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What a refreshing opinion!

It matters not whether one approves or disapproves of the strict neutrality standard of religious freedom Justice Scalia laid down in *Employment Division v. Smith*.¹ I have long been sympathetic to the argument that the Free Exercise Clause grants no special exemptions from generally applicable laws, but I am troubled by such issues as the confidentiality of confessions, gender discrimination in the priesthood, and sacramental wine. On the question presented by *City of Boerne v. Flores*,² however—the question of separation of powers, federalism, and the rule of law raised by the Religious Freedom Restoration Act (RFRA)³—there could be only one answer. There was really not much to say, and Justice Kennedy said it: Section 5 of the Fourteenth Amendment empowers Congress to *enforce* its provisions, not to *revise* them.⁴

Justice O'Connor, who thought *Smith* was wrong, agreed with the majority on this point.⁵

That the Fourteenth Amendment empowers Congress to enforce but not to revise its provisions is not only what the Constitution plainly says;⁶ it also reflects the original understanding. When Congress provided statutory sanctions for violations of the

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1. 494 U.S. 872, 879 (1990).

2. 117 S. Ct. 2157 (1997).

3. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

4. See *Flores*, 117 S. Ct. at 2164.

5. See *id.* at 2176 (O'Connor, J., dissenting). Justices Souter and Breyer, who agreed with O'Connor about *Smith*, did not reach the question of congressional authority. See *id.* at 2185 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

6. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

amendment, the Court upheld the statute;⁷ but when Congress went beyond the amendment to create new limitations of its own, it was called to order by the Court.⁸

There are circumstances in which, as the Court acknowledged, a new limitation or prohibition can qualify as a legitimate means of enforcing the amendment itself.⁹ The Court held that literacy tests for voters did not per se offend the Fifteenth Amendment because they did not, on their face, discriminate on grounds of race.¹⁰ But the tests were so often administered in a discriminatory fashion, and discrimination was so difficult to detect and prove in the individual case, that Congress concluded a prophylactic ban was necessary to prevent evasion of the constitutional command. The Court correctly upheld this provision as an appropriate means of enforcing the Fifteenth Amendment.¹¹

7. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 349 (1880) (upholding a statute imposing criminal penalties for violations of Fourteenth Amendment provisions).

8. The most famous example is the *Civil Rights Cases*, 109 U.S. 3 (1883), which struck down an effort to prohibit private discrimination. Cf. *United States v. Reese*, 92 U.S. 214 (1876) (striking down a statute interpreted to go beyond the Fifteenth Amendment by forbidding denial of the right to vote on any ground); *United States v. Cruikshank*, 92 U.S. 542, 559 (1876) (invalidating other attempts to punish private action); *United States v. Harris*, 106 U.S. 629, 637 (1883) (same). The Court discussed this line of decisions in *Flores*, 117 S. Ct. at 2166. See also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 393-401 (1985) [hereinafter CURRIE, *THE FIRST HUNDRED YEARS*] (discussing the *Civil Rights Cases* and other cases in this line of decisions).

Similarly, when Congress and the Court found legislative authority implicit in the oath requirement of Article VI and the fugitive clauses of Article IV, Section 2, they concluded only that Congress might implement the constitutional provisions, not that it might expand them at will. See Act of June 1, 1789, ch. 1, 1 Stat. 23; Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 562-63 (1842); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 69 (1860); see also DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1901* 13-15 (1997) [hereinafter CURRIE, *THE FEDERALIST PERIOD*]; Currie, *THE FIRST HUNDRED YEARS*, *supra*, at 243-44.

9. See *Flores*, 117 S. Ct. at 2163, 2167.

10. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959).

11. See *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970). For a particularly dramatic example of the same reasoning, see *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966) (upholding the Voting Rights Act of 1965, which forbade any change in the election laws in an area with a history of voting discrimination without prior approval by the Attorney General or by a federal court).

