

THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000: AN UNCONSTITUTIONAL EXERCISE OF CONGRESS'S POWER UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

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INTRODUCTION

In 2000, President Clinton signed into law the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹ RLUIPA addresses land use conflicts between religious organizations and local zoning authorities, mandating that such conflicts be decided in favor of the religious organization unless the governmental interest in the matter is compelling and the government's approach is the least restrictive means of securing that interest.² Cases challenging RLUIPA's constitutionality are starting to percolate through the federal courts.³

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1. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc-5 (2002).

2. RLUIPA also addresses the religious liberty of institutionalized persons, but my analysis will focus exclusively on the land use provisions.

3. See, e.g., C.L.U.B., et al., v. City of Chicago, No. 01-4030 (7th Cir. argued Jan. 17, 2003), available at <http://www.rluipa.com/cases/CLUB.html> (on file with the *New York University Journal of Legislation and Public Policy*); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). See also Julia Lieblich, *Churches Challenge City on Zoning Law; Group Says City's Special Use Permit Violates Statute*, CHI. TRIB., Jan. 18, 2003, Metro, at 16 (reporting on RLUIPA and C.L.U.B. case). See generally www.rluipa.com (containing information about current RLUIPA litigation and maintained by Becket Fund for Religious Liberty, public inter-

I argue that although RLUIPA addresses a serious problem of discrimination against religious institutions in land use controversies, it is nevertheless normatively unjustifiable and constitutionally infirm. The Act is normatively unjustifiable because it is based on an unacceptable theory of the free exercise of religion. This conception favors the interests of religiously motivated actors over the interests of their secular counterparts, instead of protecting religious believers who may be vulnerable to discrimination. In addition, RLUIPA is constitutionally infirm because it is an instance of Congress acting at odds with the Supreme Court on a matter of constitutional interpretation. In enacting RLUIPA, Congress exceeded its authority under Section 5 of the Fourteenth Amendment, because RLUIPA redefines constitutional rights.⁴ To understand this two-sided problem, we must examine two distinct but related areas: substantive free exercise of religion jurisprudence and constitutional theory. In Part I, I provide a background on the Supreme Court's jurisprudence on free exercise and Section 5 preceding RLUIPA. In Part II, I explain RLUIPA's land use provisions and argue that RLUIPA is unjustifiable on two fronts: it is informed by an unacceptable theory of free exercise of religion, and it is based on a conception of free exercise that conflicts with the Supreme Court's interpretation of that constitutional principle.

PART I: BACKGROUND ON FREE EXERCISE JURISPRUDENCE

The particular religious land-use conflicts addressed by RLUIPA are a subset of a larger class of issues in religious freedom: religion-

est law firm that litigates cases involving application of zoning laws to religious groups).

4. Other commentators have criticized RLUIPA's land use provisions as unconstitutional under Section 5 of the Fourteenth Amendment, as well as under the Commerce Clause, the Establishment Clause, the Separation of Powers doctrine, and the Tenth Amendment. See, e.g., Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 *FORDHAM L. REV.* 2361 (2002) (discussing Section 5 of Fourteenth Amendment); Frank T. Santoro, *Section 5 of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 *WHITTIER L. REV.* 493 (2002); Evan M. Shapiro, Comment, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 *WASH. L. REV.* 1255 (2001); Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 *WM. & MARY BILL RTS. J.* 189 (2001) (examining Establishment Clause, Commerce Clause, Separation of Powers, and Tenth Amendment); Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 *U. HAW. L. REV.* 479 (2001) (examining Separation of Powers and Tenth Amendment).

based exemptions. When the free exercise of religion, guaranteed in the First Amendment, precludes conformity with society's laws, should the religiously-motivated actor be exempt from a law that conflicts with her religious sensibilities? Professor Perry Dane writes:

The profound and difficult problem in free exercise law is religion-based exemptions. Most constitutional civil liberties protections definably limit either what government can do, or how it can do it. The gravamen of a usual constitutional challenge is that there is something objectively wrong with a statute or policy. It is stifling speech, or invading privacy, or denying due process, or making forbidden distinctions. Emblematic claims to religion-based exemptions do something different. They seek relief from a government action that is not defective itself, but happens to conflict with the religious obligations of the claimant.⁵

In the case of RLUIPA, the thorny problems of religion-based exemptions are further complicated by a Daedalian question of constitutional theory: how should the Supreme Court and Congress work together to define and enforce the Constitution's guarantees, including the right to free exercise of religion? Before understanding how these issues in free exercise and constitutional theory bear on RLUIPA, we must travel through their contemporary history.

A. *The Sherbert Quartet: Strict Scrutiny for Laws that Burden Free Exercise*

The contemporary history of the Court's free exercise jurisprudence begins with *Sherbert v. Verner*.⁶ The plaintiff in *Sherbert* was a Seventh Day Adventist who, according to the precepts of her denomination, observed Sabbath on Saturdays. As a result, she lost her job.⁷ She applied for unemployment insurance, and the state denied it on the grounds that she had not maintained employment that was available to her, but instead had rejected such employment without good cause.⁸ The Supreme Court held that this refusal violated the Free Exercise Clause of the Constitution. The Court held that, whenever the government forces a religiously motivated person to choose between conforming to the dictates of her religion or suffering the loss of a benefit or the imposition of a burden, it substantially burdens an individual's free exercise of religion, and its act is unconstitutional

5. Perry Dane, *Constitutional Law and Religion*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 117 (Dennis Patterson ed., 1999).

6. 374 U.S. 398 (1963).

7. *Id.* at 399.

8. *Id.* at 401.

unless justified by a compelling state interest.⁹ In the absence of a compelling interest, the state must depart from neutrality to accommodate religious preferences.

The standard used by the *Sherbert* Court is known as strict scrutiny, one of the so-called ‘tiers of scrutiny’ used in equal protection jurisprudence. The least restrictive tier is known as rational basis. In order to pass constitutional muster on this standard, a challenged statutory or regulatory classification of persons must have a rational basis in fact and stand in a rational relationship to a legitimate government interest.¹⁰ Not only is the rational basis test by its terms permissive, it is almost always applied so permissively that its application finds the law valid.¹¹ Strict scrutiny, in contrast, demands that the challenged law be necessary to the achievement of a compelling state interest. The necessity element imposes a high bar, providing that there must be no other plausible way of achieving the interest.¹² These tiers of scrutiny are used when laws are challenged under the Equal Protection Clause. When legislation uses an express racial classification and targets a protected class, the strict scrutiny test is applied. In contrast, laws that are facially neutral and do not pick out protected groups for disparate treatment are judged on the rational basis standard.¹³

The criticism of the tiers of scrutiny is that while they purport to be tests, they actually predetermine results. The compelling state interest test in its native environment (equal protection cases) and its normal domain of application (express racial classifications) is as ruthless as the rational relationship test is permissive; there are very few instances where the compelling state interest test has been applied and the law has been upheld.¹⁴ But the tiers have operated differently in the free exercise domain. Use of the compelling state interest test in free exercise cases like *Sherbert* would create a remarkable and unat-

9. *Id.* at 402–03.

