain that some fundamental rights, such as freedom of speech and the press, are enumerated in the Bill of Rights. Others, such as the right to seek an abortion, are deemed to be so important by the Court that their existence is implied from the concept of "liberty" itself.

Religious liberty is among the rights the Court has characterized as "fundamental". The Free Exercise Clause of the First Amendment was applied to the States in 1940[15], and the Establishment Clause was held to apply to the States in 1947[16].

As a practical matter, the application of the First Amendment to the States by the Court implies that the Fourteenth Amendment confers two powers on the federal government that the First Amendment expressly denies were granted by the original Constitution: 1) the power to eliminate any State policy that can be characterized as "an establishment of religion", and 2) the power to define the permissible scope of individual or group claims to the free exercise of religion. It also assumes that the Fourteenth Amendment is a grant of power *to the Court* to impose those rules on the States.

These are, to put it mildly, significant assertions. They are also the source of enormous conceptual difficulty for anyone trying to understand the workings of American constitutional law since the early twentieth century. The Court has never explained how the process of "incorporation" actually works, nor has it attempted to explain how an amendment that is silent with respect to federal power over matters involving religion can be used to modify the terms of the First Amendment itself.

Nevertheless, the Supreme Court has "consistently held that the Amendment grants power to the courts[.]" Any questions relating to the source or nature of its power under the Fourteenth Amendment are viewed by many, if not most, of the nine Justices as questions "of academic interest only"[17].

[15] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[16] Everson v. Board of Education, 330 U.S. 1 (1947).
[17] Oregon v. Mitchell, 400 U.S. 112, 264 n. 37 (1971).

But such questions are not, in their nature, "academic" at all; they are political. The Court has recognized on many occasions that respect for its judgments depends upon the maintenance of a public perception that the rules announced are faithful to the Constitution. As long as there is a political consensus supporting the Court's interpretations of the Constitution, the rules will endure. If a consensus appears to be developing that the Court was clearly wrong and should be reversed by political action, it will often retreat in an attempt to preserve its authority.

As a result, the all-important question of power allocation — *What happens when Congress and the Supreme Court disagree over the content or meaning of the Constitution's religious liberty guarantees ?* — arises only rarely. When it does, however, realpolitik, not the conventions of "academic" discourse, define the rules of engagement.

That uneasy political consensus supporting the Court's religious liberty jurisprudence was shattered when the Supreme Court decided *Employment Division v. Smith* (1990). At issue in *Smith* was the constitutionality of an Oregon state law that denied unemployment compensation benefits to individuals who lost their employment for job-related misconduct. The individuals involved in the case, Alfred Smith and Galen Black, had been employed as drug and alcohol counselors employed by a private, non-profit substance abuse treatment organization. Both men had been addicted to drugs and alcohol dependent, and, their employer required its recovering counselors to agree to abstain from alcohol and non-prescription drugs as a condition of employment.

Messrs. Smith and Black were also participants in the rituals of the Native American Church, and, on one occasion, they used small amount of peyote (which is viewed as a sacrament by the church) during a Native American religious ceremony. When their employer learned of their use of peyote for sacramental purposes, it fired them, and objected to their claims for unemployment benefits. Notwithstanding the religious nature of the peyote use, the unemployment claims were rejected by the Oregon Employment Division on the grounds that the use of peyote was work-related misconduct[18].

In two decisions that reshaped nearly thirty years of free exercise analysis, the Supreme Court affirmed the decisions of the Oregon

[18] EEOC v. ADAPT, Civ. No. C85-6139-E (D. Or., March 5, 1986), Appendix 1 to Brief In Opposition To Petition For Writ Of Certiorari, Employment Division v. Smith, 110 S.Ct. 1595 (1990).

courts. The seven-Justice majority in *Smith* held that "the First Amendment has not been offended" if generally applicable and otherwise valid legislation has the incidental effect of "prohibiting the exercise of religion"[19]. After *Smith*, proof of intent to discriminate or otherwise burden religion is required in order to trigger plenary judicial review of legislation or administrative action under the Free Exercise Clause[20]. Insensitivity to the legitimate claims of minority religious groups is not enough.

