RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to City of Boerne

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INTRODUCTION

After the Supreme Court struck down the Religious Freedom and Restoration Act of 1993 ("RFRA")[1], Congress responded by passing a new law to accomplish many of the same goals. Congress sought a law that could pass judicial review without undermining civil rights protections in housing and employment.[2] The result was the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[3] Passed in 2000, RLUIPA establishes strict scrutiny judicial review of land use conflicts between religious organizations and local authorities, as well as decisions involving religious prisoners and other institutionalized individuals.[4] While this article focuses on the constitutionality of RLUIPA's land use provisions, limited reference to the prison cases challenging RLUIPA's constitutionality is necessary due to the limited case law analyzing the land use provisions.

Congress knew RLUIPA would be challenged in court, so it tried to present RLUIPA as simply a codification of current free exercise jurisprudence and a proper exercise of its powers under Section 5 of the Fourteenth Amendment, as well as the commerce and spending clauses.[5] Rarely, however, does Congress conduct numerous hearings and engage in significant rhetoric, in order to merely codify Supreme Court precedent. Under the guise of protecting religious freedom, the federal government has forcefully stepped into areas that have historically been the province of the states and local governments. The decisions over where to locate parks, schools, shopping centers, and churches, are uniquely local in character. There is no common solution. Zoning and other land use decisions help form the character of our communities, as they are a reflection of our values.

Due to the intensely personal nature of land use decisions, increasing population pressures, and an increasingly litigious society, land use regulation will only become more controversial. That does not mean, however, that Congress has the right to step into the land use arena. To justify this usurpation of local power, the federal government needs to prove to the judiciary, and indeed the American people, that RLUIPA is really necessary. It needs to prove that there is "a congruence and proportionality between the injury to be

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[1] Religious Freedom and Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb4 (1994) (invalidated in part by City of Boerne v. Flores, 521 U.S. 507 (1997)).

[2] *See* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. Rev. 929, 943 (2001).

[3] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2004).

[4] *Id.*

[5] *Id.*

prevented or remedied and the means adopted to that end."[6] Congress must provide evidence of significant religious discrimination in land use decisions and demonstrate that the states are not taking sufficient action to remedy that discrimination. It has not and cannot do so.

This is not to say that the only justification for protecting religious liberty is preventing religious discrimination, but rather that discriminatory intent reveals a desire to limit the free exercise of religion. After all, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[7] For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*,[8] a law carefully proscribed religious conduct only by a minority religion and suppressed much more religious conduct than necessary to meet the government's legitimate interests. In such cases, it is clear that the law's true purpose is to prevent the free exercise of religion. Such laws are clearly unconstitutional, but fortunately they are rare in today's society. The majority of the land use laws religious institutions have complained about are not specifically directed at religious practices. They are neutral laws of general applicability that impose some burdens on religious practices in the process of trying to balance the multitude of interests present in our increasingly diverse society. Under *Smith*, the general rule is that these laws are constitutional if supported by a rational basis.[9] Section 5 does not give Congress the authority to change this substantive rule.[10]

In addition to Section 5, Congress rests its authority to pass RLUIPA on the commerce clause and the spending power. The spending power, however, has little, if any applicability to RLUIPA's land use provisions. [11] Further, Congress' power under the commerce clause has been severely restricted by the Supreme Court under Chief Justice Rehnquist.[12] In the wake of *Lopez* and *Morrison*, it is highly unlikely that land use regulation of church construction and maintenance is an economic activity open to federal regulation. Even if it was, the federal government may not regulate the manner in which state and local governments regulate their citizens' land use.[13]

In addition to analyzing Congress' power under Section 5 and the commerce

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[6] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[7] Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

[8] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533-40 (1993).

[9] *Smith*, 494 U.S. at 872.

[10] *City of Boerne*, 521 U.S. at 507.

[11] *See* Mayweathers v. Terhune, 314 F.3d 1062, 1068-69 (9th Cir. 2002).

[12] *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[13] *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

clause, a full analysis of the constitutionality of RLUIPA's land use provisions requires discussion in this article of the free exercise clause, the establishment clause, federalism, and separation of powers. These concepts are at the heart of the Court's opinions in *City of Boerne*, *Lopez*, *Morrison*, and prior related cases. Before reaching the constitutional question, however, it is necessary to review the history behind RLUIPA.

I. THE HISTORY BEHIND RLUIPA

A. The Sherbert Quartet and Yoder

The story begins in 1963 with *Sherbert v. Verner*.[14] In *Sherbert*, the Court held the denial of unemployment benefits to a Seventh Day Adventist, who lost her job after refusing to work on Saturdays, her religion's Sabbath, unconstitutional under the First Amendment's free exercise clause.[15] In reaching its decision, the Court determined forcing Sherbert to choose between her religion and her benefits was a substantial burden on her free exercise of religion and this burden was not justified by a compelling state interest.[16] Significantly, South Carolina law provided protection for workers whose religious beliefs precluded them from working on Sundays, "compound[ing]... the religious discrimination which South Carolina's general statutory scheme necessarily effect[ed]."[17] Therefore, although the Court chose to decide *Sherbert* on free exercise grounds, it could have reached the same result under the equal protection clause.

The law in *Sherbert* accommodated all religions that held Sabbath on the traditional day, while not providing the same accommodation to minority religions. Recognizing this inequity, the Court applied the strict scrutiny test from equal protection cases to the free exercise clause.[18] Until 1990, strict scrutiny remained the stated law in free exercise cases, but it was not applied as rigorously as in the equal protection arena. The old adage, "strict in theory, fatal in fact," did not hold true in free exercise cases. Often, the courts either held strict scrutiny did not apply or that there was a compelling state interest to justify the burden placed on the religious claimant.[19]

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[14] Sherbert v. Verner, 374 U.S. 398 (1963).

[15] *Id.* at 399-401.

[16] *Id.* at 406-09.

[17] *Id.* at 406.

[18] *Id.* at 406-09.

[19] *See* Joshua Geller, *The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of the Fourteenth Amendment*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 561, 564-66. (2003).