10. *See generally* Charlton v. Kimata, 815 P.2d 946 (Colo. 1991) (explaining and applying rational basis test).

11. *But see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (striking down ordinance as violating Equal Protection Clause under rational basis review).

12. Hill v. Colorado, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting) (quoting Ward v. Rock Against Racism, 481 U.S. 781, 799 (1989)).

13. There is a third test in the tiers of scrutiny analysis—intermediate scrutiny—which applies to laws which discriminate on the basis of gender. Under this test, the challenged law must bear a substantial relationship to an important governmental interest. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

14. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny to evaluate constitutionality of imposition of curfew on all persons of Japanese ancestry living on west coast, and infamously upholding curfew). For further discussion of *Korematsu*, see *infra* note 117.

tractive state of affairs: every time a law conflicted with a religious belief, the religious person would be free to disobey the law. Such a regime—where religious persons create legal microcosms for themselves, insulated from the law of the land—smacks of unfairness. As the Court itself has held, “to permit [such a system] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”¹⁵

But this bizarre situation never came about. The *Sherbert* compelling state interest standard was laid down in 1963 and remained the nominal law until 1990. But for these twenty-seven years, religiously motivated claimants almost always lost.¹⁶ Either the courts found a special ground why the challenged law was not the kind of law to which the rule applied, or else they found the compelling state interest test was satisfied.¹⁷ This is a notable anomaly in the application of strict scrutiny, as this test was characterized by one scholar in the racial context as “‘strict’ in theory and fatal in fact.”¹⁸ But in the free exercise context, it was “strict in theory, but ever-so-gentle in fact”¹⁹

Only two types of religious exemption claims prevailed at the Supreme Court level. One set encompasses *Sherbert* and three other unemployment cases (the *Sherbert* Quartet).²⁰ The other was at issue in *Wisconsin v. Yoder*,²¹ where the Supreme Court held that the Amish are entitled, because of their religious commitments, to remove

15. *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879).

16. A study of free exercise cases from 1980 to 1990 concluded that free exercise claimants lost 85 of the 97 such cases decided by appeals courts during that period. See James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416–17 (1992); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 10–12 (1994) (discussing cases).

17. See *Smith*, 494 U.S. at 883 (“We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.”) (citations omitted).

18. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

19. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992). And see Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 801 (1998) (noting that “the pre-*Smith* law of free exercise had not been very favorable to religion”).

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. 406 U.S. 205 (1972).

their children from the state school program at the age of fourteen, even though Wisconsin mandates schooling until the age of sixteen. But excepting *Wisconsin v. Yoder*, the *Sherbert* standard is the rule only for unemployment discrimination cases.²² So the standard strict scrutiny test certainly was not applied across the board. The exceptions—where the Court refused to strike down laws burdening religious exercise—swallowed up the nominal rule of strict scrutiny.

B. Employment Division v. Smith

In 1990, the Court's free exercise doctrine appeared to take a dramatic turn in *Employment Division v. Smith*.²³ The *Smith* Court held that Oregon could deny unemployment benefits to an employee fired for using a prohibited substance, even though the substance was used for religious purposes. In deciding that members of the Native American church are not constitutionally entitled to an exemption to the law prohibiting the ingestion of peyote, the *Smith* Court announced the doctrine that accommodation for religious believers is not appropriate if the law and its application are neutral.²⁴ Renouncing the *Sherbert* test as the rule in religious exemption cases, the *Smith* Court wrote that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"²⁵

It is important to note that the *Smith* decision did not totally abandon the compelling state interest test from the *Sherbert* rule. The strict scrutiny standard still may apply in four instances. First, the test applies in cases where a law is facially non-neutral (i.e., a law prohibits "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."²⁶ Next, even if a law is facially neutral, it is subject to strict scrutiny if it has the purpose of burdening religious practice. Third, strict scrutiny applies if the law is not generally applicable because it fails to regulate secular conduct that implicated the same government interests as the

22. For further discussion of the *Sherbert* line, see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1246–47, 1277–82 (1994).

23. 494 U.S. 872 (1990).

24. *Id.* at 877–80.

25. *Id.* at 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

26. *Id.* at 877.

prohibited religious conduct.²⁷ Finally, and most importantly for the present analysis of RLUIPA, the Court held that the *Sherbert* strict scrutiny standard, if it applies anywhere, may apply only in cases of individualized assessments.²⁸ This is important for analysis of RLUIPA because a zoning board's decision on a religious organization's land use request constitutes an individualized assessment within the meaning of *Smith*.²⁹

There are two elements of doctrine we must understand from *Smith*. The first applies in cases where the government is making an individualized assessment of conduct. Justice Scalia uses individualized assessments to distinguish *Sherbert*'s facts from the *Smith* case. In *Smith*, there were no individualized assessments as there were in *Sherbert*, where the plaintiff came before a review board. Scalia intimates that *Sherbert* might be bad law, but if it is to apply at all, courts should use it only in cases of individualized assessment. But Scalia does not say that the *Sherbert* strict scrutiny test must be used in such cases. *Smith* is much more limited than that; it holds merely that if the Court were to extend *Sherbert* beyond the narrow category of unemployment benefit cases, it should do so only in cases involving regimes of individualized assessments.³⁰

The second thread deals with individualized exemptions themselves. *Smith* dictates that, under a regime of individualized exemptions, it would be unconstitutional for the state to refuse categorically to accept religious reasons as sufficient grounds for an exemption. That is, if a system is in place where claimants can come and show hardship under a certain rule to receive an exemption, but the tribunal refuses to consider claims based on religious reasons, that is unacceptable:

27. *Id.* The Court faced this issue and reaffirmed its *Smith* decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court struck down a city ordinance prohibiting animal slaughter because the law only prohibited a church's animal sacrifices, while not regulating other secular conduct having the same effects, such as butchering. As the law was not properly viewed as a neutral, generally applicable law, the ordinance was struck down pursuant to the strict scrutiny standard. See Eisgruber & Sager, *supra* note 22, at 1284 (describing *Hialeah*).

28. See *Smith*, 494 U.S. at 884.

29. See Shawn Jensvold, Note, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 *BYU J. PUB. L.* 1, 13 (2001). For a full discussion of zoning laws and individualized assessments, see *id.* at 7–18.

30. *Smith*, 494 U.S. at 884 (“Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, [we would apply it only] in a context that lent itself to individual governmental assessment of the reasons for the relevant conduct.”).