The decision in *Smith* provoked a firestorm of political protest. In an extraordinary show of political solidarity that stretched across the entire spectrum of American political opinion, religious liberty advocates, civil libertarians, and advocates for the rights of Native Americans demanded that Congress intervene and "restore" the more flexible constitutional standard that the Court had rejected in *Smith*. The Religious Freedom Restoration Act [RFRA] was the result of that effort.

The Congress could not have been more explicit in its rejection of the Court's holding: the *Smith* case is mentioned by name, and its central holding is rejected in favor of the rules the Court had applied between 1963 and 1990[21]. Congress had thrown down the gauntlet. RFRA was a direct challenge to the Court's claim in *Marbury v. Madison* that it is the final arbiter of the meaning of the Constitution. A matter once described by the Court as "of academic interest only" was now a political question of the highest order.

3. Boerne, Texas v. Flores

The *Flores* case arose when the City of Boerne, Texas refused to grant demolition and construction permits for a much needed expansion of St. Peter's Catholic Church. The reason the permit was denied was that the façade of the church had been declared an "historic" structure. Although the Diocese of San Antonio was willing to expand the church

[19] Smith II, 110 S.Ct. at 1600 (emphasis added).

[20] *See* Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (discussing impact of antitrust law on freedom of the press); Washington v. Davis, 426 U.S. 229 (1976)(discussing impact of generally applicable laws on racial minorities).

[21] 42 U.S.C. §2000bb(a) provides that "in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and section (b)(1) leaves no doubt that the intent of Congress was, among other things, "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; ..."

without altering the façade in any way, the city refused to compromise. It viewed its historic preservation law as a "neutral law of general applicability" under *Employment Division v. Smith*, and declined to make any exceptions even though the growing parish was sorely in need of additional worship space.

Utilizing RFRA, the Diocese of San Antonio claimed that the denial of the building and demolition permits constituted a "substantial burden" on the church's free exercise of religion. It did not, however, get the opportunity to prove its case. The United States District Court for the Western District of Texas held that RFRA is unconstitutional[22]. On appeal, the United States Court of Appeals for the Fifth Circuit reversed and held that Congress was acting within the scope of its authority to adopt the statute. In a 6-3 decision with five written opinions, the United States Supreme Court agreed with the District Court. RFRA is unconstitutional.

The reasons for the judgment are structural and substantive. In a pointed reminder that it is the Court, not the Congress, that is the final arbiter of the Constitution's meaning, Justice Anthony Kennedy wrote:

> Under our Constitution, the Federal Government is one of enumerated powers. [citations omitted] The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited and that those limits may not be mistaken, or forgotten, the constitution is written". *Marbury v. Madison*, 1 Cranch [5 U.S.] 136, 176 (1803)[23].

Because Congress relied on its Fourteenth Amendment enforcement powers in enacting what the Court called "the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States", the ultimate issue was

> whether RFRA is a proper exercise of Congress' §5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property without due process of law" nor deny any person "equal protection of the laws"[24].

Acknowledging that Section 5 "is 'a positive grant of legislative power to Congress'", the Court recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is

[22] 877 F.Supp. 355 (W.D. Tex., 1995).
[23] City of Boerne, Texas v. Flores, 65 U.S.L.W. 4612, 4614 (U.S., July 24, 1997).
[24] Id. 4614.

not in itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States'",[25] but it warned that "[a]s broad as the congressional enforcement power is, it is not unlimited"[26]. While it includes the power to protect the rights the Court has recognized as "fundamental"

> Congress' power under §5 ... extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial", [citation omitted]. The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. 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. Were it not so, what Congress would be enforcing would not longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]".
>
> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. 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. ...[27]

In the Court's view, one of RFRA's shortcomings was that the record amassed by civil rights advocates urging Congress to pass the statute "lacks examples of modern instances where generally applicable laws have been passed because of religious bigotry. The history of persecution in this country detailed in the [Congressional] hearings mentions no episodes occurring in the past 40 years"[28]. The main reason that the Religious Freedom Restoration Act was held to be "substantive in operation and effect", however, was political: RFRA was a direct repudiation of the Court's holding in *Employment Division v. Smith*.

