

**SYMPOSIUM: RETHINKING RIGHTS: HISTORICAL, POLITICAL, AND
THEOLOGICAL PERSPECTIVES: NOTE: RELIGIOUS LAND-USE AND THE
FOURTEENTH AMENDMENT'S ENFORCEMENT CLAUSE: HOW THE FMLA
PAVED THE WAY TO THE RLUIPA'S CONSTITUTIONALITY**

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+ Juris Doctor Candidate, Ave Maria School of Law, 2005. I would like to thank Professors Richard Myers and Nora O'Callaghan, of the Ave Maria School of Law, and the attorneys at the Becket Fund for Religious Liberty. I would also like to offer a special thanks to my wife, Najwa, for all of her support both in writing this note and in life.

Text

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. Cheltenham Township, Pennsylvania. Before allowing construction of a synagogue for Orthodox Jews, city leaders insisted on a large number of parking spaces and refused to count off-site leased spaces, ¹ despite the fact that Orthodox Jews are forbidden from using motorized vehicles on the Sabbath. ² When the synagogue agreed to build a useless parking lot, the city again denied permission to build, citing traffic problems it believed would inevitably result from cars using the additional parking spaces. ³

. Douglas County, Colorado. Government officials proposed limiting the operational hours of churches in the same way they do any type of "commercial" activity. ⁴ Limiting the operational hours of a Catholic church, for example, would provide a legal impediment to otherwise lawful exercises such as celebrating an Easter vigil mass or other services that take place outside of the church's prescribed operational hours. ⁵

[*316] . Cypress, California. After denying a necessary permit for the Cottonwood Christian Center to build a new church, ⁶ city officials condemned the church's property and attempted to seize it through eminent domain. ⁷ The

¹ [*Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772, 773 \(Pa. Commw. Ct. 1989\).](#)

² Id.

³ Id.

⁴ Protecting Religious Freedom After *Boerne v. Flores* (Part III): Hearing Before the House Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 15 (1998) (statement of Mark E. Chopko, General Counsel, United States Catholic Conference).

⁵ Id.

⁶ [*Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1213 \(C.D. Cal. 2002\).](#)

city cited blight (although the property had been vacant for twelve years and the church had been waiting for nearly three years for permission to develop it) and a desire for a revenue-generating taxable use of the property.⁸ Ultimately, the city hoped to transfer the property to Costco, a members-only wholesale store, so that a new store could be built on the church's property.⁹ City staff said it was unlikely the church's plans for its property would be "consistent with the goals and objectives" the city had for the church's property.¹⁰

. Los Angeles, California. The city council cited zoning laws to justify closing down a congregation of less than fifteen elderly Jews and used the same laws to approve and protect a "gay sex club" operating 500 feet from a residential neighborhood.¹¹ The Jewish congregation had been meeting in a residential neighborhood which had no authorized place of worship.¹² Although the city allowed other places of assembly in that neighborhood, it refused the congregation's petition on the grounds that the city wanted to avoid creating a precedent that would allow places of worship in the neighborhood.¹³

While symbolic fights among religious groups, the American Civil Liberties Union, and the courts over statues featuring the Ten Commandments and other similar religious displays have received the most attention, an arguably more important, but lesser known, struggle exists between religious institutions and the communities they call home. The above examples are not isolated incidents; rather they are part of a larger trend in which local government officials stifle religious exercise under the guise of concern over neighborhood [*317] redevelopment, traffic, and aesthetics.¹⁴ Sometimes officials apply highly individualized and discretionary zoning or land-use laws in ways that have a discriminatory effect on religious uses.¹⁵ At other times, zoning board members, neighborhood residents, and even judges have explicitly offered religion¹⁶ or race¹⁷ as a reason for [*318] denying a land-use in a certain community or on a specific piece of property.

⁷ [Id. at 1214-15.](#)

⁸ [Id. at 1227-28.](#)

⁹ [Id. at 1214.](#)

¹⁰ [Id. at 1213.](#)

¹¹ Beth Shuster, *One Zoning Law, Two Outcomes*, L.A. Times, Nov. 11, 1997, at B1.

¹² H.R. Rep. No. 106-219, at 22 (1999).

¹³ *Id.*

¹⁴ 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Orrin Hatch and Sen. Theodore Kennedy on the Religious Land Use and Institutionalized Persons Act).

¹⁵ *Id.*

¹⁶ Religious Liberty Protection Act of 1998: Hearing Before the House Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 201 (1998) [hereinafter Religious Liberty Protection Act of 1998] (statement of Bruce D. Shoulson, Attorney at Law). Mr. Shoulson described a hearing before a local zoning board in which an objector "turned to the people in the audience wearing [Jewish] skull caps and said, "Hitler should have killed more of you." *Id.* Mr. Shoulson also described a small town in New Jersey where the governing body, contemplating an approval that could have potentially led to an increase in its Orthodox Jewish population, "made it known that it was interested in testimony as to the effect on other communities of substantial Orthodox Jewish populations." *Id.*; see also Religious Liberty: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 88 (1999) [hereinafter Religious Liberty] (prepared statement of Douglas Laycock, Law Professor, University of Texas). In his testimony, Professor Laycock cited several other examples of zoning based on explicitly religious motivations. He explained, "Anti-Semitic views were openly expressed in the campaign for the Ohio referendum voting down the Jewish proposal that had received land use approval. Residents created the Village of Airmont, New York, for the openly stated purpose of using the zoning power to exclude Orthodox Jews." *Id.* (citing [LeBlanc-Sternberg v. Fletcher](#), 67 F.3d 412, 418-19, 431 (2d Cir. 1995)). Laycock then described another case, [Family Christian Fellowship v. County of Winnebago](#), 503 N.E.2d 367 (Ill. App. Ct. 1986).