[A] state would be 'prohibiting the free exercise [of religion]' if it sought to ban . . . acts or abstentions only when they are engaged in for religious reasons . . . [W]here 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.³¹

Although many observers viewed the *Smith* decision as a radical shift in doctrine,³² Professors Christopher L. Eisgruber and Lawrence G. Sager argue that *Smith* was a mere formal announcement of the doctrine that the Court had actually been applying all along. That is, while the *Sherbert* test was nominally the rule, the Court refused to apply it except in a small group of cases: the *Sherbert* Quartet and *Yoder*.³³ Eisgruber and Sager explain the common thread running between the *Sherbert* Quartet and *Smith* as a normative concept of religious freedom they call "equal regard." In their words: "Equal regard requires simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."³⁴ On a theory of equal regard, the free exercise of religion is understood as protecting religiously motivated conduct, not privileging it.³⁵ Eisgruber and Sager provide the following helpful example to illustrate the difference between protection and privileging: privilege is best exemplified in free speech jurisprudence, where speech is valued highly and is given priority over other concerns because of its inherent value. In contrast, we can understand protection by looking at the constitutional status of African-Americans, who are vulnerable to various harms and are afforded heightened protection by the Constitution in order to guarantee their equal status. Eisgruber and Sager argue that the special status afforded to religious practice by the Constitution is properly understood as protection, not privilege.³⁶ Equal regard can explain a proper application of *Smith*'s individualized assessments exception as well: in order to ensure fair and equal treatment for religiously motivated actors in contexts where decisionmakers act with discretion,

31. *Id.* at 877, 884 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

32. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (noting significant shift Court has taken on Free Exercise Clause).

33. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 445–48 (1994); see also Eisgruber & Sager, *supra* note 22, at 1246–47, 1273–82 (noting limited scope of *Sherbet* test application).

34. Eisgruber & Sager, *supra* note 22, at 1283 (italics omitted).

35. *Id.* at 1250–54.

36. *Id.* at 1281–82.

making discrimination difficult to detect, heightened review may be required.³⁷

I do not offer a full argument for understanding religious freedom as protection, not privilege.³⁸ Rather, I assume for the purposes of my argument that the normative underpinning of the Free Exercise Clause is equal regard, not privilege, and I build on this presumption to flesh out an argument against RLUIPA as a proper tool to codify religious freedom in land use.

C. *The Religious Freedom Restoration Act*

In 1993, Congress responded to pressure from *Smith*'s critics and passed the Religious Freedom Restoration Act (RFRA).³⁹ RFRA was an attempt by Congress to overrule the Court's decision in *Smith* and restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.⁴⁰ RFRA provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."⁴¹

Following Justice Scalia for the *Smith* Court and Eisgruber and Sager, RFRA was not really a "restoration" of *Sherbert* strict scrutiny, because that standard was not the rule in practice, except in the *Sherbert* Quartet and *Yoder*.⁴² But whether RFRA restored the *Smith* standard or announced a new standard, it is clear that it was categorically at odds with the Court's clear pronouncement in *Smith* that religiously

37. However, this does not mean that the mere circumstances of individualized assessment should guarantee a finding for the religiously motivated actor. This would be an unjustifiable privileging, not an acceptable prophylaxis—I argue below that such privileging is at issue in the case of RLUIPA.

38. Professors Eisgruber and Sager provide such an argument. See Eisgruber & Sager, *supra* note 22; Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty after City of Boerne v. Flores*, 1997 SUP. CT. REV. 79.

39. 42 U.S.C. §§ 2000bb–2000bb-4 (1994).

40. See *Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.R. 5377*, 101st Cong. 2, 8, 9, 11, 22, 29, 31–32, 35, 38, 41, 48, 49, 51, 61 (1990); S. REP. NO. 103-111, at 2 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893. See also *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) ("Congress enacted RFRA in direct response to the Court's decision in [*Smith*].").

41. 42 U.S.C. § 2000bb-1(a)–(b).

42. See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990). See also Eisgruber & Sager, *supra* note 33, at 445–48; Eisgruber & Sager, *supra* note 22, at 1246–47, 1273–82.

motivated actors are not free to disobey laws which burden their religiously-motivated action. RFRA's compelling state interest test is based on a privileging view of religious exercise. It gives religious believers special benefits to avoid conformity to generally applicable laws, even when the purpose of those laws is not to discriminate against religious believers. RFRA was a clear and explicit rejection of the *Smith* Court's understanding of the Free Exercise Clause.

D. *Boerne & Constitutional Theory*

Almost immediately after Congress passed RFRA, the Supreme Court invalidated it in the 1997 case of *City of Boerne v Flores*.⁴³ *Boerne* involved a Catholic church in a historically designated zone in Boerne, Texas. The church sought a permit to demolish the existing building in order to build a larger structure. The city denied the church permission on the grounds that the proposed changes were inconsistent with the historical zoning regulations. The church brought a challenge under RFRA, claiming that the zoning law imposed a substantial burden on its free exercise of religion and was not justified by a compelling state interest.⁴⁴

The *Boerne* Court defined the respective roles of Congress and the Court in interpreting and giving effect to the Constitution, striking down RFRA as a product of unacceptable Congressional interpretation of substantive constitutional law.⁴⁵ The Court explained that it is the Supreme Court's role to define the substance of the Constitution—in this case, the Free Exercise clause of the First Amendment, made applicable to the States via incorporation by the Fourteenth Amendment.⁴⁶

Of course, Congress has an important role to play in the realization of the Constitution's guarantees, and one tool at its disposal is Section 5 of the Fourteenth Amendment. Section 5 gives Congress the legislative power to effectuate the guarantees of the Fourteenth Amendment (and therefore the First Amendment).⁴⁷ *Boerne*, quoting

43. 521 U.S. 507 (1997).

44. *Id.* at 511–12.

45. *Id.* at 516–36.

46. *Id.* at 536.

47. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Katzenbach v. Morgan, declares that “it is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.”⁴⁸ One might conclude from this statement that the *Boerne* Court is giving Congress great latitude to enact Section 5 legislation, but in fact, the Court is not so permissive: “Congress’s discretion is not unlimited, however, and the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution.”⁴⁹

What are the limits of Congress’s authority and how is the Court to determine whether those limits have been exceeded? According to *Boerne*:

Congress’ power under § 5 . . . extends only to “enforc[ing]” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial.” The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of [a substantive provision of the Fourteenth Amendment] cannot be said to be enforcing [that provision]. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation.⁵⁰

Boerne posits a distinction between remedial and substantive Section 5 legislation, and declares that only the former is constitutionally permissible.⁵¹ The *Boerne* Court proposed the following test to determine whether a congressional enactment is constitutional under Section 5: “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”⁵² The *Boerne* Court states emphatically that Congress has remedial but not substantive power.⁵³

U.S. CONST. amend. XIV, § 1; *see also id.* § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

48. *Boerne*, 521 U.S. at 536 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

49. *Boerne*, 521 U.S. at 536.

50. *Id.* at 519 (citation omitted).

51. *Id.* at 519–20.

52. *Id.* at 520.