In *Smith*, the Court had held that the States act within their sovereign authority in all cases where the burden on religious liberty is an unintended consequence of the neutral application of otherwise valid

[25] Id.

[26] Id. at 4615, *quoting* Oregon v. Mitchell, 400 U.S. 112, 128 (1970) (opinion of Black, J.).

[27] Id. at 4615.

[28] Id. at 4618.

law. RFRA was thus an attempt by the congress to strip the States of powers that the Court had held were reserved to them by the First, Ninth and Tenth Amendments. Addressing this point in *Boerne*, the Court held that

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens[29].

In short, Congress has only the power to protect the religious liberties that the Court is willing to recognize as being within the scope of the Fourteenth Amendment. To the extent that general (or "municipal") power over religious liberty exists, it is reserved to the States or to the People.

There were two concurring opinions and two dissents. The concurring opinion of Justice Scalia and the dissents by Justices O'Connor, Souter and Breyer simply reargue *Smith*. They demonstrate, at most, that the Court is badly divided over the meaning of religious liberty, but they are largely irrelevant to the present discussion because all of the dissenters have made it clear in other cases that Congress may not overrule the Court's decisions. The concurring opinion by Justice John Paul Stevens, however, does warrant a brief mention.

Justice Stevens was alone on the Court in believing that RFRA "is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution", but his view that churches or religious believers may not receive exemptions from generally applicable laws is shared by a number of respected academic commentators. In this view, legislative exemptions specifically designed to accommodate religious belief or practice exhibit a "governmental preference for religion, as opposed to irreligion ... forbidden by the First Amendment"[30]. This position is a minority view in the United States, but it is a significant one because it raises important questions concerning the meaning of the concept of "neutrality".

[29] Id at 4618, 4619.
[30] Id. at 4620 (Stevens, J. concurring).

To summarize and conclude: *Boerne* is a case that underscores the Court's commitment to the preservation and defense of its own power. Unfortunately, it also underscores the very deep divisions within the Court concerning the meaning of religious liberty.

II. EDUCATION FINANCE

The divisions within the Court with respect to the meaning of religious liberty were very much in evidence in the other religious liberty case decided this term: *Agostini v. Felton*[31]. The easiest way to characterize the case is to place it at the end of a long line of Supreme Court cases that parse the limits of state and federal aid to religiously-affiliated schools[32]. Viewed in this fashion, *Agostini* adds nothing new to the existing case law, but it confirms what many had long suspected: that the current majority of the Court believes that its 1985 decisions in *Aguilar v. Felton*[33] and *School District of Grand Rapids v. Ball*[34] went too far, and should be reconsidered.

The importance of *Agostini* is twofold. First, it rejects the holdings of *Aguilar* and *Grand Rapids* to the extent that they permit federal or state courts to invalidate programs that provide educational assistance to children attending religiously-affiliated schools without first considering evidence that the programs are *operated* in a manner that violates the First Amendment. Second, it sets the stage for Supreme Court review of several important education finance and welfare reform issues currently pending or about to be filed in state and lower federal courts around the country.

In *Aguilar* and *Grand Rapids* the Court invalidated the education assistance programs involved because public school teachers who provide programs on the premises of church-related schools *might* be tempted to "manifest sympathy with the sectarian aims of the school to the point of using public funds for religious educational purposes", because the school children and taxpayers *might* perceive "a symbolic union of church and state" as well as "a message ... that the State supported religion", and because a majority of the Justices in those cases felt

[31] U.S. , S.Ct. , 65 U.S.L.W. 4523 (June 23, 1997).

[32] A detailed, tabular summary of these cases appears in Table 6-2 of our recent book: ARIENS and DESTRO, *o.c.*, Chapter 6 §F at pp. 479-480.

[33] 473 U.S. 402 (1985).

[34] 473 U.S. 373 (1985).

that religiously-affiliated schools should operate without any assistance whatever from the state[35].

The important part of this rationale is its conditional nature. In *Aguilar*, Justice Louis Powell admitted that the educational programs involved "concededly have done so much good and little, if any, detectable harm"[36], but the Court invalidated them anyway because, in the view of the majority at that time, "[the] State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion"[37]. This could mean but one thing: no aid.

