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Constitutional Law - First Amendment - Enforcement Clause - Religious Freedom Restoration Act of 1993

Melissa M. Furrer

CONSTITUTIONAL LAW — FIRST AMENDMENT — ENFORCEMENT CLAUSE — RELIGIOUS FREEDOM RESTORATION ACT OF 1993 — The United States Supreme Court held that Congress' passage of the Religious Freedom Restoration Act of 1993 violated the Enforcement Clause of the United States Constitution.

City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

Boerne, Texas, situated northwest of San Antonio, is home to St. Peter Catholic Church ("St. Peter").[1] P. F. Flores, the Archbishop of San Antonio ("Archbishop"), granted the St. Peter parish permission to enlarge the church to accommodate its growing congregation.[2] Before the Archbishop applied for the requisite building permit, the Boerne City Council passed an ordinance empowering Boerne's Historic Landmark Commission to designate historic landmarks and historic districts and to approve or deny proposed construction that would either affect such landmarks or occur in historic districts.[3] Shortly thereafter, the Archbishop applied for a building permit, but the Commission denied his application because St. Peter was located in one of the historic districts created under the preservation ordinance.[4]

The Archbishop brought suit in the United States District Court for the Western District of Texas challenging the denial of the permit as violative of the Religious Freedom Restoration Act of 1993 ("RFRA").[5] RFRA provides, in pertinent part, that "Government

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1. City of Boerne v. Flores, 117 S. Ct. 2157, 2160 (1997). The church, built in 1923, is located 28 miles northwest of San Antonio. *Id.*

2. St. Peter could seat approximately 230 people; on any given Sunday, 270 to 300 members of the congregation attended a particular mass. *City of Boerne*, 117 S. Ct. at 2160.

3. *Id.* The seven stated purposes of the ordinance, Ordinance 91-05, are as follows:

(1) To protect, enhance, and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the City's and State's archeological, cultural, social, economic, ethnic and political history. . . .

(2) To safeguard the City's historic and cultural heritage . . . .

(3) To stabilize and improve property values in such locations.

(4) To foster civic pride in the beauty and accomplishments of the past.

(5) To protect and enhance the City's attractions to tourists and visitors and provide incidental support and stimulus to business and industry.

(6) To strengthen the economy of the City.

(7) To promote the use of historic landmarks for the culture, prosperity, education and general welfare of the people of City and visitors to the City.

Petitioner's Brief at 26-27, City of Boerne v. Flores, 1996 WL 689630.

4. *City of Boerne*, 117 S. Ct. at 2160.

5. Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352

shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."[6] The City of Boerne countered the Archbishop's argument by contending that RFRA was, itself, unconstitutional.[7] The district court adopted the City of Boerne's argument finding, *inter alia*, that Congress' passage of RFRA exceeded its power to enforce the provisions set forth in the Fourteenth Amendment.[8] The Archbishop petitioned the court for interlocutory appeal, which the court granted.[9] The United States Court of Appeals for the Fifth Circuit found RFRA to be constitutional, holding that its enactment fell within the scope of Congress' enforcement power under the Fourteenth Amendment, and reversed the decision of the district court.[10] The Fifth Circuit applied the three-prong *Morgan* test to RFRA and found it to be constitutional.[11]

The Supreme Court of the United States granted certiorari to address whether Congress had exceeded the scope of its power under the Enforcement Clause of the Fourteenth Amendment to the United States Constitution when it enacted RFRA.[12] Justice Kennedy, writing for the majority, held that RFRA did exceed

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(1996). RFRA has two stated purposes; the second applies to the Archbishop's claim and provides "a claim or defense to persons whose religious exercise is substantially burdened by government." Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (1993).

6. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) (1993). The exception set forth in subsection (b) provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest."

7. *Flores*, 877 F. Supp. 355.

8. *Id.* Section 5 of the Fourteenth Amendment provides in pertinent part: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The other bases on which the district court invalidated RFRA were that Congress' enactment of the law violated the doctrine of separation of powers and that the court's enforcement of RFRA would violate the doctrine of stare decisis. *Flores*, 877 F. Supp. at 357.