53. *Id.* It is argued that this limiting of Congress’s Section 5 power might hurt Congress’s ability to effectuate constitutional norms outside the province of the judiciary. *See* Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441 (2000);

The Supreme Court used the *Boerne* case as an occasion to declare RFRA unconstitutional as it exceeded the scope of Congress's authority under Section 5 of the Fourteenth Amendment. That is, RFRA fails the congruence and proportionality test because it actually attempts a substantive change in constitutional protections. According to the *Boerne* Court, Section 5 only allows Congress to enact remedial and preventative legislation which will correct state laws that violate the substantive provisions of Section 1 of the Fourteenth Amendment.⁵⁴ *Boerne* makes it clear that free exercise is to be judged according to the standard the Court laid down in *Smith*, and only congressional action in line with that standard will pass the Court's scrutiny. The Court determines whether an act of Congress is proportional in this fashion by examining the evidence on which Congress relied in determining that a violation of the constitutional standard is occurring.⁵⁵

Reacting to the *Boerne* decision, Professors Eisgruber and Sager wrote:

[N]othing in [*Boerne*] should prevent . . . Congress . . . from enacting more nuanced protections for religious commitments. Those protections might include laws designed to alleviate disparate impact discrimination, and specific prophylactic rules designed to prevent discrimination not easily detected and proven. The Court's opinion in [*Boerne*] is quite clear that, from the standpoint of Congress's Section 5 authority, either of these alternatives would survive the objections that proved fatal to RFRA.⁵⁶

The Court subsequently elaborated and refined the doctrine announced in *Boerne*.⁵⁷ The *Boerne* Court insists that Section 5 legisla-

See also Linda Greenhouse, *In Family Leave Case, Supreme Court Steps Back Into Federalism Debate*, N.Y. TIMES, Jan. 12, 2003, at A23. Discussing a current case before the Supreme Court, *Nev. Dep't of Human Resources v. Hibbs*, No. 01-1368 (U.S. argued Jan. 15, 2003), Greenhouse writes that the question in this case is whether "the court will put a stranglehold on the ability of Congress to pursue its own constitutional vision." Evaluation of this concern, however, is beyond the scope of my argument; I accept the Court's Section 5 standards as dictated in *Boerne* and subsequent cases and analyze how RLUIPA measures up to those standards.

54. *Boerne*, 521 U.S. at 519-27.

55. *See id.* at 530-31 (comparing RFRA and Voting Rights Act to illustrate importance of evidentiary record of constitutional violations in enacting Section 5 legislation).

56. Eisgruber & Sager, *supra* note 38, at 134.

57. *See* *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Fla. Prepaid Post Secondary Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645-46 (1999). *See also* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999) (tracing lineage of *City of Boerne*).

tion be congruent and proportional to a target that the Court has defined; that is, Congress must aim at remedying a situation that is unconstitutional when judged by the standard of what the Court has previously declared unconstitutional.⁵⁸

*Kimel v. Florida Board of Regents*⁵⁹ was the first case to apply the *Boerne* “congruence and proportionality” test to determine whether a Congressional action under Section 5 is constitutional. The Court held that Congress’s legislation must be narrowly tailored to reach an end that is specifically called for by the Court’s Fourteenth Amendment jurisprudence. In *Kimel*, the Court found that the Age Discrimination in Employment Act (ADEA) was not appropriate legislation under Section 5 because it granted rather than enforced constitutional protections.⁶⁰ The ADEA proposed strict regulation of age discrimination, while the accepted judicial doctrine of review of age-based classification called for more lenient rational basis review. In enacting the ADEA, Congress called for a different, more stringent standard than the Court had previously mandated under the Fourteenth Amendment. Applying the *Boerne* “congruence and proportionality” test, the *Kimel* Court answered in the affirmative its own question of whether the ADEA was not an “appropriate remedy,” but “merely an attempt to substantively redefine the States’ legal obligations with respect to age discrimination.”⁶¹

The *Kimel* Court does allow for potential wiggle room for Congress to use its institutional fact-finding capacity to interpret the Court’s Fourteenth Amendment doctrine. One of the ways that the Court has differentiated between a statute that serves as an appropriate remedy and one that substantively redefines the State’s legal obligations is by looking for Congress’s rationale for action in the legislative record.⁶² This indicates that, had Congress made findings to show

58. In subsequent Section 5 cases, the Court has declined to adopt the *Boerne* test so as to allow Congress some latitude to interpret the Court’s Fourteenth Amendment jurisprudence and decide what legislative action is necessary. See *infra* note 84. Commentators argue that the Court should grant Congress more authority to interpret the Court’s doctrine and enact remedial legislation. See Post & Siegel, *supra* note 53, at 444–46; See also Lawrence G. Sager, *Panel One Commentary: Free Exercise After Smith and Boerne*, 57 N.Y.U. ANN. SURV. AM. L. 9, 13 (2000) (arguing that Congress should have some “authority to augment the Court’s understanding of the underlying substance of constitutional rights,” and that the restrictive view “needlessly sacrifices the capacity of Congress to act as the Court’s partner in identifying the elements of freedom and equality that compose a just society”). While a more permissive test may be preferable, the Court has decisively chosen a stringent standard.

59. 528 U.S. 62 (2000).

60. *Id.* at 88–91.

61. *Id.*

62. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 530–31 (1997).

that the age discrimination at issue amounted to a constitutional violation under the Court's doctrine, the ADEA would be aimed at a target that the Court had identified and the legislation would be acceptable. But in this case, the Court found that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation."⁶³ The Court further found that "[a] review of the ADEA's legislative record . . . reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."⁶⁴ That failure "confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field."⁶⁵

On the *Kimel* theory of how the Court and Congress work to implement the Fourteenth Amendment's guarantees, the judiciary identifies a target that Congressional legislation is to aim at by narrowly interpreting the Court's substantive constitutional doctrine, *viz.* the state of affairs that the Court takes to be mandated by the Constitution. Acceptable Congressional legislation must be congruent and proportional to this judicially identified target.⁶⁶

The Court has further entrenched this rigid view of congressional Section 5 authority in *Board of Trustees of the University of Alabama v. Garrett*.⁶⁷ *Garrett*—holding that an individual may not sue a state under the Americans with Disabilities Act (ADA) of 1990—reinforced *Kimel* in stating that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."⁶⁸

In *Boerne*, *Kimel*, and *Garrett*, the Court has announced that Congress must aim narrowly—if not *exactly*—at the Court's substantive standards to use its Section 5 power. The congruence and proportionality standard tests whether Congress's aim is true: does the harm that the legislation is intended to prevent rise to constitutional magnitude? And is the legislation so out of proportion to the supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior? The legislation must be reaching for what the Court would recognize as a mandated state of affairs. This tests whether it reasonably can be understood to have an instrumental relationship to what the Court would acknowl-

63. *Kimel*, 528 U.S. at 89.

64. *Id.* at 91.

65. *Id.*

66. *Id.* at 80–91.

67. 531 U.S. 356 (2001).

