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# The Religious Freedom Restoration Act: Its Rise, Fall, and Current Status

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## Summary

In *City of Boerne, Texas v. Flores*[1] the Supreme Court on June 25, 1997, held the "Religious Freedom Restoration Act" (RFRA) to be unconstitutional as applied to the states. RFRA had been adopted in 1993[2] in response to an earlier Supreme Court decision — *Employment Division, Oregon Department of Human Resources v. Smith*[3] — which had construed the free exercise clause of the First Amendment to prohibit only government action which **intentionally** burdens the exercise of religion. Congress reacted by enacting RFRA, which prohibits government action that has the **effect** of substantially burdening religious practice as well. But in *Boerne* the Court held that Congress lacks the power under § 5 of the Fourteenth Amendment to apply RFRA to the states.

The Clinton Administration maintains that RFRA continues to be valid for the federal government; and on April 13, 1998, a federal appellate court sustained that position in *Christians v. Crystal Evangelical Free Church.*[4] In addition, members in both the House and the Senate on June 9, 1998, introduced legislation entitled the "Religious Liberty Protection Act" (RLPA) to re-apply RFRA's standards to the states under Congress' interstate commerce and spending clause powers (S. 2148, H.R. 4019).

This report briefly summarizes *Smith*, the legislative history of RFRA, the Court's decision in *Boerne*, and RFRA's current legal status, and notes the introduction of the RLPA.

## Legislative and Political History

[1]521 U.S. ___, 117 S.Ct. 2157 (1997).

[2]P.L. 103-141 (Nov. 16, 1993); 42 U.S.C.A. 2000bb et seq.

[3]494 U.S. 872 (1990).

[4]No. 93-2267 (8th Cir. April 13, 1998).

**The *Smith* Decision.** As noted, the genesis of RFRA lay in the Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith, supra*. In that case, decided in 1990, the Court narrowed the scope of the free exercise clause of the First Amendment, which provides that "Congress shall make no law ... prohibiting the free exercise (of religion)."[5] The specific issue before the Court in *Smith* was whether two Native Americans who had been fired from their jobs as drug counselors after they were discovered to have ingested peyote in a ritual of the Native American Church were eligible for state unemployment benefits. That issue the Court resolved in the negative, 6-3. But in the process of reaching that conclusion the Court also altered the standard of review generally used for free exercise cases, 5-4.

For the prior quarter of a century the Court had generally applied a **strict scrutiny test** to government action alleged to burden the exercise of religion. That test required the government to show that its action burdening religion served a compelling public interest and that no less burdensome course of action was feasible. If the government could not so demonstrate, the religious practice had to be exempted from the government regulation or prohibition at issue.

In *Smith* the Court abandoned that test (except in a few narrow categories). It held that religiously neutral laws may be uniformly applied to all persons without regard to **any** burden or prohibition placed on their exercise of religion. The free exercise clause, the Court said, **never** "relieves an individual of the obligation to comply with a `valid and neutral law of general applicability' on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" In the case at hand, that new standard meant that the free exercise clause mandated no religious exemption from Oregon's drug laws for Native American use of peyote in a sacramental ceremony and, consequently, no eligibility for unemployment benefits of two Native Americans who lost their jobs because of their participation in such a ceremony. More generally, the Court asserted that the question of whether religious practices ought to be accommodated by government was a matter to be resolved by the political process and not the courts, although it admitted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in ...."

**The Congressional Response.** The specific result in *Smith* was upsetting to some.[6] But it was the Court's virtual abandonment of strict scrutiny and relegation of free exercise concerns to the political process that generated widespread alarm in the religious community and elsewhere. That alarm quickly coalesced into a broad-based organization known as the Coalition for the Free Exercise of Religion. Its efforts quickly resulted in the introduction by bipartisan groups in both the House and the Senate of a proposed

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[5]The free exercise clause has been held applicable not only to actions by the federal government but also to actions by state and local government. See Cantwell v. Connecticut, 310 U.S. 296 (1940).

[6]Congress in 1994 made the religious use of peyote by members of the Native American Church legal under federal law. See P.L. 103-344 (Oct. 6, 1994); 42 U.S.C.A. 1996a. Oregon, similarly, decriminalized the religious use of peyote after Smith. See Ore. Rev. Stat. 475.992(5) (1996 Supp.).

"Religious Freedom Restoration Act of 1990" (H.R. 5377, S. 3254) and, 3 years later, of the enactment of a modified version of RFRA into law.

None of the versions of RFRA considered by Congress addressed any specific free exercise concern. Rather, the intent was to restore the strict scrutiny test as the general standard governing the interaction of government and religious exercise. Because a constitutional amendment would have been required to do that for the judicial interpretation of the First Amendment, RFRA was crafted to impose the strict scrutiny test as a **statutory** standard. As enacted, RFRA provided that a statute or regulation of general applicability can lawfully burden a person's free exercise of religion only if it can be shown to be "essential to further a compelling governmental interest and (to be) the least restrictive means of furthering that compelling governmental interest." RFRA made the standard applicable to governmental action at every level — federal, state, and local — and allowed aggrieved parties to bring suit if they believed their free exercise of religion had been restricted by government in violation of the statutory standard.