In response to this threat, Congress passed the Religious Land-Use and Institutionalized Persons Act of 2000 (RLUIPA or Act).¹⁸ Despite constitutional challenges, this Act is a congruent and proportional remedy under Section Five of the Fourteenth Amendment for three reasons: first, given the applicable standard defined by the Supreme Court in *City of Boerne v. Flores*,¹⁹ and *Nevada Department of Human Resources v. Hibbs*,²⁰ the Act is narrow in scope and limited in application; second, Congress provided a detailed legislative history proving it was responding to real and serious threats to constitutional protections; and third, the Act does not seek to alter or expand existing constitutional rights, but rather provides a statutory enforcement mechanism to ensure their protection.

This is not an esoteric and philosophical debate about whose version of the truth will dominate the public square. It is also not a fight religious groups can afford to lose. The outcome of the fight over religious land-use has enormous practical implications for believers and for those they seek to bring into their folds. Zoning ordinances, historic districts, and urban planning can be used to deny believers protection of one of the most basic and fundamental rights found in the Constitution: the right to gather together and worship their God.²¹ Without the right to gather together and worship - without bricks and mortar and a plot of land to assemble them - Catholics could not celebrate the Mass, Jews could not gather to read the Torah, Muslims could not attend Friday prayer, and new converts, seeking God in an overwhelmingly secular world, would suddenly find nowhere to turn. Furthermore, land-use laws restrict secular services provided by religious organizations. Homeless shelters, soup kitchens, religious schools, and hospitals - all depend for their very existence on the right of believers to acquire, develop, and use their land.

[*319] Thus far, religious organizations have not fared well in the fight. Local communities have barred churches from residential districts because they produce too much traffic,²² and from business districts because they do not

[A] neighbor said, outside the hearing process, "Let's keep those God damned Pentecostals out of here." The judge in that case said from the bench that "We don't want twelve-story prayer towers in Rockford," apparently because there was a twelve-story prayer tower at Oral Roberts University in Oklahoma, and the Illinois church in the case had a loose affiliation with the University, although that was not in the record and the judge had to have learned it outside of court. The church had not applied to build anything, let alone a twelve-story tower; it wanted to use an existing school for worship purposes.

Id. (footnote omitted).

¹⁷ See *Religious Liberty*, supra note 16, at 88-89 (prepared statement of Douglas Laycock, Law Professor, University of Texas). Professor Laycock testified:

Churches often have an ethnic as well as a religious identity, and permits are denied in whole or in part for reasons of racial discrimination... . In the Faith Cathedral case, in which the city refused permission to use a funeral chapel as a church, the funeral chapel was one-hundred feet west of Western Avenue, and thus on the white side of the main racial boundary in south Chicago. Amazing Grace Church, another black church that located in the same neighborhood, was met first with racial slurs and thrown eggs, and then with charges of zoning violations.

Id. at 88 (citing *Faith Cathedral Church v. City of Chicago* (unpublished opinion)). Laycock continued, "In the Living Word Outreach case, in which the city refused permission to use a Masonic temple as a church, the Masons had been white and the church members were black." Id. at 88-89 (describing [City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc., 707 N.E.2d 53, 55 \(Ill. App. 1999\)](#)).

¹⁸ [42 U.S.C. 2000cc](#) to [2000cc-5](#) (2000).

¹⁹ [521 U.S. 507 \(1997\)](#).

²⁰ [538 U.S. 721 \(2003\)](#).

²¹ See [U.S. Const. amend. I](#) ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...").

²² *Religious Liberty*, supra note 16, at 85 (prepared statement of Douglas Laycock, Law Professor, University of Texas).

create enough traffic. ²³ Local communities have made it especially difficult for small, little-known churches and racial minority churches to exist in their communities. ²⁴ Zoning codes often exclude churches from places where they permit theaters or meeting halls, and from other places where similarly sized groups of people meet for secular events. ²⁵ In many cases, churches have been denied the right to use rented storefronts, abandoned schools, and theaters - the very same buildings whose use had been permitted for secular assemblies. ²⁶

Congress has recently attempted to even the playing field. This note will analyze the greatest weapon religious organizations have in this fight - the RLUIPA. ²⁷ First, it will briefly review the long-running battle between the Supreme Court and Congress over the First Amendment guarantee of the free exercise of religion, and the latest attempt by Congress to protect houses of worship from the "nearly 70,000 local government entities" ²⁸ across the country. Second, it will focus on congressional reliance on Section Five of the Fourteenth Amendment for the authority to enact the RLUIPA. Third, it will discuss challenges to congressional authority to enact it. Fourth, it will discuss how the Supreme Court's decision in *Hibbs* supports the Act's constitutionality. Fifth, it will review lower-court decisions on the RLUIPA's constitutionality. Finally, this note will address arguments that zoning and land-use laws are laws of general applicability and therefore do not constitutionally require strict scrutiny.