As the Court recognized in *Flores*, there was a similar line of equally unimpeachable decisions under the essentially identical enforcement provision of the Eighteenth Amendment.¹²

The Court found no evidence of a comparable problem in *Flores*.¹³ Congress simply disagreed with the Supreme Court's interpretation of the Free Exercise Clause.¹⁴ And thus the many precedents permitting Congress to forbid practices designed to circumvent constitutional restrictions did not apply.¹⁵

The only memorable aspect of this part of the opinion is that, as in striking down Congress's insolent attempt to keep guns out of schools in *United States v. Lopez*,¹⁶ the Court exercised meaningful scrutiny in enforcing federalistic limitations on congressional power—as it had seldom done during the preceding

12. See *Flores*, 117 S. Ct. at 2163 (citing *James Everard's Breweries v. Day*, 265 U.S. 545 (1924)); see also *Lambert v. Yellowley*, 272 U.S. 581 (1926) (upholding a statute restricting medicinal use of malt liquor, wine, and whiskey); *Selzman v. United States*, 268 U.S. 466 (1925) (upholding a statute regulating the sale of denatured alcohol). The Amendment itself forbade the sale of intoxicating liquors only "for beverage purposes"; Section 2 gave Congress the "power to enforce this article by appropriate legislation." U.S. CONST. amend. XVIII (repealed 1933). For further discussion of this issue, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 180-81* (1990).

There are similar decisions, of course, under the analogous Necessary and Proper Clause. See, e.g., *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911) (affirming Congress's power to prescribe automatic couplers for cars traveling locally on interstate railroads).

13. See 117 S. Ct. at 2169 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."). Professor Douglas Laycock, an advocate of the new statute, testified that "deliberate persecution is not the usual problem in this country." *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 334 (1993), quoted in *Flores*, 117 S. Ct. at 2169. This is not simply to say that Congress failed to compile an adequate record; so did the parties before the courts.

14. *Smith* concluded that the Free Exercise Clause, which the Fourteenth Amendment has been held to make applicable to the states, "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). RFRA permitted the government to "substantially burden" religious freedom only if it employed "the least restrictive means" to further a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (1994). Congress's own theory was that RFRA's formulation struck "sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

15. See *Flores*, 117 S. Ct. at 2168-71.

16. 514 U.S. 549 (1995).

fifty-eight years. In demanding "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"¹⁷ the Court in *Flores* set forth an attractive new test to serve notice that it would no longer blindly accept untenable congressional pretenses that a particular measure was "appropriate" to enforce the Civil War amendments—or "necessary and proper" to protect interstate or foreign commerce. Nothing less would be consistent with *Marbury v. Madison*.¹⁸

Thus, the case for RFRA stands and falls with the proposition that Congress may reverse the Supreme Court's interpretation of the Constitution. But Congress cannot tell the Court what the Constitution means.

The House of Representatives recognized this nearly 200 years ago in a largely forgotten episode connected with the mysterious Western adventures of Aaron Burr. Apprehended following the dispersal of his puny band of thugs on the Mississippi and sent to Richmond for trial,¹⁹ Burr was acquitted by a reluctant jury on the basis of Chief Justice Marshall's narrow reading of Article III's definition of treason.²⁰ Republican zealots promptly proposed, and the Senate with unseemly haste adopted, a sweeping redefinition of the offense broad enough to cover Burr's case.²¹

Whether Marshall was right or wrong is neither here nor there. As even Republican members of the Senate pointed out, Article III gave Congress power only to punish treason, not to define it;²² the Constitution itself defined the offense.²³ It did

17. *Flores*, 117 S. Ct. at 2164; see *id.* at 2169-71.

18. 5 U.S. (1 Cranch) 137 (1803).

19. See *United States v. Burr*, 25 F. Cas. 55, 181 n.A1 (C.C.D. Va. 1807) (No. 14, 693). For detailed discussions of the Burr episode, see THOMAS P. ABERNETHY, *THE BURR CONSPIRACY* (1954); HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON* 219-343, 441-71 (1917); DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809* 215-370 (1970).