9. *City of Boerne*, 117 S. Ct. at 2160. An interlocutory appeal is one that is necessary to adjudicate a case on its merits, although the matter appealed is not determinable of the matter in controversy itself. BLACK'S LAW DICTIONARY 563 (6th ed. 1990).

10. Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997).

11. *Id.* at 1358. The test, which was advanced in *Katzenbach v. Morgan* (384 U.S. 641, 1996), provides that a statute is appropriate under Section 5 if (1) it "may be regarded as an enactment to enforce [the Fourteenth Amendment]," (2) if it is "plainly adapted to that end[,]" and (3) if it is "consistent with the letter and spirit of the constitution." Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

12. City of Boerne v. Flores, 117 S. Ct. 293 (1997) (granting certiorari). *See* U.S. CONST. amend. XIV, § 5.

Congress' powers under Section 5 of the Fourteenth Amendment.[13] The Court began its analysis by examining the context in which Congress enacted RFRA. RFRA was Congress' response to the Court's decision in *Oregon v. Smith*.[14] In *Smith*, the court reasoned that the application of the *Sherbert* test to a neutral law of general applicability was unwarranted.[15] The *Sherbert* test considers whether the challenged law substantially burdens a religious practice and whether some compelling government interest justifies that burden.[16] Congress disagreed with the Court's rationale in *Smith* and passed RFRA in direct response, going so far as to articulate the reinstatement of the *Sherbert* test as one of the stated purposes of RFRA.[17] RFRA prohibits the Government from substantially burdening an individual's exercise of religion, even when that burden results from a neutral, generally applicable law, unless the Government demonstrates that the law in question (1) advances a compelling governmental interest and (2) is the least restrictive means by which to do so.[18]

Because Congress relied on its Section 5 power to enact RFRA, the Court considered whether the passage of RFRA was an appropriate exercise of that enforcement power.[19] It is beyond doubt that Congress is empowered to enact legislation that enforces the free exercise of religion; however, the Court asserts that, under Section 5, this is solely a preventive or remedial power and does not extend to determining when a constitutional right has

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13. *City of Boerne*, 117 S. Ct. at 2172. Justice Kennedy was joined in his majority opinion by Justices Rehnquist, Thomas, and Ginsberg. *Id.* Justice Stevens filed a concurring opinion. *Id.* Justice Scalia concurred in part and was joined by Justice Stevens. *Id.* Justice O'Connor wrote a dissenting opinion, in which Justice Breyer joined, except as to a portion of Part I. *Id.* at 2176 (O'Connor, J, dissenting). Justice Souter wrote a dissenting opinion. *Id.* at 2185 (Souter, J., dissenting). Justice Breyer also dissented. *Id.* at 2186 (Breyer, J., dissenting).

14. 494 U.S. 872 (1990). In *Smith*, the Court declined to apply the *Sherbert* balancing test to a free exercise challenge against an Oregon state law that criminalized peyote, which is used by Native Americans as part of their religion. *Smith*, 494 U.S. 872 (1990).

15. *Id.* at 885.

16. Sherbert v. Verner, 374 U.S. 398 (1963).

17. *City of Boerne*, 117 S. Ct. at 2161-2162. The RFRA's stated purposes are as follows: "(1) [T]o restore the compelling interest test as set forth in *Sherbert v. Verner* [citations omitted] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b) (1993).

18. *Id.* at § 2000bb-1. Section 2000bb-2(1) provides RFRA applies universally to all branches, departments, and officials of all state governments as well as the federal government. *Id.* at § 2000bb-2(1). Section 2000bb-3(a) mandates retroactive application of RFRA. *Id.* at § 2000bb-3(a).

