

## PANEL ONE COMMENTARY

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Baseball has been the governing metaphor of the conference, and in these brief remarks I hope to touch all the bases. I will talk a bit about the constitutional status of religious liberty in the United States before, as well as after, the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>1</sup> Then I will turn to the Court's decisions in *City of Boerne v. Flores*<sup>2</sup> and its progeny. Finally, I will consider the Religious Land Use and Institutionalized Persons Act ("RLUIPA") of 2000,<sup>3</sup> the statute that I had heretofore thought to be unpronounceable. Even rendered pronounceable, RLUIPA is a bad piece of legislation; at best it does a job in a crude and radically overbroad way that Congress could have done surgically. RLUIPA may well be unconstitutional, and it is almost certain to encourage the Supreme Court in its ongoing hostility to what it perceives as congressional excess.

To understand religious liberty after *Smith* it is important to understand the status of religious liberty before *Smith*. For some twenty-seven years, *Sherbert v. Verner*<sup>4</sup> provided the nominally governing rule. Under *Sherbert*, any governmental act that significantly burdened religiously-motivated conduct was presumptively unconstitutional and could be redeemed only by a showing of a compelling state interest. Taken at face value, *Sherbert* thus gave persons motivated by their religious beliefs a presumptive right to disregard laws they deemed to obstruct religiously-motivated conduct, laws that all other persons were required to obey.

But it would be a great mistake to take *Sherbert* at face value; certainly the Supreme Court did not do so. The rule of *Sherbert* was honored almost exclusively in the breach; *Sherbert* claimants almost invariably were disappointed to learn that they were not free to dis-

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

2. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress exceeded its power in enacting the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000 (1994), as it granted rather than merely enforced constitutional protections).

3. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000). One of the many reasons that I am grateful to the editors of the NYU Annual Survey of American Law is that they've given us a name: they say we should pronounce it "are-LOO-pah."

4. *Sherbert v. Verner*, 374 U.S. 398 (1963).

regard laws that were obstacles to their religiously-motivated enterprises. Only two small groups of constitutional claimants successfully invoked *Sherbert*. *Sherbert* itself was joined by three other unemployment insurance cases that were more or less congruent. In addition, Amish litigants in *Wisconsin*<sup>5</sup> secured a limited exemption from state educational requirements, allowing them to withdraw their children from formal education two years early. If we set *Wisconsin* aside as an exotic outlier, we can see how strange the apparent reign of *Sherbert* actually was: for twenty-seven years the Supreme Court paid lip service to an apparently robust premise of religious liberty, but reliably acted in accord with that premise only in cases involving unrequited claims of eligibility for unemployment insurance.<sup>6</sup>

The reason for this unusual state of affairs is that the rule of *Sherbert* was always an unattractive constitutional norm—so unattractive that the Supreme Court could never really abide it. The problems with the *Sherbert* rule can be put succinctly: first, religion sponsors conduct that is good, conduct that is bad, and conduct that is very ugly. A rule that gives religiously motivated persons a presumptive right to disregard otherwise valid laws just doesn't make sense given the potential range of behavior endorsed by religious faith. Second, the nominal rule of *Sherbert* indefensibly privileges religious commitments over other deep and valuable human commitments—commitments, for example, to family, to moral probity on secular grounds, and to artistic statement. Under *Sherbert*, two people running a soup kitchen, two landlords who despise the conduct of their tenants, or two same sex couples who wish to be married, could have radically different constitutional standing if one is motivated by religion and the other merely by a passion to alleviate human suffering, to dissociate from reprehensible behavior, or to formally recognize loving commitments to each other. For these two reasons, the *Sherbert* rule was never an appealing constitutional norm and never enjoyed the functional allegiance of the Supreme Court.

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5. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that state interest in education was insufficient to impinge on the free exercise rights of Amish families).

6. *Smith*, 494 U.S. at 883-84; *Frazee v. Ill. Dep't. of Employment Sec.*, 489 U.S. 829 (1989) (holding that claimant was entitled to unemployment benefits even if religious views were independent of any sect); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1986) (involving unemployment compensation to a Seventh-Day Adventist fired for refusing to work on the Sabbath); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1980) (involving unemployment compensation for a Jehovah's Witness fired for refusing to produce weapons).