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I. The Religious Land-Use and Institutionalized Persons Act

Passed by Congress in 2000 to protect religious land-use, the RLUIPA restores strict scrutiny to governmental decisions that burden religious exercise with regard to land-use and institutionalized persons, such as prisoners and patients in nursing homes and mental institutions. Responding to what they called "very widespread" religious discrimination in land-use decisions, Senators Orrin Hatch (R-Utah) and Edward Kennedy (D-Mass.) co-sponsored the RLUIPA, ²⁹ which later passed both houses of Congress unanimously. ³⁰ In signing the Act into law, President Clinton said it would "provide protection for one of our country's greatest liberties." ³¹ The RLUIPA was supported by a coalition of more than fifty groups, including many that are often diametrically opposed. ³² Supporters included the Family Research Council and the Christian Legal Society, as well as the American Civil Liberties Union and People for the American Way. ³³

²³ *Id.*

²⁴ See Religious Liberty Protection Act of 1998, [supra note 16, at 132](#) (statement of W. Cole Durham, Jr., Law Professor, Brigham Young University Law School); *id.*, [supra note 16, at 201-02](#) (statement of Bruce D. Shoulson, Attorney at Law).

²⁵ 146 Cong. Rec. S7774 (daily ed. July 27, 2000).

²⁶ *Id.* at S7775.

²⁷ [42 U.S.C. 2000cc](#) to [2000cc-5](#) (2000).

²⁸ Religious Liberty Protection Act of 1998, [supra note 16, at 135](#) (statement of W. Cole Durham, Jr., Law Professor, Brigham Young University Law School).

²⁹ 146 Cong. Rec. S7774 (daily ed. July 27, 2000). This Senate record includes a series of hearings conducted by Congress in support of the RLUIPA in response to criticism from the Supreme Court in the *Boerne* case, concerning the incomplete legislative history in the Religious Freedom Restoration Act. See *infra* notes 140-57 and accompanying text for a more detailed explanation.

³⁰ 146 Cong. Rec. S7774 (daily ed. July 27, 2000); 146 Cong. Rec. H7190, H7192 (daily ed. July 27, 2000).

³¹ Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 2 Pub. Papers 1905, 1905 (Sept. 22, 2000).

³² See 146 Cong. Rec. S7777 (statement of Sen. Kennedy).

³³ *Id.*

In the land-use context, the RLUIPA's basic provision states that no government may enact or enforce a zoning law or land-use regulation in a manner that imposes a substantial burden on religious exercise unless it can demonstrate a compelling governmental interest³⁴ and can show that the law or regulation at issue is the least [*321] restrictive means available to further that interest.³⁵ The Act defines a substantial burden as occurring when a government implements a zoning law or other land-use regulation in a manner that substantially burdens religious exercise.³⁶ According to the Act's definitions, the use or conversion of property for religious exercise is itself religious exercise.³⁷

The Act has two major aspects. First, it prevents local governments from "imposing or implementing a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution,"³⁸ or that "discriminates against any assembly or institution on the basis of religion or religious denomination."³⁹ Second, the Act prevents local governments from "totally excluding religious assemblies from a jurisdiction,"⁴⁰ from "unreasonably limiting religious assemblies, institutions or structures within a jurisdiction,"⁴¹ and from imposing a substantial burden on the religious exercise of a person residing in, or confined to, an institution such as a prison, nursing home, or mental institution.⁴² Although this note will focus primarily on the first aspect, the land-use protections, both aspects of the Act rely on Section Five of the Fourteenth Amendment for congressional authority; both also rely on Congress's spending powers and its authority to regulate interstate commerce as alternative theories of congressional power.⁴³ In addition, the Act includes a severability clause, ensuring that if a portion of the Act is declared unconstitutional under one theory of congressional power, the remaining provisions will be unaffected.⁴⁴ This note will not consider the RLUIPA's constitutionality under the Commerce Clause or Congress's spending powers, but will instead focus primarily on congressional authority under the Enforcement Clause in Section Five of the Fourteenth Amendment.⁴⁵

³⁴ [42 U.S.C. 2000cc\(a\)\(1\)\(A\)](#) (2000). A compelling government interest in a free exercise context is satisfied by "'only the gravest of abuses, endangering paramount interests'" of the government. [Sherbert v. Verner, 374 U.S. 398, 406 \(1963\)](#) (quoting [Thomas v. Collins, 323 U.S. 516, 530 \(1945\)](#)). The Supreme Court has found a compelling government interest sufficient to withstand free exercise challenges in maintaining the nation's social security system ([United States v. Lee, 455 U.S. 252, 259-61 \(1982\)](#)), enforcing the military draft ([Gillette v. United States, 401 U.S. 437, 462 \(1971\)](#)), and ensuring a day of rest for workers sufficient to justify Sunday closing laws ([Braunfield v. Brown, 366 U.S. 599, 607 \(1961\)](#)).

³⁵ [42 U.S.C. 2000cc\(a\)\(1\)\(B\)](#).

³⁶ See [42 U.S.C. 2000cc\(a\)\(1\)](#), (a)(2)(C).