As noted, it took three years to enact RFRA. In 1990 hearings were held on the House bill (H.R. 5377) by a subcommittee of the House Judiciary Committee,[7] but no further action was taken before the 101st Congress adjourned. In the 102d Congress RFRA was re-introduced in slightly modified form (H.R. 2797 and S. 2969), hearings were held in both the House and the Senate,[8] and the measure was reported late in the second session by the House Judiciary Committee.[9] But disputes over the measure remained,[10] and the 102d Congress adjourned soon thereafter without any further action.

In the 103d Congress RFRA was again introduced in slightly modified form (H.R. 1308, S. 578). But by this time the politics of the bill had changed substantially. President Clinton, unlike President Bush, came to office an avowed supporter of RFRA.

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[7]*See Religious Freedom Restoration Act of 1990: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 101st Cong., 2d Sess. (September 27, 1990).

[8]*See Religious Freedom Restoration Act of 1991 and the Religious Freedom Act: Hearing on H.R. 2797 and H.R. 4040 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 102d Cong., 2d Sess. (May 13, 1992) and *Religious Freedom Restoration Act of 1992: Hearing Before the Senate Judiciary Committee*, 102d Cong., 2d Sess. (September 18, 1992) (unprinted).

[9]See 138 CONG. REC. D1261 (Oct. 1, 1992) (daily ed.).

[10]During the 102d Congress several concerns were raised about RFRA by the National Right to Life Committee and the U.S. Catholic Conference — that it might make it possible for women to seek exemptions from restrictive anti-abortion statutes and to obtain abortions on religious grounds, that it might allow challenges to the tax-exempt status of church organizations, and that it might endanger public grants to church-related programs and institutions. Reflecting these concerns, a competing measure was introduced (H.R. 4040) which embodied the same strict scrutiny standard as H.R. 2797 but excluded three areas from the possibility of suit under the bill (1) "the tax status of any person," (2) "the use or disposition of government funds or property derived from or obtained with tax revenues," and (3) "any limitation or restriction on abortion, on access to abortion services or on abortion funding."

The Supreme Court had had the opportunity to overturn *Roe v. Wade*[11] but had chosen not to do so.[12] The Coalition for the Free Exercise of Religion had continued to expand.[13] Most important, perhaps, earlier objections to the bill by the U.S. Catholic Conference and the right-to-life community had been mitigated.[14] As a result, H.R. 1308 was reported without dissent by the House Judiciary Committee[15] and adopted by the House May 11, 1993, under rules suspension.[16] No Member spoke against the measure on the House floor.

In the Senate, however, a new issue arose — whether prisons ought to be exempted from the bill. Twenty-two state attorneys general as well as the prison administrators of all 50 states argued for such an exemption in letters to the Senate Judiciary Committee, but the Committee chose not to add the exemption. Its report recommending adoption of RFRA stated simply that "the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison administrators" and that the strict scrutiny standard "will not place undue burdens on prison administrators."[17] Nonetheless, Sen. Reid (D.-Nev.) offered a prison exemption amendment on the Senate floor. After vigorous debate the amendment was defeated, 41-58.[18] The bill was then approved, 97-3.[19] One week later, on November 3, 1993, the House, by voice vote, accepted the Senate version of RFRA rather than go to conference.[20] President Clinton signed the measure into law on November 16, 1993.

## City of Boerne, Texas v. Flores

In *City of Boerne, Texas v. Flores, supra* the Supreme Court on June 25, 1997, held RFRA to be unconstitutional as applied to the states, 6-3. The Court said that as applied to the states RFRA exceeded Congress' power under section 5 of the 14th Amendment.[21]

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[11]410 U.S. 113 (1973).

[12]*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[13]The Coalition eventually comprised 67 organizations ranging across the political and religious spectrum. Its breadth is shown by its inclusion of such ordinarily disparate groups as the People for the American Way and the Traditional Values Coalition.

[14]The operative language of the bill had been slightly modified, a new section making clear that the bill had no application to issues of public funding for religious institutions or questions of tax exemption had been added, and the section on standing to sue had been clarified. As a result, the U.S. Catholic Conference withdrew its objections, although it never formally joined the Coalition for Free Exercise.

[15]*See* H.Rept. 103-88, 103d Cong., 1st Sess. (May 11, 1993).

[16]*See* 139 CONG. REC. H2356 - H2363 (daily ed. May 11, 1993).

[17]*See* S.Rept. 103-111, 103d Cong., 1st Sess. (1993).

[18]139 CONG. REC. S14468 (daily ed. Oct. 27, 1993).