68. *Id.* at 365.

edge to be a constitutional requirement. A helpful way to understand Congress's power at this margin is to distinguish between cases where Congress is acting as the Court's partner, and those where Congress is acting as the Court's adversary.⁶⁹

PART II: RLUIPA

The Religious Land Use and Institutionalized Persons Act was passed by Congress on July 27, 2000, and was formally sent to the White House in mid-September of that year. It was signed by President Clinton on September 22, 2000. The six years between the *Boerne* decision and the enactment of RLUIPA saw efforts by proponents of a *Sherbert* strict-scrutiny conception of free exercise to gain back some ground. To this end, two laws were proposed: the Religious Liberty Protection Act of 1998 (RLPA of 1998)⁷⁰ and the Religious Liberty Protection Act of 1999 (RLPA of 1999).⁷¹ These provisions failed to become law, largely due to objections from individuals sensitive to the concerns of the civil rights community that RLPA would give religiously-motivated discriminators the power to avoid the grasp of anti-discrimination legislation, undoing much of the progress made by Title VII.⁷² However, the legislative history and arguments behind the two bills would be used successfully in support of RLUIPA.

69. See Lawrence G. Sager, *Congress as Partner/Congress as Adversary*, 22 HARV. J.L. & PUB. POL'Y 85 (1998).

70. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998).

71. Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999). For an analysis of RLPA and its reliance on the Spending Power, see Brett D. Proctor, Note, *Using the Spending Power to Circumvent City of Boerne v. Flores: Why the Court Should Require Constitutional Consistency in its Unconstitutional Conditions Analysis*, 75 N.Y.U. L. REV. 469 (2000).

72. See H.R. REP. NO. 106-219, at 41 (1999) (Rep. Howard L. Berman et al., dissenting).

We are . . . concerned that this legislation, as drafted, would not simply act as a shield to protect religious liberty, but could also be used by some as a sword to attack the rights of many Americans; including unmarried couples, single parents, lesbians, and gays. We find deeply disturbing the prospect that legislation drafted to restore fundamental rights might have the unintended consequence of stripping large numbers of Americans of newly-won rights to seek and retain employment, a place to live and their just and equal place in society—rights that have for too long been denied to too many.

Id. See also AM. CIVIL LIBERTIES UNION, EFFECT OF THE RELIGIOUS LIBERTY PROTECTION ACT OF 1998 ON STATE AND LOCAL CIVIL RIGHTS LAWS, at <http://archive.aclu.org/congress/1012599a.html> (Jan. 25, 1999) (concerning the consequences of the Act on civil Rights laws) (on file with the *New York University Journal of Legislation and Public Policy*).

Under RLUIPA, the government may not substantially burden the exercise of religion by regulating land use unless it demonstrates that the imposition of the burden serves a compelling state interest and is the least restrictive means of furthering that interest.⁷³ Furthermore, RLUIPA prohibits the state from implementing land use regulations that discriminate against religious organizations by treating them on less than equal terms with a nonreligious assembly,⁷⁴ or by totally excluding⁷⁵ or unreasonably limiting them from a jurisdiction.⁷⁶

RLUIPA focuses RFRA's compelling state interest test on a narrow subset of religion-based exemptions: cases arising from land use regulation applied to religious land users. In RFRA's short life, many zoning cases arose under the act.⁷⁷ The religious land use issues which arose in those cases provided a perfect vehicle for *Sherbert* supporters to rehabilitate the compelling state interest standard by reforming RFRA into a more limited, politically acceptable law.⁷⁸ In order to stay within the category of free exercise of religion, while still limiting its domain to land use, RLUIPA carefully defines religious exercise as including any land use connected to religion: "The 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."⁷⁹ This focus on religious land use is supported by arguments that religious land use is a crucial element in religious exercise, and it is impossible to separate a religious community's land use activities from its "true religious activities."⁸⁰ Obviously, RLUIPA's "substantial burden"

73. 42 U.S.C. § 2000cc (a)(1) (2000) ("Substantial Burdens" provision).

74. *Id.* (b)(1) ("Equal Terms" provision).

75. *Id.* (b)(3)(A) ("Exclusions and Limits" provision).

76. *Id.* (b)(3)(B).

77. See Eisgruber & Sager, *supra* note 38, at 107 ("Zoning cases were a boom industry during RFRA's brief career on the federal statute books; indeed, aside from prisoner's rights cases, they were probably the largest source of RFRA claims."); *id.* at 103 n.82 ("RFRA's impact appeared especially great in prison and zoning cases . . .").

78. See Sager, *supra* note 58, at 15 ("The proponents of RFRA have been relentless in their effort to gain back some of the ground lost when the Supreme Court invalidated that measure. Land use offered a domain where the reinstatement of RFRA was politically acceptable.").

79. 42 U.S.C. § 2000cc-5(7)(B).

80. See Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("[T]he 'exercise of religion' often involves . . . assembling with others for a worship service . . ."). See also Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 756 (1999) ("In every major religious tradition—Christian, Jewish, Buddhist, Hindu, whatever—communities of believers assemble together, at least for shared rituals and usually for other activities as well. Churches cannot function without a physical space; creation of a church building is a

and “compelling governmental interest” standard are similar to RFRA’s content. How do RLUIPA supporters expect RLUIPA to pass constitutional muster under *Boerne* when RFRA failed?

The argument purporting to justify RLUIPA’s constitutionality under Section 5 authority is as follows:

- (1) In *Smith*, the Court intimated that courts might apply *Sherbert* strict scrutiny in individualized assessment cases, and that “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.”⁸¹
- (2) Congress produced evidence purporting to show the violation of this standard, namely, zoning authorities denying land use variances to religious institutions on account of their religion.
- (3) Under *Boerne*, Section 5 empowers Congress to enact RLUIPA to remedy a purported violation of the Court’s *Smith* standard.

In *Boerne*, the Court said that Section 5 legislation may only be enacted for the purposes of remedying an unconstitutional state of affairs—unconstitutional when measured by the substantive standard set out by the Court.⁸² The Court will judge whether a Congressional act is properly remedial by asking whether it is congruent and proportional to the end the Court has set out.⁸³ That is, under Section 5 of the Fourteenth Amendment, Congress may not act to regulate the states—in this case, the states’ regulation of land use—unless there is proof that the states have engaged in “widespread and persisting” constitutional violations and that the Congressional action is “congruent and proportional” to those violations.⁸⁴

core First Amendment right.”). Some instances, however, stretch the boundaries of what might reasonably be called religiously-motivated behavior. For example, in *Rector, Wardens, and Members of Vestry of St. Bartholomew’s Church v. City of New York*, the Church wanted to replace a building it owned with an office tower, in violation of local landmark laws. The Second Circuit held that the City’s refusal did not amount to a substantial burden on the Church’s free exercise rights, because using property to build an office tower cannot be construed as religiously-motivated conduct. 914 F.2d 348, 351, 354–55 (2d Cir. 1990).

81. *Smith*, 494 U.S. at 884 (citation omitted).

82. *See Boerne*, 521 U.S. at 532.

83. *Id.* at 530 (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.” (citation omitted)).

84. *See Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *Fla. PrePaid Post Secondary Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645 (1999); *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Boerne*, 521 U.S. at 519–20, 533–34.

Because *Boerne* held that Congress must provide evidence to prove violations of an existing constitutional standard defined by the Court,⁸⁵ the proponents of RLUIPA set out to assemble a record of history that would prove the existence of constitutional violations. To this end, the United States House Judiciary Committee held hearings to investigate the concerns that the free exercise rights of religious land users were unconstitutionally violated.⁸⁶ In these hearings, evidence was gathered of government land use regulations substantially burdening religious exercise, indicating a pattern of discrimination by land use authorities against religious organizations.