³⁷ [42 U.S.C. 2000cc-5\(7\)\(B\)](#).

³⁸ [42 U.S.C. 2000cc\(b\)\(1\)](#).

³⁹ [42 U.S.C. 2000cc\(b\)\(2\)](#).

⁴⁰ [42 U.S.C. 2000cc\(b\)\(3\)\(A\)](#).

⁴¹ [42 U.S.C. 2000cc\(b\)\(3\)\(B\)](#).

⁴² See 146 Cong. Rec. S7774 (daily ed. July 27, 2000).

⁴³ See [42 U.S.C. 2000cc\(a\)\(2\)\(A\)-\(B\)](#), 2000cc-1(b)(1)-(2).

⁴⁴ [42 U.S.C. 2000cc-3\(i\)](#).

⁴⁵ For a more comprehensive analysis of all of the RLUIPA's provisions, including the protection guaranteed to institutionalized persons not covered here, as well as alternative claims of congressional power under the Commerce Clause and Spending Powers, see Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, [9 Geo. Mason L. Rev. 929 \(2001\)](#). The article was published

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A. How We Got to the RLUIPA

Prior to 1990, when the Supreme Court decided the landmark case of *Employment Division v. Smith*,⁴⁶ the courts had applied strict scrutiny to government actions that substantially burdened religious exercise.⁴⁷ Of course, this meant that when religious exercise was substantially burdened by a governmental action, the government had to prove the burden was necessitated by a compelling governmental interest.⁴⁸ In 1990, *Smith* changed all of that.⁴⁹ When [*323] the state of Oregon denied unemployment benefits to two Native Americans who had been fired from their jobs with a drug rehabilitation organization for smoking peyote during a religious ceremony, the former employees appealed to the Supreme Court.⁵⁰ Instead of applying strict scrutiny, Justice Scalia, for the Court, wrote:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" - permitting him, by virtue of his beliefs, "to become a law unto himself" - contradicts both constitutional tradition and common sense.⁵¹

In upholding Oregon's denial of unemployment benefits in the face of a free-exercise challenge, the Court reasoned that where states are seeking to enforce generally applicable prohibitions on socially harmful criminal

before the Supreme Court announced its decision in [Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 \(2003\)](#). For a contrary view, consider Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 93 (2001), also published prior to *Hibbs*.

⁴⁶ [Employment Div. v. Smith, 494 U.S. 872 \(1990\)](#).

⁴⁷ See, e.g., [Wisconsin v. Yoder, 406 U.S. 205 \(1972\)](#); [Sherbert v. Verner, 374 U.S. 398 \(1963\)](#).

⁴⁸ [Yoder, 406 U.S. at 236](#); [Sherbert, 374 U.S. at 406](#).

⁴⁹ The *Smith* court reasoned that its decision did not change the law governing free exercise claims but rather affirmed the law as it stood hitherto. [Smith, 494 U.S. at 882-85](#). In *Smith*, the Court clarified this discrepancy, stating that it had only applied strict scrutiny to free exercise challenges of neutral, generally applicable laws when so-called "hybrid" rights - objections not based on free exercise alone but based on a free exercise claim in conjunction with another constitutional provision, such as freedom of speech and of the press - were invoked. [Id. at 881-82](#). For example, the Court cited [Cantwell v. Connecticut, 310 U.S. 296 \(1940\)](#), where the Court applied strict scrutiny to a free exercise claim where the right to distribute religious pamphlets was at issue, implicating both free exercise and free speech. [Smith, 494 U.S. at 881](#). Additionally, the Court cited [Wisconsin v. Yoder, 406 U.S. 205 \(1972\)](#), where the Court applied strict scrutiny to a free exercise claim where the right of parents to direct the education of their children was at issue. [Smith, 494 U.S. at 881](#). In concurrence, however, Justice O'Connor accused the *Smith* majority of "endeavoring to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence." [Smith, 494 U.S. at 896](#) (O'Connor., J. concurring) (internal citations omitted). Furthermore, it is worth noting that when the Court has applied strict scrutiny to laws being challenged on free exercise grounds, it has never held that it was limiting its application of strict scrutiny to the areas in the cases before the Court. See, e.g., [Yoder, 406 U.S. 205 \(1972\)](#); [Sherbert, 374 U.S. 398 \(1963\)](#). Rather, the Court has consistently applied strict scrutiny to challenges brought under the Free Speech Clause of the First Amendment. See, e.g., [Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 \(1991\)](#). Ultimately, however, this nuance may be irrelevant. The key question regarding the constitutionality of RLUIPA under Section Five of the Fourteenth Amendment is not whether Congress is actually restoring strict scrutiny to Supreme Court jurisprudence in the free exercise area, but whether the act of Congress requiring strict scrutiny for future free exercise challenges to land-use laws is permissible under the Constitution. This note will argue that it is.

⁵⁰ [Smith, 494 U.S. at 874-75](#).