Besides *Sherbert*, the Supreme Court has only applied strict scrutiny to three other unemployment cases (the Sherbert Quartet)[20] and *Wisconsin v. Yoder*.[21] In *Yoder*, the Court held Wisconsin could not prevent the Amish from removing their children from the compulsory education system after eighth grade.[22] The Amish provided significant evidence of their longstanding objection to traditional secondary education, as well as showing that after leaving school, their children continued to be educated in their faith and the skills needed in their community.[23] Therefore, the Court found that Wisconsin's interest in requiring two more years of education was minimal in comparison with the burden such a requirement would place on the Amish community.[24]

Normally, neutral laws of general applicability do not offend the Constitution's free exercise clause. In rare occasions, however, the Court has held that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[25] Twenty-seven years after declaring strict scrutiny the rule in free exercise cases, the Court affirmed that the exceptions had become the rule, in yet another unemployment case.[26]

B. Employment Division v. Smith

The *Smith* Court held Oregon could deny unemployment benefits to someone fired for using peyote, a schedule I hallucinogen used in the Native American church.[27] The Court found the prohibition against peyote was a valid and neutral criminal law of general applicability and Smith's religion did not exempt him from the law.[28] Relying on extensive precedent dating back to *Reynolds v. United States*,[29] which upheld anti-polygamy laws, as well as cases after *Sherbert*, the Court refused to grant religious objectors a private right to ignore the law.[30]

Limiting the Sherbert Quartet to their unique fact scenarios, the Court strongly reiterated that strict scrutiny still applied to government classifications

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[20] Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

[21] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[22] *Id.* at 234-36.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 220.

[26] Employment Div. v. Smith, 494 U.S. 872, 872 (1990).

[27] *Id.*

[28] *Id.*

[29] Reynolds v. United States, 98 U.S. 145 (1879).

[30] *Smith*, 494 U.S. at 872.

based on religion under an equal protection analysis.[31] The Court identified *Yoder* and similar cases as hybrid situations where free exercise claims were connected to other rights such as communicative activity or parental rights.[32] Under the Court's hybrid right analysis, since Oregon's law did not attempt to "regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs," Smith and other members of the Native American church must obey it, just like everybody else.[33] Admittedly, the hybrid right concept is vague and has proven difficult to apply, but the Court may have been trying to provide an extra level of protection for areas that implicate the "core" of the free exercise right, the "right to believe and profess whatever religious doctrine one desires."[34]

While the *Smith* decision was certainly not a ringing endorsement of the Sherbert Quartet and *Yoder*, these decisions remain, at least nominally, good law. The *Sherbert* compelling interest test arguably still applies to facially non-neutral laws, facially neutral laws with a discriminatory purpose, laws that are not generally applicable, and to laws providing a system of individualized exemptions.[35] Congress relied heavily on the last category, laws providing a system of individualized exemptions, in passing RLUIPA.[36] As Justice Scalia stated in *Smith*, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[37] Combined with the three categories borrowed from equal protection law, this rule attempts to protect free exercise by focusing judicial scrutiny on laws that either have a discriminatory intent or can be easily manipulated for discriminatory purposes through a process of individualized assessments.

C. RFRA and City of Boerne v. Flores

Not everyone saw *Smith* as a continuation of Supreme Court precedent and an affirmation of equality principles. Proponents of RFRA, passed three years after *Smith*, viewed it as overruling *Smith* and restoring the *Sherbert/Yoder* compelling interest test.[38] RFRA prohibited the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule

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[31] *Id.* at 886.

[32] *Id.* at 882.

[33] *Id.* at 883.

[34] *Id.* at 877.

[35] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

[36] 42 U.S.C. §§ 2000cc-2000cc-5 (2002).

[37] Employment Div. v. Smith, 494 U.S. 872, 884 (1990) (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[38] *See* Storzer & Picarello, Jr., *supra* note 2, at 937-39.

of general applicability," unless the government proved a compelling governmental interest and met the least restrictive means requirement.[39] Regardless of ones' take on *Smith*, RFRA was an attempt to repeal the Court's most recent free exercise case. As such, Justice O'Connor's strong dissent in *City of Boerne* agreed that if *Smith* was rightly decided, then RFRA was unconstitutional under a free exercise analysis.[40]

The majority in *City of Boerne* did not question *Smith*'s holding.[41] Instead, they focused on clarifying Congress' Section 5 powers.[42] Under Section 5 Congress may remedy or prevent constitutional violations including free exercise violations.[43] Congress may enforce the Constitution, but it cannot alter its substantive meaning. In response "to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination," Congress has the power to enforce our inalienable rights through "strong remedial and preventive measures."[44] Throughout the civil rights era, Congress, the Presidency, and the Supreme Court worked together, to push each other and the nation to make equality a reality. While the United States has not fully achieved that ideal, states and municipalities no longer sanction rampant discrimination.

As a result of changing times, and faced with a Congress that accepts no bounds to its powers, the *City of Boerne* Court refused to defer to Congress' conclusory statements concerning religious discrimination based on anecdotes and persecution that occurred over forty years ago.[45] The emphasis in congressional hearings on RFRA was not focused on deliberate prosecution or laws directly targeted at religious practices.[46] Such laws are increasingly rare. Instead, "the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion."[47] In light of *Smith*, Congress' response to the incidental burdens placed on religion by the modern bureaucracy was completely out of proportion with the constitutional injury sought to be prevented or remedied.

As Justice Kennedy stated in *City of Boerne,* "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to

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[39] 42 U.S.C. § 2000bb-1(a)-(b) (2003).

[40] City of Boerne v. Flores, 521 U.S. 507, 545 (1997).

[41] *Id.* at 507.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 526 (citing Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966)).

[45] *City of Boerne*, 521 U.S. at 530-31.

[46] *Id.*

[47] *Id.*

believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[48] RFRA, however, was not limited to possible constitutional violations. It covered every state, federal, and local government agency or official. It covered every state and federal law or local ordinance adopted before or after RFRA for the rest of eternity.[49] Its "[s]weeping coverage ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[50]

In contrast, the Voting Rights Act only targeted a few laws in limited regions with a history of voting discrimination. That Act included a provision allowing its coverage to expire in areas that were discrimination free for five years.[51] The other provisions of the Act were similarly limited and were upheld in *Katzenbach v. Morgan*, *Oregon v. Mitchell*, and *City of Rome v. United States*.[52] By adopting time, manner, and place restrictions on its legislation, Congress adopted the least intrusive means to correct constitutional violations in traditional areas of state responsibility. The earlier Congresses understood that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to achieve that end."[53] To hold otherwise is to ignore the history of the Fourteenth Amendment and the benefits of federalism.[54]

D. Religious Liberty Protection Act Bills and the Congressional Record for RLUIPA

As soon as the Court struck down RFRA in *City of Boerne*, Congress began work on a new bill to undercut the *Smith* holding. Congress toyed with a new RFRA, which would rely on the commerce and spending clauses.[55] With *Lopez* fresh in Congress' memory, however, the Religious Liberty Protection Acts of 1998 and 1999 ("RLPA") did not pass.[56] Out of their ashes rose a compromise bill, RUILPA. No hearings were held on RLUIPA directly, but some

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[48] *Id.* at 532.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 532-34 (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966)).