19. *City of Boerne*, 117 S. Ct. at 2162.

been violated or to enacting legislation that changes the meaning of the right to free exercise of religion.[20] The Court acknowledges the subtle distinction between preventing or remedying a violation of a constitutional right and substantively rewriting the law to omit such a violation but insists the distinction be maintained by requiring that the means by which a wrong is to be remedied or prevented and the wrong itself be congruent and proportional.[21]

The Court proceeded to distinguish the effect of RFRA from that of the Voting Rights Act of 1965.[22] The Voting Rights Act of 1965 served to remedy the systematic discrimination against minority voters that had been accomplished by the enforcement of facially "neutral" literacy requirements.[23] RFRA, in contrast, did not remedy any widespread religious discrimination arising from existing law.[24] Because RFRA remedies "incidental" burdens that were never intended and does so in a very broad manner, potentially intruding on every law at every level of government, the Court determined that the necessary connection between the injustice being remedied and the means by which that remedy was achieved was absent in RFRA.[25] The Court, therefore, reversed the Court of Appeals judgment and held that RFRA was unconstitutional.[26]

Justice Stevens filed a concurring opinion, noting that the effect of the application of RFRA would have granted an impermissible preference for religion in violation of the First Amendment.[27] That is, the Church would have recourse in response to the zoning ordinance that an atheist or agnostic would not.[28]

Justice Scalia, joined by Justice Stevens, concurred in part and crafted what is largely a response to Justice O'Connor's dissenting

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20. *Id.* at 2163.

21. *Id.* at 2164. In support of the fineness of this distinction, the Court discusses its decision in South Carolina v. Katzenbach, in which it upheld challenged portions of the Voting Rights Act of 1965 as a necessary remedy to unconstitutional, *i.e.*, pervasively discriminatory, literacy testing as a prerequisite to voting. South Carolina v. Katzenbach, 383 U.S. 301 (1966). The Court shied from any interpretation of *Katzenbach v. Morgan* that would validate any Congressional expansion of rights. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding the constitutionality of the Voting Rights Act of 1965 despite a New York State Constitution provision requiring voters to have English-language literacy).

22. *City of Boerne*, 117 S. Ct. at 2168.

23. Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1973b(e) (1965).

24. *City of Boerne*, 117 S. Ct. at 2169.

25. *Id.* at 2171.

26. *Id.* at 2172.

27. *Id.* at 2172 (Stevens, J., concurring).

28. *Id.* Justice Stevens cites *Wallace v. Jafree* for the proposition that any governmental preference for religion over irreligion is violative of the First Amendment. *Id.* (citing Wallace v. Jaffree, 472 U.S. 38, 52-5 (1985)).

opinion.[29] Justice Scalia examined the historical intent and function of the Free Exercise Clause by analyzing the free exercise amendments enacted by the American colonies in the period preceding the ratification of the Bill of Rights.[30] Justice Scalia determined that the *Smith* Court's reading of the Free Exercise Clause as not extending to exempt citizens from obeying laws of general applicability is consistent with the limited protections to free exercise of religion provided by the free exercise amendments and their successor statutes in that those early amendments were to give way to the government's need to preserve peace and order.[31]

In addition, Justice Scalia examined the accommodations of religious practices made by various legislatures and by the Continental Congress and determined that such accommodation does not support an inference that the Constitution requires those exemptions.[32] Finally, Justice Scalia looked to the statements made by the Framers of the Constitution in debates and letters.[33] He stressed that the personally-held beliefs of government leaders that accommodations should be made to allow and protect the free practice of religion do not indicate that such accommodations are constitutionally mandated.[34]

Justice O'Connor, joined in part by Justice Breyer, authored a dissenting opinion in which she relied on the above-mentioned historical documents to assail *Smith* and its departure from the *Sherbert* test as a misinterpretation of Free Exercise Clause jurisprudence.[35] Justice O'Connor would have read the Free Exercise Clause as affirmatively guaranteeing the right to practice one's religion without governmental interference, even interference resulting from a neutral law of general application.[36] She looked to historical materials to define "free exercise" and to support her position that the Framers intended the Bill of Rights not only to protect free exercise but also to limit government intrusion on individuals' religious practices.[37]

Finally, Justice Souter filed a dissenting opinion in which he questioned the precedential value of the Court's decision in *Smith*