⁵¹ [Id. at 885](#) (internal citations omitted).

conduct, strict scrutiny is not necessary so long as the government refrains from using individualized assessments or from refusing to extend a system of individual exemptions to cases of religious hardship.⁵²

B. Congress Responds with the RFRA, and Boerne Strikes It Down

Following *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA),⁵³ specifically referring to *Smith*⁵⁴ and restoring strict scrutiny to any government act that substantially burdened religious exercise.⁵⁵ Congress stated in the RFRA that *Smith* "virtually eliminated the requirement that the government justify [*324] burdens on religious exercise imposed by laws neutral toward religion."⁵⁶ But, it said, "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that "governments should not substantially burden religious exercise without compelling justification."⁵⁷

The RFRA required the government to show a compelling interest to justify an act that substantially burdened religious exercise,⁵⁸ and it required the government to show that there were no less restrictive means available to achieve that interest.⁵⁹ This second requirement essentially represents the second prong of a two-part strict scrutiny test the Supreme Court has applied in other contexts, particularly in cases involving the First Amendment's protections of free speech.⁶⁰

In the *Boerne* case, in 1997, however, the Supreme Court struck down the RFRA saying its "sweeping coverage ... displacing laws and prohibiting official actions of almost every description and regardless of subject matter"⁶¹ exceeded congressional authority under the Enforcement Clause in Section Five of the Fourteenth Amendment.⁶² The Court stated, "RFRA is so out of proportion to a supposed remedial or preventive objective, that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."⁶³

To this action by the Supreme Court, Congress responded in turn. The RLUIPA is Congress's most recent effort in this so-called "tug-of-war" with the Supreme Court. It is an attempt to format the new statute to the standard

⁵² See [id. at 883-85](#).

⁵³ Religious Freedom Restoration Act, [42 U.S.C. 2000bb](#) to [2000bb\(4\)](#) (2000).

⁵⁴ See [42 U.S.C. 2000bb\(a\)\(4\)](#).

⁵⁵ [42 U.S.C. 2000bb\(b\)\(1\)](#).

⁵⁶ [42 U.S.C. 2000bb\(a\)\(4\)](#).

⁵⁷ [42 U.S.C. 2000bb\(a\)\(2\)-\(3\)](#).

⁵⁸ [42 U.S.C. 2000bb-1\(b\)\(1\)](#).

⁵⁹ [42 U.S.C. 2000bb-1\(b\)\(2\)](#).

⁶⁰ See, e.g., [Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.](#), [502 U.S. 105, 118 \(1991\)](#).

⁶¹ [City of Boerne v. Flores](#), [521 U.S. 507, 532 \(1997\)](#).

⁶² [Id. at 536](#).

⁶³ [Id. at 532](#).

articulated in the Boerne decision. So far, the congressional response in the RLUIPA has been well received in the lower courts, ⁶⁴ with one lone federal district court judge finding the RLUIPA unconstitutional. ⁶⁵

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II. Congressional Power Under Section Five of the Fourteenth Amendment

The United States' government is one of enumerated powers. ⁶⁶ This arrangement allows Congress to enact legislation only in areas where the Constitution expressly allows as much. ⁶⁷ Powers not delegated by the Constitution to Congress, the President, or the Judiciary are reserved to the people and to the states. ⁶⁸ The Enforcement Clause in Section Five of the Fourteenth Amendment grants Congress express powers to legislate.

The Fourteenth Amendment itself provides the familiar guarantees that the states may not make or enforce laws that deprive citizens of the United States of equal protection under the laws; nor may they deprive citizens of life, liberty, or property without due process of law, or deprive citizens from one state of the privileges or immunities enjoyed by citizens of another state. ⁶⁹ Like the other Reconstruction Era amendments to the United States Constitution, ⁷⁰ the Fourteenth Amendment contains an enforcement clause allowing Congress to enact legislation to enforce the protections contained in the Amendment. ⁷¹ The Enforcement Clause states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." ⁷² This is an express grant of power to Congress to enact legislation protecting the rights provided by the Fourteenth Amendment.

[*326] Through the incorporation doctrine, the Supreme Court has applied key sections of the Bill of Rights to the states and to local governments through the Fourteenth Amendment. ⁷³ Of course, the Court has determined that the Free Exercise Clause of the First Amendment is one of those provisions that applies to the states through incorporation. ⁷⁴ Thus, the incorporation doctrine, combined with Section Five of the Fourteenth Amendment,

⁶⁴ See, e.g., [United States v. Maui County, 298 F. Supp. 2d 1010, 1016 \(D. Haw. 2003\)](#) (finding the RLUIPA to be a "proper exercise of congressional power under the 14th Amendment"); [Westchester Day Sch. v. Vill. of Mamaroneck, 280 F. Supp. 2d 230, 239 \(S.D.N.Y. 2003\)](#), vacated on other grounds, [2004 U.S. App. LEXIS 20327 \(2d Cir. 2004\)](#) ("... RLUIPA is a valid enactment pursuant to Congress's powers under the Commerce Clause and Section 5 of Fourteenth Amendment and therefore does not violate the Tenth Amendment."); [Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 121 \(D. Conn. 2003\)](#) (stating that the RLUIPA does not violate Section Five of the Fourteenth Amendment because it "essentially codifies First and Fourteenth Amendment standards ... and institutes proportional remedies").

⁶⁵ See [Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1102 \(C.D. Cal. 2003\)](#). For a greater discussion of this one exception, see *infra* note 161.

⁶⁶ [McCulloch v. Maryland, 17 U.S. 316, 405 \(1819\)](#) ("This government is acknowledged by all to be one of enumerated powers.").