This evidence gathered in support of RLPA was bolstered by evidence introduced by Representative Henry J. Hyde (R-Ill.). Hyde's evidence, prepared by the Christian Legal Society, described zoning conflicts between cities and religious organizations around the country.⁸⁷ These instances include disputes over "church soup kitchens or homeless shelters in suburbs, expansion of church facilities, parking squeezes on Sunday, breaches of noise ordinances or disagreements on what kind of meetings the zoning permits."⁸⁸ Hyde introduced examples of disputes regarding the height of church steeples, permission for churches to locate radio stations on church property, and the collection of exorbitant fees from churches for land use permits.⁸⁹ These examples include cases where genuine discrimination may have played a part in the zoning authority's decision.⁹⁰ Congress found that zoning laws often facially discriminate against the religious, and that zoning boards may apply neutral zoning laws discriminatorily.⁹¹

For RLUIPA to pass constitutional muster, these legislative findings must amount to evidence of a constitutional violation under

85. See *Boerne*, 521 U.S. at 530–31 n.31 (comparing RFRA and Voting Rights Act to illustrate importance of evidentiary record of constitutional violations in enacting § 5 legislation).

86. See *Protecting Religious Freedom After Boerne v. Flores*, II: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998); *The Need for Federal Protection of Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Rep. Canady).

87. 146 CONG. REC. E1564 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

88. *Id.*

89. *Id.* at E1565.

90. See *id.* at E1564–65 (describing discrimination faced by Muslims trying to establish mosque in Palos Heights, Ill.).

91. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

Smith's "individualized assessments" doctrine.⁹² *Smith* loosely suggests that when government bodies have authority to make individualized assessments, a *Sherbert* compelling state interest test may be appropriate.⁹³ *Smith* more firmly holds that the state may not categorically refuse claims of religious hardship when a system of individual exemptions is in place.⁹⁴ Zoning regimes, to the extent that they grant variances, are such systems of individual exemptions.⁹⁵ It appears RLUIPA's drafters attempted to fit its provisions into this category from *Smith*. The Act provides that the compelling state interest test applies in any case in which:

the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.⁹⁶

But this makes too much of the language of *Smith*. Justice Scalia writes only that the compelling state interest may be appropriate in the individualized assessments area, if at all (as opposed to the case of a generally applicable criminal law, as was at issue in *Smith*). *Smith* does not hold that the compelling state interest test is mandatory in such a context; the Court's holding mandates only that a zoning board could not discriminate against a religious claimant because of the religious character of the claim.

So use of the compelling state interest test in the zoning domain might be appropriate under *Smith*, if the evidence gathered by Congress of constitutional violations were convincing. The evidence gathered in support of RLPA and RLUIPA, however, is not universally accepted as establishing such a pattern. Professor Marci Hamilton, in a letter to the United States Senate, is deeply skeptical of the findings of the legislative history. Professor Hamilton writes:

After a decade of searching for examples, the supporters of RLUIPA have cobbled together a short string of anecdotes that do not illustrate constitutional violations, and certainly do not illustrate "widespread and persisting" constitutional violations by the states.

92. See Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2d 47, 50 n.5 (2002) (arguing RLUIPA "essentially re-enacted RFRA's requirements but only in circumstances that implicate . . . substantive violations of the religion clauses as interpreted by the Supreme Court"). I argue, to the contrary, that every zoning board decision adverse to churches is not such a violation.

93. See *Smith*, 494 U.S. at 884; *supra* notes 27-31 and accompanying text.

94. *Smith*, 494 U.S. at 884.

95. Jensvold, *supra* note 29, at 13.

96. 42 U.S.C. § 2000cc(a)(2)(c) (2002).

While it is true that churches, like every other land-owning entity, bear burdens imposed by land use regulations, there is little, if any, proof that churches have been the target of discrimination by local zoning boards. . . . It is telling that no cases can be offered in support of the extreme claim that cities and localities are engaged in orchestrated and persistent discrimination against religious bodies through their land use laws that requires redress under Section 5 of the Fourteenth Amendment.⁹⁷

The findings of a recent scientific study on land use and religious organizations accord with Professor Hamilton's assertions, concluding that "[o]verall, results from the NCS—a nationally representative sample of religious congregations—suggest that it is extraordinarily uncommon for congregations to be denied permission by government authorities to engage in the activities in which they wish to engage."⁹⁸

Both sides of this debate may be exaggerating. Surely there are cases of discrimination against religious organizations by zoning authorities in land use decisions involving individualized assessments. But there are also many instances where a town has a legitimate interest in zoning that may conflict with a church's building plans. These state interests include landmark preservation, traffic, noise, and other legitimate concerns which might not rise to the level of a compelling state interest, but are legitimate exercises of zoning power. Always putting the interests of churches ahead of these legitimate zoning interests amounts to unjustifiable privileging of religion over other interests. It simply is not the case that every time a town denies a church a permit, discrimination is afoot.

RLUIPA supporters answer that "the Act does not give churches the right to act with impunity; they remain subject to the overwhelming majority of zoning and landmark laws that meet RLUIPA's standards."⁹⁹ They rightly point out that RLUIPA does not give religious institutions a "blank check" when it comes to land use.¹⁰⁰ But the hurdles RLUIPA poses for zoning authorities are high. Professor Sager explains that "almost any time a community does not allow the developmental plans of a church, it will face the costly and precarious

97. Letter from Marci Hamilton, Thomas H. Lee Chair of Public Law, Benjamin N. Cardozo School of Law, to the United States Senate (July 24, 2000) (on file with the *New York University Journal of Legislation and Public Policy*).

98. Mark Chaves & William Tsittos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335, 342 (2000).

99. 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, 946 (2001).

100. Storzer & Picarello, *supra* note 99, at 946 n.109.

prospect of defending itself in federal court, where its attempt to apply reasonable land use restrictions will be presumed to be invalid.”¹⁰¹

The Court’s free exercise religion-based exemption standards are articulated in *Smith*. As discussed above, the *Smith* Court recognized that special considerations must apply when the state engages in a system of individualized assessment, as in zoning: “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.”¹⁰² But the normative force behind the *Smith* doctrine is about protection, not privileging.¹⁰³ To be acting as the Court’s partner, Congress may enact only that legislation which is in line with the protection paradigm. But RLUIPA clearly has the effect of privileging some over others.¹⁰⁴

Smith and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*¹⁰⁵ instruct Congress to focus on eradicating discrimination against religiously-motivated actors; this anti-discrimination norm is the operative substantive constitutional standard. *Boerne* and its progeny instruct Congress that its efforts must be “proportional and congruent” to that standard.