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29. *City of Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring).
30. *Id.* at 2172 (Scalia, J., concurring).
31. *Id.* at 2173 (Scalia, J., concurring).
32. *Id.* at 2172 (Scalia, J., concurring).
33. *Id.*
34. *City of Boerne*, 117 S. Ct. at 2174-75 (Scalia, J., concurring).
35. *Id.* at 2176 (O'Connor, J., dissenting).
36. *Id.* at 2177 (O'Connor, J., dissenting).
37. *Id.* at 2179 (O'Connor, J., dissenting).

and acknowledged the weight of Justice O'Connor's understanding of the historical materials examined.[38] Justice Souter stopped short of joining either the dissent or the majority opinion, however, because the Court had not entertained briefs and arguments on the merits of the case and he was disinclined to rule on the issue without reargument.[39]

An examination of its Free Exercise Clause and Enforcement Clause jurisprudence aids an understanding of the Court's decision. In *Ex parte Virginia*,[40] the Supreme Court considered the constitutionality of an act of Congress making it a felony for a judge to prevent an otherwise-qualified citizen from serving on a jury solely on the basis of race. Because enforcement of the state act would advance the objectives of the Fourteenth Amendment by enabling African-Americans to exercise their right (and duty) as citizens to serve as jurors, the Court held that the act was an appropriate use of Congress' broad Enforcement Clause powers to enforce the objectives of the Fourteenth Amendment.[41] This decision amounted to judicial acknowledgment of the broad nature of Congress' powers under Section 5.[42]

Four years later, in the *Civil Rights Cases*,[43] the Court articulated the inherent limitations on Congress' power and determined the nature of that power to be remedial and preventive. The Court considered the Civil Rights Act of 1874, which made it a crime to deny a person access to public accommodations on the basis of race, finding that the Act exceeded Congress' enforcement power by attempting to regulate private conduct.[44] Under the Enforcement Clause, the Court explained, Congress was authorized to enact only corrective legislation, *i.e.*, that which would be necessary and proper to counter state laws violating the Fourteenth Amendment.[45] Under this analysis, the Civil Right Act failed because it was directed at the behavior of private citizens.[46]

Modern consideration of Congress' powers under the Enforcement Clause began in earnest in 1940. *Cantwell v.*

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38. *Id.* at 2185-86 (Souter, J., dissenting).
39. *City of Boerne* at 2186 (Souter, J., dissenting).
40. 100 U.S. 339, 344 (1879).
41. *Ex parte* Virginia, 100 U.S. at 339.
42. *Id.* at 346.
43. 109 U.S. 3 (1883).
44. *Civil Rights Cases*, 109 U.S at 13. *See also* Civil Rights Act of 1874, 42 U.S.C.A. § 1983 (1874).
45. *Civil Rights Cases*, 109 U.S. at 14.
46. *Id.* at 15.

Connecticut established the limit on Congress' power to enforce the right to free exercise of religion.[47] In *Cantwell*, Jehovah's Witnesses challenged a statute that completely prohibited solicitations by organizations other than those licensed by the state of Connecticut as religious, charitable, or philanthropic.[48] The Court acknowledged that the right to free exercise of religion is not absolute and that imposing general and nondiscriminatory regulations empowers the states to regulate that exercise.[49] However, the Court struck down the statute, holding that the definition of fundamental liberties encompasses the rights protected under the First Amendment, including the right to free exercise of religion, protected under the Fourteenth Amendment.[50] *Cantwell* is significant because the inclusion of freedom of religion as a right guaranteed by the Fourteenth Amendment places that right squarely within the ambit of Congress' enforcement powers.

Until recently, the leading case establishing the limits that may be placed on a citizen's free exercise of religion has been *Sherbert v. Verner*.[51] In *Sherbert*, the Court considered a South Carolina statute, which defined the eligibility requirements for unemployment compensation, as applied to a Seventh-Day Adventist, whose religious beliefs prevented her from accepting employment that would entail working on Saturday, her Sabbath.[52] The Court recognized the First Amendment right to exercise of religion free of governmental interference, which is extended to interference by state government through the Fourteenth Amendment, and applied a balancing test to determine whether, through the statute, South Carolina enforced or advanced a compelling state interest justifying its substantial infringement on the right to free exercise of religion protected by the First Amendment.[53] The Court held that the statute in question was an unconstitutional infringement on that right because it failed the

47. 310 U.S. 296 (1940).