⁶⁷ See *id.*

⁶⁸ [U.S. Const. amend. X](#).

⁶⁹ [U.S. Const. amend. XIV](#).

⁷⁰ [U.S. Const. amend. XIII](#) (ratified Dec. 18, 1865); [U.S. Const. amend. XV](#) (ratified Mar. 30, 1870).

⁷¹ See [U.S. Const. amend. XIV, 5](#). For a more detailed discussion of the Fourteenth Amendment, see Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 3.6 (2d ed. 2002).

⁷² [U.S. Const. amend. XIV, 5](#).

⁷³ See Chemerinsky, *supra* note 71, 6.3.3.

⁷⁴ [Cantwell v. Connecticut, 310 U.S. 296, 303 \(1940\)](#).

effectively grants Congress power to enact legislation, binding on the states and their political subdivisions, to safeguard the free exercise of religion.

A. Historical Interpretation of Section Five Powers

Traditionally, the Supreme Court has taken a relatively liberal view of how much authority Congress has under Section Five. For example, in *Katzenbach v. Morgan*⁷⁵ the Court said Congress could "exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁷⁶ Significantly, the Court expressly rejected an argument that Section Five justifies legislation contrary to an existing state law only if the judicial branch determined the state law at issue is prohibited by the provisions of the Fourteenth Amendment.⁷⁷ Such a reading, the Court said, "would depreciate both congressional resourcefulness and congressional responsibility of implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."⁷⁸

B. City of Boerne v. Flores and a New Standard: Boerne Strikes Down the RFRA as Exceeding Congressional Power Under Section Five

The Court's approach changed significantly in 1997 when it decided *City of Boerne v. Flores*.⁷⁹ Boerne involved a challenge to congressional authority to use the Fourteenth Amendment's [*327] Enforcement Clause to enact the RFRA.⁸⁰ The RFRA required that if an action by a governmental body substantially burdened an individual's free exercise of religion in any context, the government had to show its action was in furtherance of a compelling government interest and that the action taken was the least restrictive means available to further that interest.⁸¹ The RFRA was the predecessor to the RLUIPA and it, too, relied on Section Five of the Fourteenth Amendment to protect religious exercise.⁸²

⁷⁵ [384 U.S. 641 \(1966\)](#).

⁷⁶ [Id. at 651 \(1966\)](#).

⁷⁷ [Id. at 648](#).

⁷⁸ [Id. at 648-49](#) (footnote omitted).

⁷⁹ [521 U.S. 507 \(1997\)](#).

⁸⁰ [Id. at 511 \(1997\)](#).

⁸¹ See [id. at 515-16](#) (citing [42 U.S.C. 2000bb-1](#)).

⁸² [Id. at 516](#) ("Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States."). The ruling that the RFRA was not an appropriate use of Section Five of the Fourteenth Amendment voided the law as applied to the states and their political subdivisions. The Court did not make clear whether the RFRA still applied to the federal government. After Boerne, however, the federal government continued to operate as if the RFRA were good law. See 146 Cong. Rec. S7776 (daily ed. July 27, 2000). Federal appellate courts have also held that the RFRA remains binding on the federal government. See [Kikumura v. Hurley](#), [242 F.3d 950, 960 \(10th Cir. 2001\)](#) ("... RFRA as applied to the Federal government is severable from the portion of the RFRA declared unconstitutional in Flores, and independently remains applicable to federal officials."); [Christians v. Crystal Evangelical Free Church \(In re Young\)](#), [141 F.3d 854, 859 \(8th Cir. 1998\)](#), cert. denied sub nom. **Christians v. Crystal Evangelical Free Church**, [525 U.S. 811 \(1998\)](#) ("RFRA's protection against federal interference with religious liberties is independent and distinct from its protection against state interference ...").

In Boerne, the St. Peter Catholic Church of Boerne, Texas, sought to expand its church to accommodate a growing congregation.⁸³ The parish sought, and obtained, permission from the archbishop of San Antonio for the construction project.⁸⁴ Before the archbishop applied for the necessary building permit, however, the city council passed a new ordinance authorizing a city commission to prepare a plan with proposed historic landmarks and districts.⁸⁵ Under the ordinance, any construction project affecting a historic landmark or a building in a historic district had to be approved by the commission.⁸⁶ When the archbishop applied for the necessary building permit for the expansion, city officials denied the application, arguing that the recently approved ordinance placed the church in a designated historic district.⁸⁷ Invoking the RFRA's protections, the archbishop **[*328]** sued the city, attempting to force it to grant the building permit to the diocese.⁸⁸

When the challenge reached the Supreme Court, the Boerne Court interpreted congressional legislative authority under Section Five far more narrowly than it had in Katzenbach. Writing for the Court, Justice Kennedy acknowledged that Congress deserves wide latitude to decide which laws enacted under Section Five remedy or prevent unconstitutional actions as opposed to those that make a substantive change, but he stated, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁸⁹ The RFRA, he said, was not thus balanced.⁹⁰ Justice Kennedy said the RFRA, as a result of its "sweeping coverage," displaced laws "of almost every description and regardless of subject matter."⁹¹ He continued, "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."⁹² Reasoning that Section Five of the Fourteenth Amendment was designed to enforce existing constitutional protections and not expand them, the Court held that the RFRA exceeded congressional authority under the Enforcement Clause in Section Five of the Fourteenth Amendment.⁹³