Storzer and Picarello argue that RLUIPA meets the Court’s Section 5 criteria on three fronts:

First, far from redefining the substance of constitutional law, RLUIPA provisions based on the Enforcement Clause [Section 5] were designed to restate current First Amendment and Fourteenth Amendment standards. Second, RLUIPA’s legislative history contains an extensive factual record establishing that these standards are violated frequently and nationwide. Third, to the extent RLUIPA contains “preventative” or “deterrent” measures at all, they are “congruent” and “proportional” to these extreme constitutional injuries.¹⁰⁶

101. Sager, *supra* note 58, at 14.

102. *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990).

103. See Eisgruber & Sager, *supra* note 22, at 1250–54 and accompanying text.

104. See Sager, *supra* note 58, at 14 (“[RLUIPA] is a remarkable privileging of the land use interests of churches over all but the most weighty of land use concerns.”); cf. *Freedom Baptist Church of Delaware Co. v. Township of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002) (“[RLUIPA] places a statutory thumb on the side of religious free exercise in zoning cases.”). While Judge Dalzell concluded that RLUIPA was a constitutional exercise of Congress’s § 5 authority, he conceded that there is a “substantial ground for difference of opinion” on this question and certified the issue of RLUIPA’s constitutionality to the United States Court of Appeals for the Third Circuit. *Id.* at 875.

105. 508 U.S. 520 (1993).

106. Storzer & Picarello, *supra* note 99, at 979.

The first point is an unjustifiable exaggeration. Storzer and Picarello rest their analysis on the individualized exemptions language from *Smith*, which was reinforced in *Hialeah*.¹⁰⁷ The *Hialeah* Court stated: “As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.’”¹⁰⁸ But this language—“may not refuse to extend”—states merely that the government must give religious groups the same exemptions as other groups receive; there is nothing to imply that churches should enjoy any special privilege in exemption situations. I agree that most zoning and landmarking systems are fairly characterized as systems of individualized exemptions.¹⁰⁹ But resting RLUIPA on this doctrine from *Smith* and *Hialeah* is misconstruing the individualized assessments language.¹¹⁰ Mandating higher scrutiny in individualized assessment situations is aimed at protecting vulnerable religious groups from discriminating decisionmakers. It goes against the normative grain of the Court’s decisions to understand the individualized exemptions exception to swallow up the rule of equal regard, giving religious groups such an overpowering advantage in land use disputes where the zoning authority may well have legitimate reasons behind its decisions.

In addition, § 8(7)(B) of RLUIPA, which defines all land use by religious organizations as religious exercise, represents a drastic break with the Court’s understandings of free exercise. While Storzer and Picarello claim that certain RLUIPA provisions “were designed to do little, if anything, more than codify existing First Amendment and Fourteenth Amendment jurisprudence,”¹¹¹ they themselves admit that this sweeping expansive definition of all religious land use as religious

107. *Id.* at 980–82.

108. *Hialeah*, 508 U.S. at 537 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

109. See Storzer & Picarello, *supra* note 99, at 984–85 n.386 (listing cases where lower courts have found that zoning authorities used individualized exceptions).

110. Other commentators have relied on misinterpretations of *Smith* to support RLUIPA. See Note, 16 *BYU J. Pub. L.* 1, at 7-8 (“RLUIPA . . . merely clarifies the Court’s own holding that laws which provide governmental officials with the power to make individualized assessments are not generally applicable, and therefore, require strict scrutiny review.”); *Id.* at 8, fn. 50 (“[RLUIPA], unlike RFRA, would not negate the basic holding of *Smith* . . .”). This analysis misunderstands *Smith*, the basic holding of which is that while religiously motivated actors must be protected from discrimination, that their interests must not be privileged. The “individualized assessments” language in *Smith* directs only that if the compelling state interest test is viable for religion-based exemptions at all, it is only where individualized assessments occur. *Smith* does not hold that laws which provide for individualized assessments are not generally applicable and require strict scrutiny review.

111. Storzer & Picarello, *supra* note 99, at 979.

exercise is a substantive change: “RLUIPA’s definition of ‘religious exercise’ clarifies one of the most significant issues in judicial review of zoning actions: whether the specific church activity burdened by the application of local law is religious or secular.”¹¹² If clarification is needed for a significant issue, this implies that there was confusion about an important piece of substantive law—in this case, what exactly is “religious exercise”? By providing such a clarification, RLUIPA is not merely codifying an existing standard, but setting a new one. This is an instance of Congress “decree[ing] the substance of the Fourteenth Amendment’s restrictions on the States,” and “determin[ing] what constitutes a constitutional violation”¹¹³—a clear violation of Congress’s Section 5 authority.

On Storzer and Picarello’s second point about RLUIPA’s legislative history, there is debate about what the evidence actually proves about the extent of discrimination against religious organizations in land use matters.¹¹⁴ There are surely instances of religious groups being unconstitutionally discriminated against by zoning authorities, and Congress should act to protect those groups. But much zoning against the interests of churches is not rooted in discriminatory purpose. Of course, religious organizations, like all other land owners, must bear the burdens imposed by generally applicable, neutral land use regulations, but these burdens do not amount to constitutional violations. To the extent that RLUIPA puts every such zoning regulation to strict scrutiny, it goes too far.

This ties in to the third point about congruence and proportionality. Citing *Boerne*, Storzer and Picarello argue that “[r]ather than ‘prohibit[ing] conduct which is not itself unconstitutional,’ [the prohibitions of RLUIPA] merely restate frequently violated constitutional standards and provide familiar judicial remedies for their violation.”¹¹⁵ This is not the case. A planning board making a ruling against a church not for discriminatory reasons, but for legitimate zoning reasons, is not acting unconstitutionally within the meaning of *Smith* and *Hialeah*. Those cases are not about privileging religious groups in the land use arena, but about protecting them from discrimination.

RLUIPA is an unconstitutional exercise of Congress’s Section 5 authority because there is no convincing evidence of a widespread and

112. *Id.* at 946.

113. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

114. Compare Letter from Marci A. Hamilton, *supra* note 97, with Storzer and Picarello, *supra* note 99 and accompanying text.

115. Storzer & Picarello, *supra* note 99, at 986 (quoting *Boerne*, 521 U.S. at 518).

persisting pattern of constitutional violations toward religious land-owners, and even if such a pattern existed, RLUIPA is not congruent and proportional to such a pattern.

There are two interpretations of RLUIPA to consider. Namely, whether it is: (1) a reasonable prophylaxis against religious discrimination, and thus a congruent and proportional response to a constitutional violation; or (2) a product of Congress adopting a *Sherbert*-style view of the land use rights of churches? If RLUIPA is to survive the Section 5 inquiry, it must be the former. However, it is not a reasonable prophylaxis. RLUIPA's use of the compelling state interest test is akin to shooting a mouse with an elephant gun. *Boerne* does contemplate Congress enacting reasonable prophylactic rules. The issue in Section 5 authority in general, and in this case in particular, is whether RLUIPA, which puts itself forward as a prophylaxis, is a reasonable one.¹¹⁶ A prophylaxis is a rule which bars a group of events, some of which might be acceptable, in order to be safe. We judge whether the prophylaxis is reasonable by asking how much damage it does to legitimate policies in the name of preventing harms.