48. *Cantwell*, 310 U.S. at 301.

49. *Id.* at 304 (noting that states are empowered to regulate, within reason, the time, place, and manner of activities protected under the First Amendment).

50. *Id.* at 303, 306.

51. 374 U.S. 398 (1963).

52. *Sherbert*, 374 U.S. at 398. The South Carolina Unemployment Compensation Act provided that a would-be claimant who refused "available suitable work" without "good cause" was not eligible to receive benefits. 68 S.C. CODE § 68-114(3) (1952).

53. *Sherbert*, 374 U.S. at 406. Furthermore, the state's infringement was compuneded by the discriminatory nature of the statute (claimants were not required to accept employment requiring them to work on Sundays) and the state's failure to identify less restrictive alternatives to the statute in question. *Id.*

applicable balancing test; *i.e.*, the state's interest in preventing fraudulent benefits claims did not outweigh the claimant's right to observe her religious Sabbath.[54]

Modern decisions have also focused on the requirement that legislation enacted pursuant to Congress' Section 5 enforcement powers be remedial. The Court's analysis of *South Carolina v. Katzenbach* emphasized "historical experience" in determining whether the Voting Rights Act of 1965 was a constitutional exercise of Congress' Section 5 powers.[55] The Court reviewed evidence of "subsisting and persuasive" discrimination in the use of literacy tests by states to prevent minorities from exercising their right to vote.[56] In light of that historical evidence, the Court found the Voting Rights Act provisions prohibiting such literacy testing to be a necessary and proper legislative response intended to remedy widespread discrimination; as such, the provisions were within Congress' enforcement powers.[57]

That same year, the Court addressed the constitutionality of yet another provision of the Voting Rights Act in *Katzenbach v. Morgan*.[58] The section in question prevents states from forbidding citizens from voting when they are not English-literate but have at least a sixth-grade education.[59] The Court upheld the statute as it applied to an unconstitutionally discriminatory provision of the New York State Constitution but clearly tied the propriety of the preventive remedy to the history and depth of the wrong being corrected.[60] The provision in the New York State Constitution was intended to prevent Hispanic minorities from exercising their right to vote. The *Morgan* Court broadly read Section 5 as a positive grant of power to Congress to legislate as it saw fit to protect rights set forth under the Fourteenth Amendment.[61] According to the Court's reading of Section 5, if Congress' legislation meets the standard set forth in *McCullough v. Maryland*, courts will deem it appropriate legislation under the Enforcement Clause.[62]

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54. *Id.*

55. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). *See also* Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1073b(e) (1965).

56. *Katzenbach*, 383 U.S. at 333-34.

57. *Id.* at 313.

58. Katzenbach v. Morgan, 384 U.S. 641 (1966).

59. Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1073b(e) (1965).

60. *Morgan*, 384 U.S. at 658.

61. *Id.* at 651.

62. *Id.* at 651. The Court in *McCullough* determined that Congress' act to establish a federal bank was a "necessary and proper" legislative action consistent with the Constitution.

In 1970, amendments to the Voting Rights Act sparked additional litigation, and the Court considered whether those amendments were within Congress' enforcement powers.[63] The Court upheld amendments that abolished literacy and residency requirements as within Congress' Section 5 powers to prescribe and regulate voting qualifications.[64] The Court also narrowed Congress' power by holding that, although the amendment enfranchising eighteen year olds in federal elections was within its power, the amendment seeking to do the same in state and local elections exceeded the scope of Congress' power, *Morgan* notwithstanding.[65]

A broad reading of Congress' enforcement powers prevailed in *City of Rome v. United States*.[66] The *Rome* Court held that a Voting Rights Act provision requiring local governments that fall within certain coverage criteria to submit any proposed changes to approval by the electorate was a constitutional exercise of Congress' Enforcement Clause powers.[67] The Court held that even state practices that do not, themselves, violate the United States Constitution can be prohibited by Congress when appropriate; *i.e.*, necessary and proper.[68]