The *Sherbert* quartet of cases themselves are best understood as prompted by a prophylactic impulse—an impulse to protect unemployment insurance applicants with non-mainstream religious affiliations from discrimination in a highly discretionary administrative context.<sup>7</sup> On this account, *Sherbert* and its immediate progeny are best explained as anti-discrimination cases. More precisely, they are best explained as reflecting what Chris Eisgruber and I have described as the constitutional norm of equal regard.<sup>8</sup>

Equal regard is a general requirement of a politically just society. It holds that the interests and concerns of every member of the political community should be treated equally, that no person or group should be treated as unworthy or otherwise subordinated to an inferior status. In the special context of religious liberty, equal regard requires that the religious concerns of minority religious believers be treated with the same regard as mainstream religious and secular concerns. In the distinct context of unrequited unemployment insurance claimants, the *Sherbert* rule was a plausible prophylaxis against the failure of equal regard. But in other contexts, where the normative appeal of equal regard did not lend intuitive support to the results demanded by *Sherbert*, the Court could not abide by its own articulated rule. Thus, *Smith* announced the death of a rule that never really existed.

In the wake of *Smith*, equal regard has been brought closer to the surface of the Court's religious liberty jurisprudence; religious liberty has benefited rather than suffered from this turn toward equality. *Smith*'s somewhat elusive insistence on neutral and generally applicable standards<sup>9</sup> begins to make sense if it is understood as a surrogate for equal regard. In the *Hialeah* decision,<sup>10</sup> the Court embarrassed those who had declared that *Smith* signaled the death of religious liberty by unanimously striking down legislation that singled out religiously-motivated animal slaughter for adverse treatment. *Hialeah* was quintessentially an application of the norm of equal regard.

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7. This point is not incidental to RLUIPA, to the discussion of which we will shortly turn. RLUIPA is in part structured to exploit the prophylactic interpretation of *Sherbert*.

8. In essence, “[e]qual 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.” Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1283 (1994).

9. *Smith*, 494 U.S. at 878-80, 884-86.

10. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

Equal regard also best explains the improved prospects of religious liberty claimants in the lower courts after *Smith*. Thus, if a police department permits officers with a skin condition adverse to shaving to wear beards, then that same department must permit officers who have a religious condition adverse to shaving to wear beards.<sup>11</sup> Similarly, if a public university permits freshmen to live in private housing rather than dormitories based on secular reasons, it must give religiously motivated freshmen the same opportunity.<sup>12</sup> As a final example, if a community grants exemptions from land use regulations on grounds of financial hardship, it must make available comparable exemptions on grounds of religious hardship.<sup>13</sup> These cases are all best understood as driven by concerns of equal treatment, and they offer a glimpse of the contours of a jurisprudence of equal regard.

In summary, the twenty-seven year reign of *Sherbert* obscured the actual source of normative energy behind the Free Exercise Clause. The normative energy was, for all practical purposes, a tacit commitment to equal regard. *Smith*'s demand for neutral rules of general applicability is best understood as responding to much the same impulse. In the wake of *Smith*, in both the Supreme Court and the lower courts, the centrality of equality concerns is becoming increasingly transparent.

All of which brings us to the Religious Freedom Restoration Act ("RFRA") of 1993,<sup>14</sup> *City of Boerne*,<sup>15</sup> and RLUIPA.<sup>16</sup> In response to *Smith*, as many of you know, Congress enacted RFRA. RFRA attempted to make the nominal rule of *Sherbert* the actual rule and thereby purported to "restore" a regime of religious liberty that had never existed. RFRA suffered fully from the vices that led the Court to avoid a serious application of *Sherbert* in the first place, and from at least two additional vices as well. In the name of the restoration

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11. *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

12. *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996). But see *Hack v. President & Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000) (holding that students required to live in coeducational halls in spite of religious beliefs did not have a claim against Yale College because Yale was not a state actor for § 1983 liability and the policy was one of inclusion not exclusion, thus precluding a Fair Housing Act claim).

13. *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996).

14. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994).

15. 521 U.S. 507 (1997) (holding that Congress exceeded its power in enacting the Religious Freedom Restoration Act of 1993 as it granted rather than merely enforced constitutional protections).

16. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000).

of religious liberty, RFRA required the Supreme Court to engage in a charade. RFRA required the Court to adopt the rhetoric and failed rule of the *Sherbert* regime, a regime which a majority of the Court had rejected twice over: first, by refusing to act on *Sherbert*'s directive for the twenty-seven years of its nominal life; and second, by renouncing that directive as a "constitutional anomaly" in *Smith*. In the name of the restoration of a failed view of religious liberty, RFRA cut a staggeringly broad swath of federal oversight into the otherwise reasonable and valid policies and enterprises of state and local governments. It would have been remarkable for the Supreme Court to have allowed RFRA to stand, and this the Court declined to do in *City of Boerne*.<sup>17</sup>