[52] Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980).

[53] *City of Boerne*, 521 U.S. at 520.

[54] *See id.* at 520-25; *see also* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 320-23 (2003).

[55] Geller, *supra* note 19, at 575.

[56] H.R. 4019, 105th Cong. (1998); H.R. 1691, 106th Cong. (1999).

commentators aggregate the hearings on RFRA and RLPA to argue that extensive hearings were held on RLUIPA.[57] These hearings do provide some evidence of questionable land use decisions that may have been motivated in part by discriminatory intent or at least a failure to understand and accommodate the unique land use issues presented by religious institutions.[58] It is important to remember, however, that the right to free exercise of religion is not a right to accommodation, nor is it a right to be granted preferential treatment. Many land use decisions regarding uses that do not easily fit into the traditional zoning categories are evidence of the rigidity and perhaps the small-mindedness of planners. As unwise as these decisions may seem when taken out of context, courts must uphold them so long as they can be supported by a rational basis.

The congressional record points to several cases of possible religious discrimination, but the congressional record's failure to devote more than a paragraph to each case does not do them justice.[59] These short case summaries are the same kind of anecdotes rejected in *City of Boerne*, because they take a brief synopsis of a small number of cases as proof that Congress must take drastic action.[60] In passing RLUIPA, Congress did not seek testimony analyzing RLUIPA's "potential impact in the field. Nor was there any attempt to investigate the existing principles applied to landowners and religious landowners in the land use process."[61] Nor did Congress take into account recently passed state and local laws seeking to alleviate the burdens of land use laws on religious institutions.[62] Land use is an area of historically local concern, yet Congress has proven unwilling to let the states try to solve any problems that may exist.

II. THE DIVERSITY OF LAND USE LAW

A brief survey of Supreme Court cases illustrates that land use law is as varied as the people living in this country. Environmental laws,[63] setback ordinances,[64] historical preservation laws,[65] regulation of the secondary effects

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[57] *See* Storzer & Picarello, Jr., *supra* note 2, at 945-46.

[58] *See* Storzer & Picarello, Jr., *supra* note 2, at 944; 146 Cong. Rec. E1564 (2000).

[59] 146 Cong. Rec. E1564 (2000).

[60] City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997).

[61] Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335 (2003); *see also* Geller, *supra* note 19, at 578.

[62] *See* Storzer & Picarello, Jr., *supra* note 2, at 995-96 (citing cases upholding religious exemptions from zoning laws at state and local level).

[63] *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[64] *See, e.g.*, Gorieb v. Fox, 274 U.S. 603 (1927).

of adult businesses,[66] and the desire to ensure adequate low-income housing[67] are just some of the concerns validated in Supreme Court cases. States and municipalities all balance these conflicting concerns differently. Throughout the nation, various communities have adopted zoning ordinances governing the use of certain properties. Building restrictions are prompted by aesthetic, environmental, and health and safety concerns. Meanwhile, historical preservation laws protect a region's cultural and historical resources.

The treatment of religious concerns under land use laws is equally varied, with some states being more accommodating than others. Even the most accommodating, however, recognize the importance of applying health and safety restrictions to all buildings, including churches.[68] The wide variety of ways that communities treat religious institutions "can be attributed to different traditions, different values, different dominant land uses, and different state constitutional treatment for religious entities."[69] By leaving such personal choices to states and municipalities, communities are allowed to express their unique cultural heritage. Through these numerous approaches communities strive for the public good, the ideal balance between historical preservation and growth and between the social benefits of religion and of other community organizations.

Congress, however, failed to explore this diversity and consider the reasons why land use has been traditionally left to the state. Nor did Congress examine the trend of modern churches that reach far beyond their local neighborhood and serve many additional societal needs, by functioning as homeless shelters, drug treatment centers, and day care centers. These social services require ever-larger church grounds and cause greater negative secondary effects.[70] Established churches are not only seeking to expand their uses, but also to fulfill their larger missions by serving bigger congregations. Historical preservation statutes that celebrate the unique architecture and importance of churches in our history, sometimes makes it harder for congregations such as one in *City of Boerne* to renovate and modernize their churches.[71]

While new churches do not have the problems experienced by some established churches, it can be difficult for a new church, regardless of its

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[65] *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); *City of Boerne*, 521 U.S. at 507.

[66] *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[67] *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519 (1992).

[68] *See* Hamilton, *supra* note 61, at 337-38; Geller, *supra* note 19, at 578.

[69] *See* Hamilton, *supra* note 61, at 337-38.

[70] *See id.* at 340.

[71] *See* Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 WHITTIER L. REV. 493, 535-36 (2002).

particular religious affiliation, to find an appropriate space in fully developed regions. Cities and churches have struggled with whether churches should be located in residential or commercial zones. Also, there is not always a large enough parcel of land available even if the city and church agree as to the appropriate zoning designation.[72] These issues are not the result of religious discrimination, but rather the increasing pressures on society's remaining undeveloped lands.[73] While the legitimate interests involved in discretionary decisions by city councils and land use agencies can be manipulated for the purpose of religious discrimination, this problem does not justify RLUIPA's land use provisions.

III. RLUIPA'S LAND USE PROVISIONS ARE UNCONSTITUTIONAL

Under RLUIPA, the government may not impose a substantial burden on religious exercise unless that imposition furthers a compelling governmental interest and uses the least restrictive means of furthering that interest.[74] This general rule, which is virtually identical to the one in RFRA, is limited to situations where the spending power, commerce clause, or Section 5 of the Fourteenth Amendment applies.[75] In addition to this general rule, RLUIPA prohibits unequal treatment of religious institutions, discrimination against religious institutions, and total exclusion of, or unreasonable limitations on, religious institutions within a jurisdiction.[76]

While several cases have been brought under RLUIPA, the land use cases that have reached the circuit courts deal primarily with the application of RLUIPA, not its constitutionality. The Sixth, Seventh, and Ninth Circuits have held RLUIPA was not applicable, because the challenged land use regulation did not impose a substantial burden on the religious institution.[77] Additionally, these cases held the regulations at issue did not violate the free exercise clause, as they are laws of general and neutral applicability.[78]

Unlike in the land use context, the circuit courts faced with RLUIPA challenges to prison rules have reached the constitutional issues of RLUIPA's

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[72] *See id.* at 535-36 (examples of conflicts between religious institutions and land use agencies).

