

RLUIPA AND CONGRESSIONAL INTENT

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Today I want to talk about the Religious Land Use and Institutionalized Persons Protection Act, otherwise known by the acronym RLUIPA. Specifically, I want to talk about the portions of RLUIPA that deal with land use more than the institutionalized persons provisions of RLUIPA. I want to try to, in brief fashion, make two quick arguments. One is that the land use provisions of RLUIPA are constitutional. In other words, Congress had the authority under Section 5 of the Fourteenth Amendment to enact those provisions. And two, to the extent that there are constitutional questions about the power of Congress to pass RLUIPA, the current academic debate and current academic literature is missing the primary point, as it is largely devoted to what I think might be a non-issue.

First let's get a little bit of background on RLUIPA. To do that, I have to briefly talk about the dialog between the U.S. Supreme Court and Congress during the decade of the 1990s regarding religious freedom. I'll focus on some slightly different portions of that dialog than what we have heard already. The starting point is *Employment Division v. Smith*, and we have already learned that *Employment Division v. Smith* tells us that as long as the law is neutral, and as long as the law is generally applicable, then the religious claimant is not entitled to an exemption from that law even if the law puts a substantial burden on the religious claimant. Of course, American polls have consistently shown that Americans support giving religious claimants a free exercise exemption from laws regardless of whether they are neutral or generally applicable. And as has already been discussed, it did not take long for Congress to attempt to deal with *Employment Division v. Smith*, through the Religious Freedom Restoration Act (RFRA). RFRA attempted to restore what was perceived by Congress as the pre-*Employment Division* standard for free exercise. Under this test, religious

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claimants who have been substantially burdened by a law, regardless of whether it is neutral or generally applicable, are entitled to an exemption unless the government in question can demonstrate compliance with the compelling interest test, which requires not only showing a compelling interest not to grant the exception but also that this government interest is being achieved in the least restricted means available.

RFRA easily passes through Congress with wide support, but of course was eventually struck down by the Supreme Court in *City of Boerne v. Flores*. The basis for the Court striking down *Boerne* was the lack of power under Section 5 of the Fourteenth Amendment. To the extent that RFRA was an attempt to alter the standard that state governments would be held under, Congress needed to rely on Section 5 of the Fourteenth Amendment, and the Court determined that Congress had exceeded its power in RFRA. *Boerne* is an important case—not only does it reverse the decision or the attempt by Congress to restore religious freedom in the context of state governments, but *Boerne* also tells us or informs us what standard the Court is going to use to determine the scope of Congress's power under Section 5 the Fourteenth Amendment. And the test that we get from *Boerne* is the congruent and proportional test. What the Court does when it considers a challenge to the ability of Congress to enact a statute under Section 5 of the Fourteenth Amendment, it asks what constitutional right Congress is attempting to enforce, what does the statute require, and is the statute congruent and proportional to the perceived constitutional violations that are occurring? I am not the first one to suggest this analogy, but I think a very good analogy is the analogy of a net being cast. Congress casting a net in the form of a statute and the congruent and proportional test asks: Of the state law violations that are caught up in the net, how much of those are an actual constitutional violation as opposed to a mere violation of a more protective legislative standard?

Boerne v. Flores gives us the congruent and proportional test, and courts have been applying that test in the previous decade since the *Boerne* decision. After *Boerne*, however, we get an additional requirement for the analysis used in determining the scope of congressional power under Section 5 of the Fourteenth Amendment. This is this requirement that Congress have demonstrated or documented, in the congressional record, a history and pattern of unconstitutional activity by the states in the area sought to be regulated. In subsequent cases looking at the FMLA and the ADA,

when the Court is doing the Section 5 congruent and proportional analysis, now the Court has added the additional analysis that looks at whether Congress did its homework: Did Congress demonstrate in the record that there is a history and pattern of unconstitutional discrimination by the states?

With that background laying out the relevant constitutional standard, I now turn to the actual provisions of RLUIPA. RLUIPA is Congress's response to the Supreme Court's decision in *Boerne*. What RLUIPA tends to do is restore a more liberal or expansive protection of free exercise rights in two specific areas—in the context of land use planning and also in the context of religious claims of institutionalized persons. The RLUIPA standard is *Sherbert v. Verner*, which is the pre-*Boerne v. Flores* Free Exercise Clause standard. In other words, in these contexts, if there is a substantial burden on a religious claimant, regardless of whether the law is neutral or generally applicable, the religious claimant is entitled to a religious exemption from the law unless the compelling state interest test can be met by the government entity in question.