Such was the evolution of the Court's Section 5 jurisprudence, which was centered largely around protection of civil rights. In 1990, in *Oregon v. Smith*, the Court declined to apply the *Sherbert* balancing test to an Oregon drug law making it a crime to use peyote.[69] Because Oregon criminalized the use of peyote, the Free Exercise Clause did not protect Native American church members who were deemed ineligible for state unemployment compensation benefits after they had been dismissed for the sacramental use of peyote.[70] The Court distinguished *Sherbert* because that decision applied the balancing test to analyze, not to invalidate, free exercise challenges.[71] Holding the balancing test and its compelling interest requirement inapplicable to a neutral statute of general

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Id. See McCullough v. Maryland, 17 U.S. 316 (1819).

63. Oregon v. Mitchell, 400 U.S. 112 (1970). The amendments gave eighteen-year-old individuals the right to vote and abolished literary tests and state residency requirements for presidential elections. *Id.*

64. *Mitchell*, 400 U.S. at 112.

65. *Id.*

66. 446 U.S. 156 (1980).

67. *City of Rome*, 446 U.S. at 162.

68. *Id.*

69. *Smith*, 494 U.S. at 876. *See also* supra note 11 and accompanying text.

70. *Smith*, 494 U.S. at 884.

71. *Id.* at 884-85.

applicability designed to prohibit criminal conduct, the *Smith* Court found that no individual should be permitted to disobey such laws on the basis of his or her religious beliefs.[72] The Court rejected the compelling interest test specifically to avoid the result mandated by RFRA; *i.e.*, the presumptive invalidity of any statute when in conflict with any religious belief.[73]

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[74] the Court reversed lower court decisions that held city ordinances prohibiting the sacramental slaughter of animals were not violative of the Free Exercise Clause. The Court held that the ordinances did violate the rights of people who practice the religion of Santeria and applied a strict scrutiny standard to the ordinances because they were neither neutral nor generally applicable but, rather, were aimed directly at religious animal sacrifice.[75]

Congress' passage of RFRA was intended to evade strict scrutiny as applied to generally applicable, neutral statutes. The Court necessarily struck down RFRA because it was entirely inconsistent with Free Exercise and Enforcement Clause jurisprudence. The Court seemed bent on protecting the states from a wholesale intrusion on their police powers by Congress through RFRA.

Although the *Boerne* Court's analysis of Section 5 jurisprudence allows it considerable discretion to determine on a case-by-case basis when a statute impermissibly infringes on an individual's religious freedom, that same discretion could ultimately undermine the very protection intended. The Court acknowledged that the line between enforcing a right and changing what that right means is blurred and faint. By endorsing a subjective test and granting Congress considerable deference to enforce the right to free exercise, the Court has created a situation that will almost certainly result in inconsistent decisional law.

The alternative, however, would have been even less palatable. Had the Court not invalidated RFRA, individual citizens would have been able to simply pick and choose which state regulations would apply to them. It is clear, therefore, that a blanket protection such as RFRA far exceeds the scope of Congress' enforcement powers.

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72. *Id.* at 885.

73. *Id.* at 888.

74. 508 U.S. 520 (1993).

75. *Hialeah*, 508 U.S. at 520. The Santeria religion espouses animal sacrifice, in which the animals are killed, cooked, and eaten following the majority of Santerian rites; the Court found that the Hialeah ordinances in question, taken as whole, although facially neutral, were actually aimed at suppressing the Santerian practice of animal sacrifice. *Id.*

The challenge for the Court now is to devise a stronger, more objective test by which to analyze those statutes that are less patently unconstitutional.