[73] *See also* Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335, 342 (2000).

[74] 42 U.S.C. § 2000cc(a)(1) (2004).

[75] 42 U.S.C. § 2000bb-1(a)-(b) (2003); 42 U.S.C. § 2000cc(a)(2) (2004).

[76] 42 U.S.C. § 2000cc(b) (2004).

[77] *See* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004); Civil Liberties for Urban Believers v. City of Chicago, 432 F.3d 752 (7th Cir. 2003), *reh'g en banc denied*, 2003 U.S. App. LEXIS 24176; DiLaura v. Ann Arbor Charter Township, No. 00-1846, 30 Fed. Appx. 501 (6th Cir. 2002) (not for full-text publication).

[78] *Id.*

validity under the spending and establishment clauses. Three circuits have held RLUIPA's prison provisions do not violate the establishment clause.[79] The Sixth Circuit, however, held RLUIPA's prison provisions do violate the establishment clause.[80] Therefore, when considering the constitutionality of the land use provisions, the appellate decisions suggest that the land use provisions do not provide clear guidance on the establishment clause issue, but the appellate courts have not directly addressed the Section 5 and commerce clause issues.

There are some district court cases, however, that have analyzed RLUIPA's constitutionality under Section 5, the commerce clause, and the establishment clause. The major decision upholding RLUIPA's constitutionality is *Freedom Baptist Church of Delaware County v. Township of Middletown*, decided by the Eastern District of Pennsylvania.[81] Relying on and quoting heavily from *Freedom Baptist Church*, the Southern District of New York and the District of Hawaii have also upheld RLUIPA's constitutionality, as has the Western District of Texas in a brief aside.[82] On the other side of the argument, the Central District of California held RLUIPA violates both Section 5 and the commerce clause in *Elsinore Christian Center v. City of Lake Elsinore*.[83]

A. Section 5 of the Fourteenth Amendment

RLUIPA was a direct response to *City of Boerne*, which focused almost exclusively on Congress' Section 5 powers, and RLUIPA's general rule is virtually identical to that in RFRA. Therefore, Section 5 is the natural place to begin analyzing RLUIPA's constitutionality.Section 5 gives Congress the power to enforce the Fourteenth Amendment, but Congress cannot redefine the substantive meaning of the Constitution by way of a legislative statute.[84] While Justice Kennedy believed Congress "must have wide latitude in determining"

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[79] Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) (remanded for decision on remaining constitutional challenges).

[80] Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003).

[81] Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (settled while on interlocutory appeal).

[82] Westchester Day Sch. v. Vill. of Mamaroneck, 280 F. Supp. 2d 230 (S.D. N.Y. 2003); United States v. Maui County, 298 F. Supp. 2d 1010 (D. Haw. 2003); Castle Hills First Baptist Church v. City of Castle Hills, 2004 U.S. Dist. LEXIS 4669 (W.D. Tex. 2004). Unfortunately, due to their heavy reliance on *Freedom Baptist Church*, these cases do not add anything to the analysis of whether RLUIPA is constitutional.

[83] Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) (court declined to reach RLUIPA's constitutionality under establishment clause).

[84] City of Boerne v. Flores, 521 U.S. 507, 519 (1997); *see also* Marbury v. Madison, 5 U.S. 137 (1803).

whether its actions are remedial or substantive in nature, the weakness of RFRA's legislative record and the apparent disdain for the judiciary was fatal in *City of Boerne*.[85] Respect and deference is a two-way street.

The Court not only reacted to the lack of respect for the judiciary, but also continued to advance its federalism jurisprudence by insisting that Congress prove the need to "usurp state power or intermeddle in traditional fields of state authority."[86] By passing RFRA, Congress intruded into "every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[87] Justice Kennedy's opinion of the weak legislative record used to justify this dramatic action was not only scathing, but made it clear what he meant by saying "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[88]

In the face of the legislative record:

> It is difficult to maintain that [the anecdotes in the record] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or the purpose of legislation.[89]

The Supreme Court was looking for more than anecdotes and persecution that occurred over forty years ago.[90] The Court sought a real discussion of the issues, but Congress failed to take these words to heart. Congress did not have a single hearing on RLUIPA, relying instead on its hearings for RLPA and RFRA.[91] These hearings only addressed land use law in general terms and barely mentioned institutionalized persons.[92] Once again, Congress focused on anecdotes and generalized conclusions, not whether passing the law was a good idea, or even constitutional.[93] As a consequence, Congress did nothing to regain respect and deference from the judiciary.

While some commentators vigorously reject this view of the legislative record, Judge Dalzell in *Freedom Baptist Church* dismisses questions as to the

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[85] *City of Boerne*, 521 U.S. at 519-20, 531, 535.

[86] Hamilton, *supra* note 61, at 327; *see also* United States v. Lopez, 514 U.S. 549 (1995).

[87] *City of Boerne*, 521 U.S. at 532.

[88] *Id.* at 531.

[89] *Id.*

[90] *Id.* at 530-31.

[91] *See* Hamilton, *supra* note 61, at 341-52; Geller, *supra* note 19, at 578-81.

[92] *Id.*

[93] *Id.*

sufficiency of the record altogether.[94] Content to defer to Congress, Judge Dalzell admits RLUIPA is at least near, if not over the line between remedial and substantive legislation, yet fails to analyze RLUIPA under *City of Boerne's* congruence and proportionality test.[95] Instead, Judge Dalzell largely limits his analysis under Section 5 to referring to the individualized exemption language in *Smith* and characterizing RLUIPA as "targeted solely to low visibility decisions with the obvious—and for Congress unacceptable—concomitant risk of idiosyncratic application."[96] While this risk may be obvious to Congress and Judge Dalzell, the assertion is not supported by the legislative record and goes against *City of Boerne's* understanding of the impacts of land use decisions on the free exercise of religion.[97]

In *Elsinore Christian Center*, on the other hand, Judge Wilson simply notes the weaknesses of the legislative record as contrasted with the records attending the Voting Rights Act and the federal Family and Medical Leave Act as applied to state employers.[98] Having noted the insufficiency of the record, he mentions the deference owed to Congress and moves on to the more serious shortcoming, the lack of congruence and proportionality, identified in *City of Boerne*.[99] Regardless of the extent of unconstitutional activity actually identified by Congress, RFRA was "so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior."[100] As Judge Wilson states, RLUIPA suffers from this same constitutional infirmity.[101]

RLUIPA targets all land use "under which a government makes, or has in place a formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed use for the property involved."[102] Judge Dalzell in *Freedom Baptist Church* and the other district

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[94] Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002); *see* Timothy J. Houseal, *RLUIPA: Protecting Houses of Worship and Religious Liberty*, 20 DEL. LAW. 28 (2002); *see also* Storzer & Picarello, Jr., *supra* note 2, at 944.