Justice Kennedy also objected to the lack of a detailed and up-to-date record of religious discrimination in the RFRA's legislative history.⁹⁴ Such a history, he said, would substantiate the threats to constitutional protections that Congress said it was trying to prevent.⁹⁵ Justice Kennedy also noted that the RFRA, unlike Katzenbach and other Voting Rights Act cases,⁹⁶ had no termination date or mechanism for repeal should the problems the legislation sought to address be remedied,⁹⁷ and that it was not limited to the geographical areas where

⁸³ [Boerne, 521 U.S. at 511-12.](#)

⁸⁴ [Id. at 512.](#)

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ [Id. at 520.](#)

⁹⁰ See [id. at 532.](#)

⁹¹ *Id.*

⁹² *Id.*

⁹³ See [id. at 519, 536.](#)

⁹⁴ [Id. at 530-31.](#)

⁹⁵ *Id.*

⁹⁶ Other Voting Rights Act cases include [City of Rome v. United States, 446 U.S. 156 \(1980\)](#), reh'g denied, **447 U.S. 916 (1980)**, and [South Carolina v. Katzenbach, 383 U.S. 301 \(1966\)](#).

discrimination was most flagrant or to a **[*329]** specific "class of laws" where discrimination had been most pronounced.⁹⁸

Ultimately, Justice Kennedy concluded:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. 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.⁹⁹

In essence, the Court held that legislation creating or expanding constitutional rights rather than enforcing existing constitutional rights, exceeds Congress's authority under Section Five of the Fourteenth Amendment.

III. Hibbs Lights the Way to Appropriate Use of the Fourteenth Amendment's Enforcement Clause

In 2003, the Supreme Court provided a roadmap of sorts for proper use of Section Five when it decided *Nevada Department of Human Resources v. Hibbs*.¹⁰⁰ In *Hibbs*, William Hibbs sued the state of Nevada, his employer, alleging the state violated the Family Medical Leave Act (FMLA) when it fired him for refusing to return to work after taking leave.¹⁰¹ The FMLA entitles an eligible employee to take up to twelve weeks of unpaid leave each year "for any of several reasons, including the onset of a 'serious health condition' in an employee's spouse."¹⁰² The Act creates a private right of action for a wronged employee, allowing such an employee to seek damages against his or her employer for violations of the Act's leave policies.¹⁰³ **[*330]** Mr. Hibbs, an employee of Nevada's Department of Human Resources, took leave under the FMLA to care for his wife, who was recovering from neck surgery.¹⁰⁴ When Mr. Hibbs did not return to work, he was terminated and he sued, claiming Nevada violated his rights under the FMLA.¹⁰⁵ Nevada defended the suit by claiming the Eleventh Amendment barred the action by guaranteeing sovereign immunity to the states.¹⁰⁶ The Supreme Court made clear that Congress may abrogate state sovereign immunity if Congress makes its intention to do so clear in the statute, and if Congress acts pursuant to a valid exercise of its power under Section Five of the Fourteenth Amendment.¹⁰⁷ The ultimate issue in the

⁹⁷ [Boerne, 521 U.S. at 532-33.](#)

⁹⁸ [Id. at 533.](#) Justice Kennedy went on to state that Section Five legislation does not necessarily "require[] termination dates, geographic restrictions, or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress's means are proportionate to ends legitimate under 5." *Id.*

⁹⁹ [Id. at 508.](#)

¹⁰⁰ [538 U.S. 721 \(2003\).](#)

¹⁰¹ [Id. at 725.](#)

¹⁰² [Id. at 724](#) (quoting [29 U.S.C. 2612\(a\)\(1\)\(C\)](#)).

¹⁰³ [Id. at 724-25](#) (citing [29 U.S.C. 2617\(a\)\(2\)](#), [2615\(a\)\(1\)](#)).

¹⁰⁴ [Id. at 725.](#)

¹⁰⁵ *Id.*

¹⁰⁶ [Id. at 725-27.](#)

¹⁰⁷ [Id. at 727.](#)

Hibbs case became whether Congress had acted within its constitutional authority under Section Five of the Fourteenth Amendment when it enacted the FMLA.¹⁰⁸

In Hibbs, the Court concluded that the FMLA was an appropriate use of congressional power under Section Five of the Fourteenth Amendment.¹⁰⁹ When considered alongside the standard the Court articulated in Boerne, the Hibbs decision supports the RLUIPA's constitutionality. The differences that led to the Congressional action in Hibbs being upheld and similar action in Boerne being struck down can essentially be grouped into two categories. First, while Justice Kennedy in Boerne decried the RFRA's "sweeping coverage" that displaced laws of almost every kind,¹¹⁰ the Court in Hibbs approved of the FMLA's narrow and limited nature, both in the Act itself and in its application.¹¹¹ Second, the Boerne Court said that a lack of detailed and up-to-date legislative history with specific examples of religious discrimination called into question whether the discrimination the RFRA sought to remedy actually existed.¹¹² Conversely, the Hibbs Court noted with approval the evidence in the FMLA's legislative history of facially discriminatory policies and laws governing family and medical leave, and the evidence that facially neutral policies had been applied in discriminatory ways.¹¹³