One striking example of a prophylaxis is the compelling state interest test in the context of overt racial discrimination. We can see why such a powerful rule is reasonable: the magnitude of the damage it seeks to prevent is great. However, in the arena of religious land use, we must ask whether such a heavy burden against government zoning interests is appropriate. Under RLUIPA, any time a religiously-motivated actor is burdened by a zoning law, it is presumed that the general zoning law is invalid, in spite of the fact that these zoning laws serve important functions. State and local governments, through their zoning regimes, determine local neighborhood requirements and implement plans to ensure fairness, safety, and efficiency in land use. There are certainly occasions where zoning laws are used as tools of invidious discrimination. RLUIPA, however, is an instance of an over-broad prophylaxis. The harm it does to legitimate and important zoning interests makes it unacceptable.

Additionally, under *Boerne* and its progeny, the latter option of adopting a *Sherbert* strict scrutiny test is clearly unconstitutional. Congress may not substitute its view of the free exercise clause by instantiating the *Sherbert* compelling state interest standard in the religious land use arena. The strict scrutiny standard is an appropriate tool in some circumstances, the most striking example being the re-

116. See *Boerne*, 521 U.S. at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means and the ends to be achieved.").

view of laws which use racial classifications.¹¹⁷ The strict scrutiny standard in this context is fitting because race is rarely, if ever, relevant to any legitimate governmental purpose. To judge suspect racial classifications, we use this test as a filtering device, to “flush out” unconstitutional motivation.¹¹⁸

Similarly, the strict scrutiny standard may have been appropriate in the *Sherbert* Quartet. The facts of these cases are characterized by a common profile: a plaintiff who is generally available for work and can accept most jobs, but is deemed ineligible for benefits because he is acting from religious motivation in refusing a particular job. The strict scrutiny test is appropriate in such cases because dismissing out-of-hand the plaintiffs’ religious interests is a kind of tone-deafness to the force of their religious beliefs. There is no harm in giving them benefits, but the harm inherent in forcing them to choose between following their religious conscience or receiving benefits is great.¹¹⁹ The use of the strict scrutiny test in this context is likewise an appropriate prophylaxis against religious discrimination.

In cases involving the land use of religious organizations, however, simply because there is a varying procedure that sometimes results in a decision adverse to the religious organization, there is no reason to presume that zoning boards are acting in a discriminatory fashion. Zoning boards have many land use goals for which to aim;

117. A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be “necessary . . . to the accomplishment” of their legitimate purpose.

Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (ellipses in original) (citations omitted); see also *Korematsu v. United States*, 323 U.S. 214, 216 (“It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 601 (3d ed. 1996) (“[D]espite its specific holding, *Korematsu* today can be taken to ‘stand’ for the proposition that statutes that facially discriminate against racial minorities are almost always unjust and unconstitutional.”).

118. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 146 (1980).

119. Where minority religious claimants satisfy the general envelope of circumstance contemplated by an administrative regime of exemption—here, by being generally available for work and having a narrow but sharp personal interest in declining particular employment—the compelling state interest test seems well-suited to insuring that the process takes fair account of their interests.

See Eisgruber & Sager, *supra* note 22, at 1300.

the fact that achieving these goals might run contrary to a given religious organization's interests raises no presumption of discrimination. Every zoning board decision against a church is not an instance of a constitutional violation under the *Smith* standard. Furthermore, even if there are a significant number of instances of individual cases of religious discrimination by zoning boards, the use of the compelling state interest test is still wildly out of proportion. Unlike application in the racial and employment benefits contexts, there are worthy goals behind zoning laws which may incidentally burden churches, and the use of the compelling state interest test does unconscionable violence to these goals.

Although the violations against religious landowners do not amount to the level of harm that could justify an extreme response like RLUIPA, there is important work for Congress to do to protect religious organizations in land use. Professor Hamilton's assertions notwithstanding,¹²⁰ there are instances of zoning boards using their discretion for discriminatory purposes. For example, in June 2000, a Palos Heights, Illinois Muslim group was thwarted in its effort to buy a church and convert it into a mosque, under circumstances that seem discriminatory.¹²¹ Such a situation certainly runs afoul of the anti-discrimination principles announced in *Smith* and *Hialeah* and calls for remedial legislation by Congress. Although RLUIPA is an overbroad, ill-conceived solution, legislation to remedy such discrimination, properly tailored, could be based on the Court's *Smith* jurisprudence via Section 5 of the Fourteenth Amendment. Such legislation would protect religious groups in the zoning process, where they are vulnerable to discriminatory treatment by zoning boards, while still allowing for the furtherance of legitimate zoning goals.

Professor Sager provides suggestions for more "surgically designed" Congressional action to protect churches from discrimination. He proposes examples such as:

[L]egislation that did not permit houses of worship to violate height restrictions but did entitle them to locate in residential districts absent a compelling state interest to the contrary. . . . [L]egislation that identified specific circumstances that give rise to suspicion of discrimination, the presence of which would trigger a presumptive right of a church to locate in the community. Such circumstances could include the unavailability of any locations in the community that are appropriate for the location of a house of worship, inconsis-

120. Letter from Marci A. Hamilton, *supra* note 97 ("[T]here is little, if any, proof that churches have been the target of discrimination by local zoning boards.").

121. 146 CONG. REC. E1564-65 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

tent treatment between churches established in the community and those which want to establish themselves in the community, and changes of zoning practices adverse to particular churches.¹²²

Such reasonable prophylactic legislation would be an appropriate Congressional exercise that conformed with the Section 5 restrictions of congruence and proportionality, by staying within the Court's direction to protect religious organizations, while not redefining substantive guarantees by privileging religious groups. If it were the case that discrimination against religious organizations in land use was rampant, and that there was no way outside of a compelling state interest standard to curb such discrimination, then RLUIPA would be acceptable. But a more subtle tool could handle the job without doing violence to legitimate zoning goals.

CONCLUSION

The free exercise conflict between zoning authorities and religious groups is a complex one. Unlike the issue of school desegregation, the question of who should prevail in religious land use disputes is not a matter of "simple justice." Surely there are instances where churches are discriminated against in land use disputes and need protection. And Congress would be right to pass legislation under its Section 5 authority to remedy these violations; RLUIPA could be reformed as a more nuanced test, incorporating triggers for discrimination. But it clearly is not the case that every time a land use conflict arises between a religious organization and a zoning authority, justice requires that the religious organization prevail.

Boerne and its progeny make clear that the Court is the final arbiter of what states of affairs are required by the Constitution. Congress's role is to craft legislation instrumental to realizing that state of affairs, and Section 5 is the tool with which it crafts such legislation. *Smith* and *Hialeah* dictate that discriminating against the religious is wrong, but the Constitution does not mandate that we privilege the interests of the religious in land use. RLUIPA's privileging is thus unjustifiable. Although this legislation may have been fashioned to protect the religious, it does too much damage to legitimate zoning goals. It is not a reasonable prophylaxis, congruent and proportional to the target the Court has set out. Accordingly, it is an unconstitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

122. Sager, *supra* note 58, at 14–15.