[95] *Freedom Baptist Church of Delaware County*, 204 F. Supp. 2d at 873-74. "Whatever the true percentage of cases in which religious organizations have improperly suffered at the hands of local zoning authorities, we certainly are in no position to quibble with Congress's ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country." *Id.*

[96] *Id.* at 873-74.

[97] *City of Boerne*, 521 U.S. at 534-36.

[98] Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1100-01 (C.D. Cal. 2003); *cf.* Nev. Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[99] *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1100-01.

[100] *City of Boerne*, 521 U.S. at 532.

[101] *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1100-01.

[102] 42 U.S.C. § 2000cc(a)(2)(C) (2004).

courts following his opinion, believe that RLUIPA simply codifies the *Sherbert* exception.[103] This exception, however, has almost exclusively been limited to the unemployment compensation context.[104] There have only been two district court cases applying the *Sherbert* test to the denial of land use permits and then only where the denials restricted activities that were central to the adherent's religious practices.[105]

It is quite difficult, if not impossible, to distill a general rule from this limited judicial history. Yet Douglas Laycock and other commentators insist, "that under a reasonable interpretation of *Smith* and *Church of the Lukumi*, where a law has secular exceptions, or an individualized exemption process, any burden on religion requires a compelling justification."[106] Laycock, however, reads too much into *Smith* and *Church of Lukumi*. Citing *Smith*, *Church of Lukumi* simply reiterated, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[107]

Smith and other Supreme Court jurisprudence limits this rule regarding individual exemptions to governmental actions imposing a substantial burden on religious practice and strongly suggests only central or fundamental religious exercise should receive this high level of constitutional protection.[108] RLUIPA, on the other hand, applies to any substantial burden on religious exercise, defining religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[109] Moreover, RLUIPA states that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[110] In setting this definition, even RLUIPA proponents Roman P. Storzer and Anthony R. Picarello, Jr. admit Congress is going beyond codifying the Court's free exercise jurisprudence, settling a significant debate as to which church activities are considered religious, rather than secular.[111] By settling this debate and going

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[103] Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857, 873-74 (E.D. Pa. 2002).

[104] *See* Employment Div. v. Smith, 494 U.S. 872, 883 (1990).

[105] *See Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1097.

[106] Santoro, *supra* note 71, at 534-35 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 956 (3d ed. 2000); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 771 (1999)); *see also* Storzer & Picarello, Jr., *supra* note 2, at 949-52.

[107] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 568 (1993).

[108] *See Smith*, 494 U.S. at 883; *see also Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1098.

[109] 42 U.S.C. § 2000cc-5(7)(A) (2004).

[110] 42 U.S.C. § 2000cc-5(7)(B) (2004).

[111] Storzer & Picarello, Jr., *supra* note 2, at 946. *See also* Santoro, *supra* note 71, at 537. "RLUIPA's definition is based on a Congressional finding that congregational worship is a

beyond the Court's jurisprudence in many other respects, Congress has set a new substantive legal standard in violation of *City of Boerne*.[112]

Not only does RLUIPA cover religious practices not protected under the Supreme Court's jurisprudence, it broadens the reach of the *Sherbert* exception to cover not only "individualized exemptions," but all "individualized assessments."[113] Unlike situations covered by the *Sherbert* exception, when municipal authorities "determine[e] whether to issue a zoning permit, [they] do not decide whether to *exempt* a proposed use from an applicable law, but rather whether the general law *applies* to the facts before it."[114] Nobody is exempt from a zoning law. Some people may locate in a particular zone, as a matter of right, while everybody else must apply for a special use permit under a system of individual assessments.[115] And even in instances more closely resembling individual exemptions, a threshold requirement under *Smith* and *Church of Lukumi* is that the local agency refused to extend the system of individual exemptions to cases of religious hardship.[116] Instead of simply assuring that various religious concerns are given the same access to the system of individualized exemptions as other non-religious concerns, RLUIPA "places a statutory thumb on the side of religious free exercise in zoning cases."[117] It privileges religious institutions over other socially desirable land uses, without reference to the specific situation.

Clearly, there is room for debate as to the meaning of the *Sherbert* exception. Douglas Laycock and other commentators argue "land use regulation is among the least generally applicable bodies of law in the American legal system."[118] The majority of case law, in particular *City of Boerne*, however, supports the view that most zoning laws and landmark preservation laws are neutral and generally applicable. Under this view, the *Sherbert* exception does not cover most land use regulations.[119] Thus, this is yet another area where Congress went

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fundamental tenet to most faiths, and therefore, governmental decisions that tough upon houses of worship have a corresponding effect upon free exercise." *Id.*

[112] *See* Geller, *supra* note 19, at 582-83; *see also* Santoro, *supra* note 71, at 537.

[113] 42 U.S.C. §§ 2000cc-2000cc-5 (2002).

[114] Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1098 (C.D. Cal. 2003).

[115] *See id.*

[116] *See id.* at 1099.

[117] Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002).

[118] Santoro, *supra* note 71, at 534-35 (citing Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 748 (1998)); *see also* Storzer & Picarello, Jr., *supra* note 2, at 949-52.