20. See sources cited *supra* note 19.

21. See 17 ANNALS OF CONG. 108-09, 159-60 (1808).

22. See *id.* at 138 (statement of Sen. Pope).

23. See U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. . . . The Congress shall have Power to declare the Punishment of trea-

so, moreover, in order to restrain Congress, for in England the legislative power to define treason had been greatly abused.²⁴ The House rejected the bill without so much as a hearing.²⁵

This is not to deny that Congress has the right and duty to interpret the Constitution. It does so implicitly every time it passes a bill, for its members too have sworn to respect constitutional limitations on their power.²⁶ Jefferson and Jackson were right that a president may refuse on constitutional grounds to enforce or sign a law after the Court has upheld it.²⁷ Indeed, because judgments bind only the parties, Lincoln may even have been right, within the limits of good faith, that Congress may reenact a law the Court has struck down.²⁸ But the very basis of both these positions is that each branch has the obligation to interpret the Constitution for itself. Congress may adopt an interpretation for its own purposes and for such persuasive force as it may have for others, as it did in the War Powers Resolution.²⁹ But *Marbury* made clear that the Supreme Court must interpret the Constitution for itself as well.³⁰

son"); 17 ANNALS OF CONG. 109-11 (1808) (statement of Sen. Mitchell).

24. See 17 ANNALS OF CONG. 135-45 (1808) (statement of Sen. Pope) (contrasting the treason provision with Art. I, § 8, cl. 10, which empowered Congress "to define and punish," inter alia, offenses against the law of nations).

25. See MALONE, *supra* note 19, at 368.

26. "Were it otherwise," the Court sagely observed in *Flores*, "we would not afford Congress the presumption of validity its enactments now enjoy." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171-72 (1997).

27. See Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 50-51 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (explaining Jefferson's pardon of persons convicted under the Sedition Act); President Andrew Jackson, Veto Message to the Senate (July 10, 1832), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576-91 (James D. Richardson ed., 1896) (explaining Jackson's veto of the national bank).

28. See President Abraham Lincoln, Sixth Debate with Stephen A. Douglas (Oct. 13, 1858), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 255 (Roy P. Basler ed., 1953).

29. 50 U.S.C. § 1541(c) (1973). Compare the Second Congress's effort to define by statute what Article II, Section 1 meant in allotting to each state as many presidential electors as "the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2. See Act of Mar. 1, 1792, ch. 8, 1 Stat. 239, amended by Act of Mar. 26, 1804, ch. 50, 2 Stat. 295; see CURRIE, THE FEDERALIST PERIOD, *supra* note 8, at 138-39.

30. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

The Court appeared to forget this once in its history, and it was that slip that gave supporters of RFRA their only real hope of success. The case was *Katzenbach v. Morgan*,³¹ and the conclusion was that Congress could forbid English literacy tests for voters who had gone to school for six years in Puerto Rico, whether or not the tests offended the Equal Protection Clause.³² One of the reasons was deference to Congress:

[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools . . . constituted an invidious discrimination in violation of the Equal Protection Clause.³³

The Court in *Flores* distinguished this passage on the ground that it suggested only that Congress had "a factual basis" for concluding that New York had violated the Fourteenth Amendment, not that the Court was required to accept Congress's interpretation of the amendment itself.³⁴ But it is the courts' responsibility to apply the Constitution as well as to construe it, and Justice Harlan seems right that the language quoted is difficult to reconcile with the duty of the Supreme Court to determine for itself what the Constitution requires.³⁵

Happily, deference to congressional findings was only an alternative basis for the *Morgan* decision. The Court also concluded, more conventionally, that the restriction of English literacy tests was an appropriate means of ensuring the nondiscriminatory treatment of Puerto Ricans that the amendment itself clearly required.³⁶

Thus the *Flores* decision renders a major service to the cause of constitutionalism by eradicating a nagging doubt created by the *Morgan* opinion as to the power of Congress effectively to modify

31. 384 U.S. 641 (1966).

32. See *id.* at 648-49, 656-58.

33. *Id.* at 656.

34. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997).

