***City of Boerne v. Flores, Archbishop of San Antonio* (1997)**

521 U.S. 507

In Sherbert v. Verner (1963), the Court ruled that the Free Exercise Clause required government to exempt religious believers from generally applicable laws that burdened their religious practices, unless the laws were justified by a compelling governmental interest and were narrowly tailored to achieve that interest. However, in Department of Human Resources of Oregon v. Smith, the Supreme Court abandoned that position. In 1993, Congress responded to Smith by enacting the Religious Freedom Restoration Act (RFRA), which was "to restore the compelling interest test set forth in Sherbert v. Verner and to guarantee its application in all cases where free exercise of religion is substantially burdened." St. Peter Catholic Church, located in Boerne, Texas, was built in 1923 to seat about 230 worshippers and was too small to accommodate the parish's growing congregation. The archbishop of San Antonio therefore applied for a building permit to enlarge the church. A few months previous, however, the Boerne City Council had authorized the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the plan, the commission had to approve in advance construction affecting historic landmarks or buildings in historic districts. Relying on the ordinance and the designation of a historic district that included the church, the commission denied the application to enlarge the church. The archbishop filed suit in federal district court, relying primarily on RFRA in challenging the permit denial. The district court concluded that RFRA exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment. The Fifth Circuit reversed, finding RFRA to be constitutional, and the Supreme Court granted certiorari.

Opinion of the Court: Kennedy, Rehnquist, Stevens, Thomas, Ginsburg, Scalia (in part).

Concurring opinion: Stevens.

Concurring in part: Scalia, Stevens.

Dissenting opinions: O'Connor, Breyer (in part); Souter, Breyer.

JUSTICE KENNEDY delivered the opinion of the Court.

[*Employment Division v.*] *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. Members of Congress in hearings and floor debates criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. The Act's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or subdivision of a State." The Act's universal coverage is confirmed in section 2000bb-3(a), under which RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States. The parties disagree over whether RFRA is a proper exercise of Congress' section 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."

In defense of the Act respondent contends that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under Smith. It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that section 5 includes the power to enact legislation designed to prevent as well as remedy constitutional violations. It is further contended that Congress' section 5 power is not limited to remedial or preventive legislation.

All must acknowledge that section 5 is "a positive grant of legislative power" to Congress, *Katzenbach v. Morgan* (1966). Legislation 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 not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer* (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach* (1966), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections* (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the State. It is also true, however, that "as broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell* (1970) (opinion of Black, J.).

In assessing the breadth of section 5's enforcement power, we begin with its text. Congress' power under section 5 extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The design of the Amendment and the text of section 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 violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. In February [1866], Republican Representative John Bingham of Ohio reported the following draft amendment to the House of Representatives on behalf of the Joint Committee [on Reconstruction]: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." The proposal encountered immediate opposition … [because] the proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. The House voted to table the proposal until April, which was seen as marking the defeat of the proposal. The Joint Committee began drafting a new article of Amendment, which it reported to Congress on April 30, 1866. Under the revised Amendment, Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective. The new measure passed both Houses and was ratified in July 1868 as the Fourteenth Amendment.

The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the *Civil Rights Cases* (1883), the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress' power by seeking to regulate private conduct. The Enforcement Clause, the Court said, did not authorize Congress to pass "general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the State may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing." Although the specific holdings of these early cases might have been superseded or modified, their treatment of Congress' section 5 power as corrective or preventive, not definitional, has not been questioned.

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, alterable when the legislature shall please to alter it." *Marbury v. Madison* [1803]. Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. 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. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights. The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. Were it otherwise, we could not afford Congress the presumption of validity its enactments now enjoy.

[B]ut as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

It is for Congress in the first instance to "determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

JUSTICE STEVENS, concurring.

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a "law respecting an establishment of religion" that violates the First Amendment to the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. 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 government preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

JUSTICE O'CONNOR, with whom JUSTICE BREYER [joins in part], dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress' power to enforce § 5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in Employment Division, Department of Human Resources of *Oregon v. Smith* (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believe that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.