While the invalidation of RFRA was all but inevitable, the analytical framework relied upon by the Court in *City of Boerne* was a mistake. In *City of Boerne*, the Court insisted that when Congress is acting pursuant to its authority under Section Five of the Fourteenth Amendment, its prerogatives are exclusively remedial.<sup>18</sup> Congress, on this view, is bereft of any authority to augment the Court's understanding of the underlying substance of constitutional rights. What this view most prominently fails to take account of is the powerful institutional forces that constrain and foreshorten the Court's doctrinal implementations of the rights-bearing provisions of the Constitution—in particular the substantive provisions of the Fourteenth Amendment. In addition, this 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. The hope that *City of Boerne* would come in time to be tempered by the Court's appreciation of these concerns has been dimmed by subsequent decisions in that case's name, decisions that lean towards rigidity rather than nuance.<sup>19</sup>

Congress bears at least some of the responsibility for this unfortunate development. After *Smith*, a broad political coalition formed which brought fevered pressure on Congress to respond to what was grossly mischaracterized as a deep threat to religious liberty.

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17. 521 U.S. at 536.

18. *Id.* at 519.

19. See, e.g., *Board of Trustees v. Garrett*, 121 S. Ct. 955, 963 (2001) (holding that an individual may not sue a State under the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12111-12117 (1995), and noting that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantee."); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88-91 (2000) (holding that Congress exceeded its power in enacting the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 (1999) (as amended) because it granted rather than enforced constitutional protections).

That pressure could have been countered by simple good sense but, unfortunately, at that time good sense lacked a political constituency. The result was Congress's nearly unanimous adoption of RFRA. RFRA begged for the Court's critical scrutiny and could only have exacerbated the tendency of at least some members of the Court to question the soundness of Congress's judgment.

RLUIPA, unhappily, is more of the same. It too is a markedly bad piece of legislation. RLUIPA will also do little to encourage the Court to welcome Congress's partnership. I have in mind the land use provisions of RLUIPA and, in particular, the most important land use provision, which addresses any land use restriction which involves the discretionary judgment of local officials.

Any time a church is denied permission to use its land for any church-related purpose—including the construction of a high-rise business building, a towering tabernacle or a radio antenna—RLUIPA intervenes if the municipal decision in question involved discretionary judgment. RLUIPA grants the affected church a federal cause of action in which the municipality bears the burden of demonstrating that its decision was necessitated by a compelling state interest. Given the pervasive availability of variances, special use permits and the like, most land use restrictions ultimately include the possibility of discretionary judgment by local officials. As a result, almost any time a community does not allow the developmental plans of a church, it will face the costly and precarious prospect of defending itself in federal court, where its attempt to apply reasonable land use restrictions will be presumed to be invalid. This is a remarkable privileging of the land use interests of churches over all but the most weighty of land use concerns.

The endorsers of RLUIPA seem—at least publicly—to eschew the indefensible claim that the land use interests of churches should be presumed to be more weighty than the collection of concerns served by municipal land use restrictions. Instead, they defend RLUIPA as a prophylaxis against discrimination by municipalities against disfavored churches. This argument, redolent of the norm of equal regard and the prophylactic interpretation of the *Sherbert* quartet, represents a distinct conceptual advance. While this defense of RLUIPA has the right conceptual form, it cannot justify RLUIPA itself.

Congress could have protected churches against municipal discrimination with much more narrowly tailored or surgically designed legislation, legislation that would not have upended municipal land-use authority by presumptively exempting church enterprises from that authority. For example, if the primary con-

cern is that all religions be able to provide their faithful with houses of worship, much more narrow legislation would have sufficed. One possibility, for example, is legislation 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. Another possibility would have been legislation 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, inconsistent 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. Legislation of this sort would have provided an effective barrier to the discrimination that has been vividly invoked by RLUIPA's supporters.

More narrowly crafted legislation of the sort outlined here would not favor a church that wants to build a radio tower, an enormous tabernacle, an open religious stadium, or a skyscraper for economic purposes in violation of landmark preservation ordinances. Under RLUIPA, however, every one of those churches has a presumptive right to proceed, a right enforceable in federal court. RLUIPA is not fairly characterized as a means of protecting churches against discrimination; it is a bald and rather extreme privileging of churches for which no justification is available. RLUIPA is best understood as aimed not at the protection of churches against discrimination but rather at a very different target. 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.

To come full circle: RLUIPA is wholly inconsistent with the best understanding of religious liberty, which centers on the norm of equal regard. In addition RLUIPA, like RFRA before it, will encourage the Supreme Court to view Congress as irresponsible and overreaching rather than as a valued partner in the enterprise of securing constitutional justice. RLUIPA may well fare badly in the courts. The judiciary may sharply curtail the statute's reach by narrowly interpreting what counts as a "substantial burden" on religion by its own terms. The judiciary may even invalidate RLUIPA. But, those possibilities are not my focus here. I simply want to observe

that RLUIPA is a bad law, a law which is likely to produce bad results however it fares in the courts.