The continued assertion of RFRA in the arena of federal governmental regulation, in the months since the Court's decision illustrates the need to do so. In December of 1997, both the United States, as plaintiff, and an individual defendant in one case urged the United States District Court for the District of New Mexico to revisit the constitutionality of RFRA as applied to the federal, and not state or local, government.[76] In *Sandia*, the defendant had been prosecuted for the illegal possession and sale of various body parts of federally-protected birds.[77] Both Sandia and the United States argued that the *Boerne* Court's decision did not extend to invalidate the application of RFRA to federal governmental regulations.[78] The *Sandia* Court rejected this notion and held that, regardless of whether Congress relied on its Section 5 powers, its Article I powers, or both to enact RFRA, the *Boerne* Court found RFRA to be unconstitutional and, as a matter of law, RFRA cannot be asserted as a defense to the violation of a federal governmental regulation.[79]

In marked contrast to the *Sandia* Court's decision, the United States Court of Appeals for the Eighth Circuit considered whether RFRA was constitutional as applied to federal governmental regulations and held that it was.[80] In *Christians v. Crystal Evangelical Free Church*,[81] the Eighth Circuit held that, under RFRA, tithing to one's church could not constitute an avoidable transaction in a bankruptcy proceeding.[82]

After its decision in *Boerne*, the Supreme Court vacated the Eighth Circuit's decision, remanding the case for reconsideration in

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76. United States v. Sandia, No. CR 99-717 MV, 1997 WL 894538 (D.N.M. Dec. 22, 1997).

77. *Sandia*, 1997 WL 894538, at *1. Sandia, a member of the Jemez Pueblo tribe of Native Americans, was prosecuted under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 (1997), the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (1985), and the Lacey Act, 16 U.S.C. §§ 3371-78 (1997). *Id.* (The Lacey Act makes it unlawful to "import, export, transport, sell, receive, acquire, or purchase any . . . wildlife . . . taken, possessed, transported, or sold in violation of [any federal or Indian tribal law.]" 16 U.S.C. § 3372(a)(1)).

78. *Id.*

79. *Id.* at *3.

80. Christians v. Crystal Evangelical Free Church, No. 93-2267, 1998 WL 166642 (8th Cir. (Minn.) Apr. 13, 1998).

81. 82 F.3d 1407 (8th Cir. 1996).

82. Christians v. Crystal Evangelical Free Church, 82 F.3d 1407, 1420 (8th Cir. 1996).

light of *Boerne*.[83] On reconsideration, the Eighth Circuit relied on the constitutionality of Congress' exercise of its Article I powers to hold that RFRA is constitutional as applied to the federal government and reinstated its decision.[84]

The constitutionality of RFRA as applied to federal governmental regulation was also addressed in the United States Court of Appeals for the Tenth Circuit. In *Gunning v. Runyon*,[85] the United States District Court for the Southern District of Florida considered whether the refusal of the administrators of a branch of the United States Postal Service to play a Christian radio station over the post office's public address system despite the requests of employees violated RFRA. The *Gunning* Court noted that it believed that the constitutionality of RFRA as applied to federal governmental regulations remained an open question.[86] The *Gunning* Court assumed that RFRA was a viable defense.[87]

Although the continued reliance on RFRA stems in part from the *Boerne* Court's silence as to its applicability to federal regulations,[88] it seems likely that the district and circuit courts feel compelled to so interpret the *Boerne* Court's silence given the lack of an alternative, specific test to apply to federal regulations. If the Court were to devise a concrete test for determining whether a statute (be it federal, state, or local in nature) violated the First Amendment right of free exercise of religion, RFRA could be put to rest.

Melissa M. Furrer

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83. Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997).

84. *Christians*, 1998 WL 166642, at *1.

85. No. 96-0452-Civ., 1998 WL 199654 (S.D. Fla. Apr. 17, 1998).

86. Gunning v. Runyon, No. 96-0452-Civ., 1998 WL 199654, at *10 (S.D. Fla. Apr. 17, 1998).

87. *Gunning*, 1998 WL 199654, at *10.

88. *See, e.g.*, Magic Valley Evangelical Free Church, Inc., v. Fitzgerald, No. 96-0458-E-BLW, 1998 WL 173065 (D. Idaho Apr. 3, 1998) (holding that the Supreme Court's silence on the matter should be interpreted so as to signify RFRA's constitutionality as applied to federal regulations, but noting that the question was open to interpretation).