[119] *See* City of Boerne v. Flores, 521 U.S. 507 (1997); *see also* Mount Elliot Cemetery Ass'n v. City of Troy, 171 F.3d 398, 400 (6th Cir. 1999); Saint Bartholomew's Church v. City of New York, 914 F.2d 348, 351 (2d Cir. 1990).

beyond merely codifying *Smith* and *Church of Lukumi* to set a new substantive standard. Consequently, by passing a substantive, rather than a remedial regulation, Congress exceeded its Section 5 power.[120]

Also, as was the case with RFRA, the imposition of a least restrictive means requirement "indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations."[121] The least restrictive means-compelling interest test is the hardest constitutional test a law can face and the application of any land use law to a religious institution is subject to challenge at any time. Furthermore, as noted earlier, RLUIPA contains none of the time, manner, or place restrictions, which appropriately limited Congress' intrusions into traditional areas of state responsibility in order to end widespread and pervasive civil rights violations.[122] RLUIPA applies the strictest standard of judicial review to all land use laws, which provide for individualized assessments, regardless of intent or the legitimate state interests that they advance.

Depending on judicial interpretation of "substantial burden" and "individualized assessments," RLUIPA invalidates the application of a huge number of land use regulations to religious institutions, regardless of their intent or effect. Landmark preservation, environmental concerns, traffic, and aesthetic concerns may not rise to the level of a compelling state interest, but they are legitimate, non-discriminatory interests and "the use of the compelling state interest test does unconscionable violence to these goals."[123] While concerns that these interests can be misused as post hoc justification for discriminatory decisions are legitimate, RLUIPA does not even attempt to single out these cases.[124] RLUIPA "is not confined to a specific type of law (or zoning regulation) 'with a long history as a 'notorious means' of effecting unconstitutional discrimination,'" or to a specific geographical region that has historically discriminated against religious institutions.[125] Instead, RLUIPA applies the strictest standard of judicial review to an entire class of laws, regardless of whether there is any evidence of an unconstitutional purpose or effect. By imposing this strict standard Congress lost sight of a basic fact of life. The modern regulatory state imposes substantial burdens on many people and "it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."[126]

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[120] *See Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1099-100.

[121] *Id.* at 1101.

[122] *Id.*

[123] Geller, *supra* note 19, at 586.

[124] *See* Storzer & Picarello, Jr., *supra* note 2, at 949-52.

[125] *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1101.

[126] City of Boerne v. Flores, 521 U.S. 507 (1997); *see also Elsinore Christian Ctr.*, 291 F. Supp.

B. Commerce Clause

RLUIPA contains a severability provision, so that even if the Court were to find the Section 5 provision unconstitutional, the commerce provision may still bring a land use decision under RLUIPA's general rule.[127] Many commentators and judges, however, have focused their energies on either Section 5 in the land use context or on the spending clause in the prison cases.[128] This decision is prompted not only by the focus in *City of Boerne* on Section 5 and the breadth of Congress' power under *Dole*, but also by the complexity of the commerce clause issue in the wake of *Lopez* and *Morrison*. Unfortunately, *Freedom Baptist Church* fails to recognize this complexity and oversimplifies the issues in finding RLUIPA does not violate the commerce clause after minimal analysis.[129] Unlike *Freedom Baptist Church*, *Elsinore Christian Center* only briefly discusses *Lopez* and *Morrison*, never reaching the question of whether land use laws regulate activities that have a substantial effect on interstate commerce.[130] Instead, Judge Wilson held Congress cannot regulate the manner in which the states regulate private conduct.[131] As a result, neither *Freedom Baptist Church* nor *Elsinore Christian Center* answers all of the constitutional questions posed by RLUIPA's commerce prong.

The commerce clause issue is difficult because, prior to *Lopez*, the Court had "overwhelmingly deferred to Congress' judgment regarding which activities fell under its Commerce Clause power".[132] *Lopez* dramatically changed the Court's overall approach to the commerce clause. Following on the heels of *City of Boerne*, *Lopez* served notice that the Court would no longer rubber-stamp Congressional actions.[133] Congress' power is limited and it is the Court's job to ensure Congress does not overstep its bounds. Citing James Madison's "The Federalist No. 45", the Court reaffirmed the importance of both federalism and separation of powers in protecting our fundamental liberties and maintaining the

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2d at 1101.

[127] 42 U.S.C. § 2000cc-3 (2004). It is not clear whether the Supreme Court would essentially allow Congress to ignore *City of Boerne* and its limitations under Section 5 by asserting its commerce power.

[128] *See* Storzer & Picarello, Jr., *supra* note 2, at 987-92 (explaining a detailed analysis of RLUIPA under commerce clause by a pro-RLUIPA commentator). *See also* Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 832, 838-39 (S.D. Ohio 2002) (recognizing complexity of commerce clause question, before disposing of prison case on spending clause grounds).

[129] Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

[130] *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1102-04.

[131] *Id.*

[132] *See* United States v. Lopez, 514 U.S. 549 (1995) (providing history of Court's commerce clause jurisprudence); Evan M. Shapiro, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255, 1270 (2001).

[133] *Lopez*, 514 U.S. at 549.

proper balance of power.[134]

Protecting the powers reserved to the states, *Lopez* limited Congress' commerce power to three broad categories, which were reiterated five years later in *Morrison*.[135] These three categories are: 1) The use of the channels of interstate commerce; 2) The regulation and protection of the instrumentalities of interstate commerce, even if the threat only comes from intrastate activities; and 3) The regulation of activities substantially relating to interstate commerce.[136] *Lopez* and *Morrison* focused on the last category, the aggregation principle, which Congress has in the past used to expand its power into numerous areas originally reserved to the states.[137] Examining the previous cases applying the aggregation principle, Justice Rehnquist found a common theme: in all of the legislative acts upheld under the commerce clause, the regulated activity was economic in nature.[138] While *Lopez* and *Morrison* both dealt with laws attempting to create federal crimes, they stand for a broader economic limitation on the use of the aggregation principle.[139] In determining whether an activity that is economic in nature satisfies the aggregation principle, Justice Rehnquist directed lower courts to examine the legislative findings, the nexus between the activity and interstate commerce, and any jurisdictional element contained in the statute.[140]

Before turning to these three factors, it is important to determine if RLUIPA regulates an economic activity. There is no doubt land use regulations have at least a minimal affect on economic activities. For example construction is affected by imposing limits on building expansion and use. RLUIPA, however, is not a pure land use regulation. RLUIPA regulates federal, state, and local governments' land use decisions that affect religious activity.[141] While land use regulation has a minimal affect on economic activity, land use regulation itself, is not an economic activity.[142] The primary concern of land use regulations is

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[134] *Lopez*, 514 U.S. at 552 (citing THE FEDERALIST NO. 45, at 292-93 (C. Rossiter ed. 1961)); *see also Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).

[135] United States v. Morrison, 529 U.S. 598, 608-09 (2000).