[19]139 CONG. REC. S14471 (daily ed. Oct. 27, 1993).

[20]139 CONG. REC. H8715 (daily ed. Nov. 3, 1993).

[21]The Fourteenth Amendment, *inter alia*, bars the states from depriving "any person of life,

(continued...)

The case arose because of a conflict between a local Catholic church and the city of Boerne's historic preservation ordinance. St. Peter the Apostle Catholic Church wanted to raze much of its existing structure and build a larger sanctuary in order to accommodate its rapidly growing congregation; but the city refused it permission to do so because, it said, the Mission Revival architecture of the church made it an historic structure that needed to be preserved. Archbishop Flores sued on behalf of the church, arguing in part that the city's denial of a building permit violated RFRA. The city responded by contending that RFRA was unconstitutional.

The Supreme Court agreed with the city, holding that as applied to the states RFRA "exceeds Congress' power." Justice Kennedy, writing for the majority, agreed that under § 5 of the 14th Amendment Congress has the power to enforce its provisions; but, he said, that power is limited. Congress can not in the guise of enforcement, he stated, adopt legislation that "alters the meaning" or the substance of the rights protected by the Fourteenth Amendment:

> 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.

Congress' lack of power to define the rights protected by the Fourteenth Amendment, Justice Kennedy asserted, was clear both in the legislative history of the Amendment and in most of the judicial decisions interpreting its provisions.

Moreover, he elaborated, in Congress' exercise of its remedial or preventive power under § 5, there must "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." But here, he said, Congress had failed to develop a legislative record that showed extensive denials of religious liberty. Yet RFRA was so broad that it intruded "at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." Particularly with respect to the states, he asserted, RFRA constituted "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." As a consequence, he concluded, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... and contradicts vital principles necessary to maintain separation of powers and the federal balance."

## Present Status

Because of the *Boerne* decision, states and localities are no longer bound by RFRA; as to them, RFRA is unconstitutional. But RFRA may still be valid with respect to the federal government, because for that application Congress did not rely on § 5 of the

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[21](...continued)
liberty, or property, without due process of law." "Liberty" includes religious liberty. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Fourteenth Amendment but on the "necessary and proper"clause of Article I, § 8, of the Constitution.[22] The Clinton Administration has taken that position, and on April 13, 1998, the U.S. Court of Appeals for the Eighth Circuit agreed. In *Christians v. Crystal Evangelical Free Church*[23] the appellate court held, 2-1, that RFRA is a valid exercise of Congress' power under the necessary and proper clause and, in the circumstances of the case, of its plenary power over bankruptcy. The facts of the case involved an effort by a trustee in bankruptcy under § 548(a)(2) of the Bankruptcy Code[24]to recapture tithes to a church which a couple had made in the year prior to declaring bankruptcy. The court held that RFRA in effect amended the Bankruptcy Code and that a recapture of their tithes, which had been made in good faith, would place a substantial burden on their religious practice without compelling justification. As a consequence, it held RFRA to bar the recapture. The court also held RFRA not to violate the establishment of religion clause of the First Amendment. The dissenting judge contended, however, that the clear implication of *Boerne* was that even as applied to the federal government, RFRA violates the separation of powers doctrine by imposing on the courts a standard of review for a constitutional right beyond what the Supreme Court has held the Constitution to require.

Meanwhile, St. Peter the Apostle Catholic Church and the city of Boerne have worked out an accommodation in lieu of pursuing further litigation. The church will be permitted to build a structure adding 850 seats to its sanctuary which will retain 80% of the original facade.

Finally, on June 9, 1998, Senators Hatch and Kennedy and Representatives Canady and Nadler introduced the "Religious Liberty Protection Act" (RLPA) (S. 2148, H.R. 4019). RLPA would re-impose strict scrutiny on state burdens on religious practice under Congress' powers over interstate commerce and federal spending and would as well limit state and local land use decisions that adversely impact religious institutions. Both the House and Senate Judiciary Committees have already held hearings on the proposal.[25]

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[22]Article I, § 8, provides: "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[23]No. 93-2267 (8th Cir. April 13, 1998). The appellate court had previously held RFRA to be constitutional and to bar a trustee from voiding debtors' tithes to their church as avoidable transfers under § 548(a)(2) of the Bankruptcy Code, but the Supreme Court had vacated and remanded that decision for reconsideration in light of *Boerne*. *See Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *judgment vacated and case remanded for further consideration in light of City of Boerne, Texas v. Flores*, 521 U.S. (1997).

[24]11 U.S.C.A. 548(a)(2).

[25]*Hearing on H.R. 4019 Before the Subcommittee on the Constitution of the House Judiciary Committee*, 105th Cong., 2d Sess. (June 16, 1998) and *Hearing on S. 2148 Before the Senate Judiciary Committee*, 105th Cong., 2d Sess. (June 23, 1998).