Congress learned its lesson from RFRA and in drafting RLUIPA did its homework to anticipate the potential constitutional challenges to RLUIPA, specifically the challenge that Congress lacked the power to pass this provision. Congress attempted to deal with those potential constitutional attacks by carefully defining the circumstances under which RLUIPA is applicable. The statute provides that it will only apply in three circumstances. Each of these circumstances is intended to closely conform with an enumerated power of Congress. First, the statute applies in situations in which Congress's Spending Clause power is implicated. In other words, RLUIPA applies when the relevant government institution or entity is receiving federal funds. In these circumstances, RLUIPA seems to be clearly within Congress's Spending Clause power and thus constitutional. Second, RLUIPA is tied to Congress's power under the Interstate Commerce Clause. The statute contains a jurisdictional hook, consistent with modern Supreme Court Commerce Clause jurisprudence that limits its applicability to cases implicating interstate commerce. Again, the legitimacy of these provisions seems to be clear because the jurisdictional hook ensures that the Commerce Clause power is implicated.

The particular provision or part of RLUIPA that I want to focus on is the third part of RLUIPA, which is another provision detailing when RLUIPA provides the standard for religious exercise

claimants, although, unlike the spending and commerce provisions, this third section applies only in the land use, and not the prison, context. Under this section, the protective religious standard applies in land use situations is when there has been some sort of individualized assessment on behalf of the government decision-making entity. The specific language from the statute is “individualized assessments of the proposed uses of the property involved.” If the decision-making body of the local government can be described as involving individualized assessments, then RLUIPA applies. This third provision is the basis of the constitutional challenges to RLUIPA. The argument is that this provision attempts to rely on Congress’s Section 5 power to enforce the 14th Amendment, but that it is violation of the *Boerne* congruent and proportional test. .

Congress, with the individualized assessment provision, is picking up on the explanation of the *Sherbert* unemployment line of cases found in *Smith*. In *Employment Division v. Smith*, the majority opinion said we are not overruling the *Sherbert-Thomas* line of employment division cases because those cases involve situations in which the government action involved individualized decision-making. Picking up on that explanation, or articulation of the *Sherbert* case, Congress took the *Smith* Court at face value and reasoned that there is still a free exercise claim when the government decision-making process involves individualized assessments. The land use context is a good one in which to apply that individualized assessment theory. No body of law involves more individualized assessments than the land use context.

For those of you that are familiar with land use law, you know that most land use decisions involve some sort of discretionary authority by a land planning commissioner or group of commissioners. These officials make individual determinations as to whether to grant, for instance, a land use permit. For instance, a religious institution seeking to build a place of worship will be required to go to the planning commission to get approval for the building or the addition. All of those decisions in the land use process are done on an individualized, case-by-case, some would say, even ad hoc method. The standard that the planning commission is applying, the legislative guidance for these disputes, tends to be very generic legal standards. A planning commission, in evaluating a special use permit by a land use claimant, is usually going to apply a standard such as whether the permit is good for the general health and welfare of the community. This is one of the

more frequent articulations of the standard that planning commissions or planning commissioners apply in land use disputes. Another standard that you will see is: "Is this use consistent with the neighborhood and consistent with the comprehensive plan? I think you can see that this type of decision-making will tend to be done on a case-by-case basis. To the extent that *Employment Division v. Smith* explained *Sherbert* and the unemployment line of cases as cases exempt from the *Smith* rule because of the case-by-case decision-making authority of the government provided in question, the application to the land use context seems to make sense because those decisions seem to be almost always made on a case-by-case, ad hoc basis.

With this background, we can now turn our attention to the current constitutional attacks on RLUIPA. Initially, the law review articles and cases focused on whether RLUIPA is congruent and proportional to the constitutional standard. What I would submit is that, to the extent that the statute applies only to individualized exemption types of case, this standard is merely tracing the free exercise standard articulated in *Employment Division v. Smith* case. If you take the *Smith* case and the *Smith* opinion at face value, *Sherbert* is still good law because it involves individualized exemptions. All RLUIPA has done is to apply that constitutional standard to the land use context. The congruent and proportional test, at least to the extent that RLUIPA traces the constitutional standard, is ultimately without merit. The current trend in the case law is to conclude that RLUIPA is as a congruent and proportional response to unconstitutional state action, on the theory that it really does no more than trace *Smith's* explanation of *Sherbert*.

The modern trend, however, in attacking RLUIPA is to focus on the lack of a congressional record: Is there a sufficient congressional documentation of unconstitutional discrimination in the land use context to justify this remedial legislation under Section 5? There have been a series of academic articles, debating back and forth whether the empirical evidence is sufficient. A lot of time has been spent attempting to demonstrate, empirically, whether discrimination in the local land use context does actually exist against religious land users and particularly minority land users. What I want to suggest is that this focus, that energy, that academic discussion, becomes irrelevant if in fact RLUIPA does nothing but trace the *Employment Division* explanation from *Sherbert*. In other words, if all that the statute does is trace the *Sherbert* individualized assessment standard, then why is it

necessary for Congress to document that there have been instances of unconstitutional discrimination? If my reading of RLUIPA is correct, and that seems to be the trend, all Congress has done is to provide a statutory remedy for a constitutional violation with the additional benefit of attorneys fees. So I would submit that the academic discussions from this point should focus less on the congressional record and more on determining whether RLUIPA simply traces the *Sherbert* exception left after *Employment Division v. Smith*.