[136] *Id.*

[137] *See* Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[138] *Lopez*, 514 U.S. at 559-60; *Morrison*, 529 U.S. at 610.

[139] Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857, 865-67 (E.D. Pa. 2002). Judge Dalzell in *Freedom Baptist Church* narrowly reads *Lopez* and *Morrison* to only limit *Wickard* when applied to criminal conduct, failing to recognize the category of legislative acts regulating non-economic, non-criminal conduct. *Lopez* can also be read, however, as to prevent the federal government from displacing state laws governing education, which has traditionally been left to the states. *Lopez*, 514 U.S. at 580-83 (Kennedy, J., concurring).

[140] *Lopez*, 514 U.S. at 561-68.

[141] *See* Shapiro, *supra* note 132, at 1282.

[142] *Id.*

not economics, but the promotion of public health and safety and aesthetics.[143] The question is then, if we assume for the moment that the activities regulated by land use law could be regulated directly under the commerce clause, can Congress regulate the manner in which states regulate those activities?

Congress has broad authority to encourage state regulation by offering states the choice to either adopt certain regulations or forego federal funding and face federal preemption.[144] Additionally, the federal government may regulate individuals directly, including regulating states and municipalities, when the local government is acting as an economic actor.[145] Under the Tenth Amendment and general federalism principles, however, the federal government may not conscript state officials for its own benefit by compelling state officials to help enforce federal laws or by compelling the states to enact certain laws or regulations.[146] By allowing the federal government to coerce, but not compel, state governments to take certain actions in their sovereign capacities to regulate their own citizens, *New York* and *Printz* sought to protect the sovereign authority of both the states and the federal government.

Seeking to further define just how far Congress can go to get its way, the Supreme Court upheld a law addressing state disclosure of motor vehicle records because it "'regulated state activities,' rather than 'seeking to control or influence the manner in which States regulate private parties.'"[147] Although RLUIPA does not command states to take specific affirmative actions, it does "seek to control or influence the manner in which States regulate private parties," by placing significant limitations on states' abilities to subject religious institutions to land use laws.[148] Thus, RLUIPA directly violates one of the few limits on the manner in which Congress can regulate under the commerce clause.[149] Therefore, even if we assume land use laws regulate activities, which have a substantial effect on interstate commerce; Congress does not have the power to pass RLUIPA under *New York* and *Printz*.[150]

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[143] *Id.*

[144] *See* New York v. United States, 505 U.S. 144, 166-68 (1992) (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)).

[145] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (upholding application of federal minimum wage and overtime standards to municipally owned transit system).

[146] *See New York*, 505 U.S. at 144 (holding federal government cannot compel states to enact or enforce a regulatory program); Printz v. United States, 521 U.S. 898 (1997) (invalidating a provision of Brady Act commanding state and local officers to conduct background checks on gun buyers).

[147] Reno v. Condon, 528 U.S. 141, 150 (2000), *quoting*, South Carolina v. Baker, 485 U.S. 505, 514-15 (1988). *See also New York*, 505 U.S. at 166 (stating Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce").

[148] *See* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1102-04 (C.D. Cal. 2003).

[149] *Id.*

[150] *See New York*, 505 U.S. at 144; *Printz*, 521 U.S. at 898.

Assuming for the sake of argument that RLUIPA does not violate *New York* and *Printz*, it is necessary to determine if land use laws regulate activities that have a substantial effect on interstate commerce. In *Lopez*, Justice Rehnquist identified three factors to be used in making this determination. These three factors are legislative findings, the nexus between the activity and interstate commerce, and any jurisdictional element contained in the statute.[151] Given the extensive discussion on legislative findings when discussing how RLUIPA is unconstitutional under Section 5, it is not necessary to analyze this factor again. It is only necessary to note *City of Boerne*, *Lopez*, and *Morrison* all deny Congress a general police power in the name of federalism and the enumerated powers.[152] Together these cases stand for a clear proposition: Congress must respect the domain of the states, only infringing on traditional areas of state control where national legislation is truly necessary because the states cannot or will not regulate the activity themselves. The Court will not simply defer to Congress and "pile inference upon inference" in order to find a nexus between the activity and interstate commerce.[153]

The possible economic activities affected by RLUIPA are primarily limits on construction by imposing restraints on acceptable building expansion and other restrictions on land use. Indirectly, these limits may affect decisions by religious institutions regarding whether to sell, purchase, or lease property, but this connection is far too attenuated to be considered a basis for Congress' power under the commerce clause.[154] Therefore, the proper question is whether limits on the use of property are economic in character? It is true that landmark preservation rules prevent construction, which is an economic activity.[155] These rules also promote the maintenance and restoration of historical buildings, which is also an economic activity. Nearly all regulations have an effect on the economy, if only by necessitating the consultation of lawyers to understand the complex rules governing the modern regulatory state. Not all regulations, however, govern activities that are properly considered economic in character.

While Congress may regulate some aspects of the construction industry under the commerce clause, limits on the use of property are too attenuated for Congressional regulation under the commerce clause. Furthermore, even if RLUIPA regulates an economic activity, there must be a nexus between the

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[151] United States v. Lopez, 514 U.S. 549, 561-68 (1995).

[152] *See, e.g., Lopez*, 514 U.S. at 567-68.

[153] *Id.* at 567.

[154] *See* Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857, 866 (E.D. Pa. 2002); *see also* Storzer & Picarello, Jr., *supra* note 2, at 988-90 (arguing that RLUIPA regulates an economic activity because land use laws affect economic value of regulated property).

[155] *Id.*

activity and interstate commerce.[156] With few exceptions, pieces of property are contained in a single state, so their use has limited affect on interstate commerce. Additionally, construction activities generally only involve local workers. And unlike *Wickard*, RLUIPA is not an "essential part of a larger regulation of economic activity."[157] Therefore, RLUIPA must stand on its own. A particular activity cannot fall under the commerce clause provision simply because some building materials may pass over state lines before being sold in the state.[158] A finding that such transactions have a substantial aggregate effect on interstate commerce would be speculative at best, rendering RLUIPA's already questionable jurisdictional element a nullity.[159] Therefore, even if Congress could control or influence the manner in which state and local governments regulate land use, RLUIPA would still violate both the commerce clause and Section 5.