35. See *Morgan*, 384 U.S. at 665-71 (Harlan, J., dissenting).

36. See *id.* at 652; *Flores*, 117 S. Ct. at 2168.

the Constitution under the guise of enforcing it. For in this respect RFRA unfortunately does not stand alone. Like the Senate with regard to treason in 1807,³⁷ Congress in recent years has increasingly succumbed to the temptation to respond to perceived defects in the Constitution, or in the Court's understanding of it, by enacting simple legislation requiring neither a two-thirds majority nor ratification by three-fourths of the states.

When Congress detected a flaw in Article I's unmistakable requirement that a president approve a bill in its entirety or not at all,³⁸ it attempted to undermine the provision by allowing the president to "cancel" particular spending provisions after signing the law.³⁹ When Congress feared that other states might be required to recognize Hawaii judgments upholding marriages between persons of the same gender, it provided to the contrary by statute⁴⁰—undeterred by the fact that the Supreme Court had consistently held that the term "full faith and credit,"⁴¹ which appears in the text of Article IV, itself required respect for judicial decisions.⁴² When Congress took issue with the Supreme Court's holding that the judicial power of the United States as defined by Article III did not extend to suits against states brought by their own citizens,⁴³ it enacted a statute that said it did.⁴⁴

37. See *supra* notes 19-25 and accompanying text.

38. "[I]f he approves he shall sign it, but if not he shall return it . . ." U.S. CONST. art. I, § 7.

39. See Line Item Veto Act of 1996, 2 U.S.C.A. §§ 691-691f (West 1997); *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (dismissing a well-founded challenge to this Act for want of standing).

40. See Defense of Marriage Act of 1996, 2 U.S.C.A. § 1738c (West Supp. 1997).

41. U.S. CONST. art. IV, § 1.

42. See, e.g., *Mills v. Duryee*, 11 U.S. (1 Cranch) 481 (1813). The question of the validity of this provision is complicated by the uncertain relationship between Article IV's requirement that states give "full faith and credit" to one another's judgments and its authorization of Congress to "prescribe" their "effect." See U.S. CONST. art. IV, § 1. But it is by no means certain that the latter provision permits Congress to excuse what the former requires. See David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 2D 7, 7-8 (1997).

43. See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890).

44. See Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710(d)(7) (1994). The Supreme Court rightly invalidated this provision in *Seminole Tribe v. Florida*, 116 U.S. 1114 (1996). See David P. Currie, *Ex parte Young after Seminole Tribe*, 72 N.Y.U. L. REV. 547, 547-48 (1997); cf. *United States v. Klein*, 80 U.S. (1 Wall.) 128

These examples could be multiplied. In some of these cases Congress may simply have been doing what Lincoln, with much force, argued it had a right to do: challenge the Supreme Court to reexamine its own questionable decisions.⁴⁵ Sometimes, however, it is difficult to interpret such behavior otherwise than as an effort to amend the Constitution without respecting the safeguards laid down in Article V.

If human nature tells us it is too much to expect that the *Flores* decision will put a stop to such nonsense, at least it seems fair to assume that *Flores* may indicate to Congress the futility of attempting to tell the Supreme Court how to interpret the Constitution.

After the Court in *Oregon v. Mitchell*⁴⁶ invalidated a congressional effort to lower the voting age to eighteen in state elections, its decision was promptly reversed in the manner provided by the Constitution. "The right of citizens of the United States who are eighteen years of age or older, to vote," says the Twenty-sixth Amendment, "shall not be denied or abridged by the United States or by any State on account of age."⁴⁷ "Praise for the amendment," as I have said elsewhere, "is entirely consistent with applause for the decision; it is the business of the country, not of the Court, to rewrite the Constitution."⁴⁸

Flores is a salutary reminder that it is not the business of Congress either, except in accordance with the exacting provisions of Article V.

(1872) (setting aside a statutory attempt to redefine the constitutional effect of a pardon).

45. See *supra* note 28 and accompanying text.

46. 400 U.S. 112 (1970).

47. U.S. CONST. amend. XXVI, § 1.

48. CURRIE, *supra* note 12, at 563.