Rejecting the premise that the only way to assure that impermissible aid does not flow to religious institutions is to deny them otherwise legitimate aid, the *Agostini* majority *appears* to reaffirm its holding in *Bowen v. Kendrick*[38] that churches and religiously-affiliated schools can participate in neutral programs of generally available aid, subject only to the condition that they may not use the assistance for unconstitutional purposes. Such a holding would be a significant one in the context of aid to religiously-affiliated elementary and secondary education, and would make the law of the Establishment Clause consistent with the Free Exercise Clause rule announced in *Employment Division v. Smith* that government does not violate the First Amendment unless it can be shown to have engaged intentionally in unconstitutional action. But the majority does not make its position explicit, in part because it is so badly divided on the underlying normative issues.

In sum, the decision in *Agostini* is important, not so much for what it says, but for what it implies. Education finance reform is a critically important issue in each of the fifty states and the District of Columbia. One of the Nation's largest public welfare programs (next to Social Security) is an entitlement enshrined in the constitution of every state: free public schooling. Education is, under both the federal and state constitutions, a *State* function, and the States are very protective of their authority so much so that President Clinton's recent suggestion that "voluntary" federal standards for academic achievement be adopted by the States was greeted by a howl of protest from State governors, who dismissed it as a political stunt.

[35] Agostini v. Felton, 65 U.S.L.W. at 4534-4535 (Souter, J., dissenting).

[36] Aguilar v. Felton, *Id.*, 473 U.S. 402, 415 (Powell J., concurring).

[37] Id., *quoting* Meek v. Pittenger, 421 U.S. 349, 371 (1975) (emphasis added) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

[38] 487 U.S. 589, 614, 621 (1988).

Viewed from a "federalism" perspective, *Agostini* stands for the proposition that the federal government (the Supreme Court) will not make a prophylactic rule that denies any possibility of aid to children enrolled in church-affiliated schools. This is an important political development. The public schools of the fifty states and the District of Columbia are under enormous political pressure to improve student achievement scores. They are under even greater fiscal pressure to provide high-quality education at a reasonable cost — a feat that eludes many large bureaucracies.

The result has been at least twenty-five years of litigation under State constitutions challenging state education financing schemes. State Supreme Courts have ordered their respective State legislatures to design entirely new finance and taxing mechanisms to support public education, and billions of dollars are now in play. The competition for scarce tax dollars has made the issue one of the most controversial in state and federal politics. A federal rule prohibiting any aid whatever to private or religiously-affiliated schools would complicate, and perhaps make impossible, a reasonable solution of these State level controversies. The reason is simple: the support voters who sent their children to private and church-related schools are needed if taxes are to be raised. Without that support, compromise would be difficult, if not impossible.

Agostini has precisely the same significance for the ongoing debate in Congress on how to reform the federally-funded public welfare system. One of the key issues in that debate is the extent to which the government may arrange to have public welfare programs administered by non-governmental organizations that are religious in character, such as churches, schools and organizations that provide assistance and job training for the poor. If the First Amendment forbids *any* "direct" payments to religious organizations on the theory that they *might* use the public welfare programs they administer as an opportunity to inculcate their religious views, quite a few federal and state welfare reform proposals currently under consideration will be unconstitutional. A more carefully tailored approach, one that requires evidence of unconstitutional behavior, would make experimentation feasible without the pervasive threat that the federal courts will intervene to stop the programs before they start.

III. CONCLUSION

The dominant themes of the Supreme Court's October 1996 Term were the structural issues of separation of powers and federalism. We did

not learn much about the substantive content of religious liberty from the United States Supreme Court, but we did learn that politics at the state and federal level does play an increasingly significant role in its protection.

One final point should be emphasized in closing. If any message is clear from the Supreme Court's decisions in *Boerne* and *Agostini*, it is that the States have an important role to play in the protection of religious liberty. Space constraints do not permit a review of the relevant statutes and cases affecting religious liberty in the States, but they are worth examining[39].

[39] Any reader interested in pursuing this or any other topic discussed in this essay should feel free to contact me via the Internet: <Destro@law.cua.edu>.