C. Establishment Clause

In his short but firm concurrence in *City of Boerne*, Justice Stevens declared RFRA unconstitutional under the establishment clause because it gives religious organizations and individuals "a federal statutory entitlement to an exemption from a generally applicable, neutral civil law... provid[ing] the [religious] with a legal weapon that no atheist or agnostic can obtain."[160] While no other justice commented on the establishment clause issue and the courts have determined RFRA still applies to the federal government, Stevens' concurrence still resonates among at least some jurists and commentators. Taking Justice Stevens' concurrence in *City of Boerne* to heart, the Sixth Circuit has found RLUIPA's prison provisions unconstitutional under the establishment clause.[161] On the other hand, the Fourth, Seventh, and Ninth Circuits held RLUIPA's prison provisions do not violate the establishment clause[162] and the circuit courts have upheld state and local laws exempting religious organizations from zoning regulations.[163] Justice Stevens and others who have followed his *City of Boerne* concurrence may be in the minority, but they have raised a serious question as to

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[156] *See* Storzer & Picarello, Jr., *supra* note 2, at 990-91 (arguing link to interstate commerce is direct, not attenuated).

[157] Lopez, 514 U.S. at 560-61.

[158] *See* United States v. Morrison, 529 U.S. 598 (2000); *Lopez*, 514 U.S. 549.

[159] *See* Shapiro, *supra* note 132, at 1287-88 (comparing RLUIPA's jurisdictional element with jurisdictional element in United States v. Bass, 404 U.S. 336, 347-51 (1971)).

[160] City of Boerne v. Flores, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring).

[161] Cutter v. Wilkinson, 349 F.3d 257, 259 (6th Cir. 2003).

[162] Madison v. Riter, 355 F.3d 310 (4th Cir. 2003); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1063 (9th Cir. 2002).

[163] *See* Storzer & Picarello, Jr., *supra* note 2, at 995-96.

whether RLUIPA prefers religion over irreligion, violating the establishment clause.

At issue is the meaning of governmental neutrality towards religion. When does an attempt to accommodate religion in furtherance of free exercise and equal protection become an endorsement of religion? While *Smith* held Oregon could refuse to provide an exemption allowing peyote use for religious purposes, the Court also found other states could continue to provide religious exemptions.[164] In *Yoder*, Chief Justice Burger stated that:

> The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses 'we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed.'[165]

These cases admit that there is a gray area between the free exercise and establishment clauses in which the legislature, not the judiciary, can recognize that certain religious exemptions promote religious autonomy, without endorsing religion. This view has been termed substantive, rather than formal neutrality.[166]

Under formal neutrality, the government can never, under any circumstances, use religious classifications to confer a benefit or impose a burden.[167] With an eye towards maximizing both neutrality and religious autonomy, however, substantive neutrality allows greater flexibility, promoting not religion, but the freedom to have religious beliefs whether or not the majority shares those beliefs. An example is the practice of allowing religious objectors to opt out of military combat service, but in exchange requiring them to choose an alternative military service.[168] At least in some cases, legislatures can practice "benevolent neutrality," neither sponsoring, nor interfering with religious practices.[169]

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[164] Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[165] Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (citing Walz v. Tax Commission, 397 U.S. 664, 672 (1970)).

[166] *See* Shawn P. Bailey, *The Establishment Clause and the Religious Land Use and Institutionalized Persons Act of 2000*, 16 REGENT U. L. REV. 53, 59-62 (2004).

[167] *Id.* at 74-76 (outlining flaws of fundamental neutrality).

[168] *See id.* at 61-62.

[169] *See, e.g.*, Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (holding that an exemption to Title VII of Civil Rights Act of 1964 that

These competing views of neutrality have strongly colored courts' analysis of RFRA and RLUIPA under the *Lemon* test.[170] Under *Lemon*, courts examine the actual purpose and the effect of a governmental action, as well as making sure government does not become excessively entangled with religion.[171] Despite the problems with RLUIPA on federalism grounds and the weakness of the legislative record, the modern regulatory state imposes burdens on religious institutions that can reasonably be considered to be higher than those imposed on other citizens due to their unique character. Therefore, it is rational to conclude that RLUIPA's purpose and effect is to remove the most significant of these burdens.[172] Obviously, courts could read RLUIPA to favor religious institutions to the point where government would become excessively entangled with religion, but at least some courts have read RLUIPA more narrowly.[173] If these courts are any indication, RLUIPA's purpose and effect can at least rationally be considered to simply treat religious institutions in a neutral manner, allowing them greater autonomy from government restrictions on land use. Therefore, RLUIPA does not violate the establishment clause.

CONCLUSION

Passed with the same basic goals, RLUIPA suffers from the same constitutional infirmities as RFRA. Even if the legislative record was strong enough to show a clear need for federal action to prevent unconstitutional land use decisions, RLUIPA goes far beyond anything reasonably considered necessary to remedy constitutional violations of free exercise in the land use arena. The land use provisions also cannot be supported under the commerce clause, since they are an attempt by Congress to regulate the manner in which states and municipalities regulate their citizens. Therefore, RLUIPA is unconstitutional under both Section 5 of the Fourteenth Amendment and the commerce clause.

In response, proponents of RLUIPA have asserted that minority and ethnic religions are over-represented in religious land use decisions, indicating possible discrimination.[174] Regardless of whether this over-representation results from

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allows religious employers to discriminate on religious grounds does not violate establishment clause).

[170] Lemon v. Kurtzman, 403 U.S. 602 (1971), *modified by,* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[171] *Lemon*, 403 U.S. at 602.

[172] *See* Bailey, *supra* note 166, at 84.

[173] *See* San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003); Dilaura v. Ann Arbor Charter Tp., 30 Fed. Appx. 501 (6th Cir. 2002).

[174] *See* Houseal, *supra* note 94, at 32.

discrimination, these statistics and examples of questionable land use decisions involving minority or ethnic religions do not support broad legislation targeted at land use decisions involving all religious practices. At most, it is a reason for Congress to consider specific, limited legislation focusing on ensuring that all religious organizations are treated equally, rather than giving religious organizations an across the board preference. In tailoring any such legislation, the diversity of state land use law must be taken into account. Not only do different communities have different religious and ethnic make-ups, but also some states already have specific legislation lessening the burdens on religious organizations as a result of land use regulation.[175] Therefore, if federal legislation is appropriate at all, it must be extremely narrowly tailored, respecting the province of the states and directed at a specific recent pattern of religious discrimination, not mere anecdotes.

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[175] *See* Hamilton, *supra* note 54, at 337-38; Geller, *supra* note 19, at 578.