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A. Limitations Placed on the FMLA

The Boerne Court found the "sweeping coverage" of the RFRA's protections so widespread that the Act could not possibly be considered remedial or preventive, but rather amounted to a substantive change in constitutional protections.¹¹⁴ In Hibbs, the Court distinguished the FMLA from the RFRA and other statutes "which applied broadly to every aspect of state employers' operations," stating, "the FMLA is narrowly targeted at the fault line between work and family ... and affects only one aspect of the employment relationship."¹¹⁵ Not only did the Court approve of the FMLA's narrow field of application - it only regulates the leave employers must grant to employees for medical or family reasons - Justice Rehnquist, writing for the Court, said, "we also find significant the many other limitations that Congress placed" within the FMLA to restrain the way it governed this narrow area of employment law.¹¹⁶ For example, Justice Rehnquist noted the FMLA requires only unpaid leave.¹¹⁷ The Act applies only to employees who have worked for their employer for at least one year and who have provided at least 1,250 hours of service within the past twelve months.¹¹⁸ Employees in high-ranking or sensitive positions are ineligible for the FMLA leave, and the statute excludes from coverage elected state officials, their staffs, and appointed policymakers.¹¹⁹ Furthermore, employees must give advance notice when their leave is foreseeable, and

¹⁰⁸ [Id. at 726-27.](#)

¹⁰⁹ [Id. at 739-40.](#)

¹¹⁰ [City of Boerne v. Flores, 521 U.S. 507, 532 \(1997\).](#)

¹¹¹ [Hibbs, 538 U.S. at 738-39.](#)

¹¹² See [Boerne, 521 U.S. at 530-31.](#)

¹¹³ [Hibbs, 538 U.S. at 732.](#)

¹¹⁴ [Boerne, 521 U.S. at 532.](#)

¹¹⁵ [Hibbs, 538 U.S. at 738.](#)

¹¹⁶ *Id.*

¹¹⁷ [Id. at 739](#) (citing [29 U.S.C. 2612\(a\)\(1\)](#)).

¹¹⁸ *Id.* (citing [29 U.S.C. 2611\(2\)\(A\)](#)).

employers may require a healthcare provider to certify the need for leave.¹²⁰ Congress also limited the leave to twelve weeks, a period Justice Rehnquist believed "long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" ¹²¹ In addition, the cause of action under the FMLA is restricted to damages recoverable and is strictly defined and **[*332]** measured by actual monetary losses, and the accrual period for back-pay is limited by the Act's two-year statute of limitations.¹²²

B. The FMLA's More Complete Legislative History

Whereas the Boerne court struck down the RFRA partly because of the lack of a record of constitutional violations in its legislative history, the Hibbs Court found that the FMLA's legislative history pointed to constitutional violations justifying legislation under the Enforcement Clause of the Fourteenth Amendment. In Boerne, the largest problem Justice Kennedy had with the RFRA was that the legislative history of the Act "lacked examples of modern instances of generally applicable laws passed because of religious bigotry."¹²³ He said the lack of these specific and up-to-date examples likely meant deliberate religious discrimination was not a significant problem.¹²⁴ The FMLA, upheld in Hibbs, did not have this shortcoming. There, Justice Rehnquist said the Act's legislative history contained sufficient evidence to conclude that employers were unequally granting family leave to women over men.¹²⁵ This unequal treatment implicated the Equal Protection guarantees of the Fourteenth Amendment and justified Congress's enactment of legislation under the Amendment's Enforcement Clause to protect that right.¹²⁶ The Court gave credence to a nationwide survey contained within the FMLA's legislative history, showing "stereotype-based beliefs" that lead to unequal rights to family leave.¹²⁷ In addition, Justice Rehnquist said, "Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways."¹²⁸ Quoting the legislative history, the Court said there was evidence of "'serious problems with the discretionary nature of family leave,' because when 'the authority to grant leave and to arrange the length of that leave rests with individual supervisors,' it leaves 'employees open to discretionary and possibly unequal treatment.'" ¹²⁹

[*333] The Hibbs Court found the limitations in the scope of the FMLA and in its application compelling, and it found in the FMLA's legislative history evidence sufficient to justify enacting positive legislation under the Fourteenth Amendment. Due to these factors, the Court found that the FMLA was "congruent and proportional ... and [could] "be understood as responsive to, or designed to prevent, unconstitutional behavior."¹³⁰ Therefore, the

¹¹⁹ Id. (citing [29 U.S.C. 2611\(2\)\(B\)\(i\)](#), [2611\(3\)](#), [203\(e\)\(2\)\(C\)](#)).

¹²⁰ Id. (citing [29 U.S.C. 2612\(e\)](#), [2613](#)).

¹²¹ Id. (quoting [Ragsdale v. Wolverine World Wide, Inc.](#), [535 U.S. 81, 94 \(2002\)](#) (quoting [29 U.S.C. 2601\(b\)](#))).

¹²² [Id. at 739-40](#) (citing [29 U.S.C. 2617\(a\)\(1\)\(A\)\(i\)-\(iii\)](#), [2617\(c\)\(1\)-\(2\)](#)).

¹²³ [City of Boerne v. Flores](#), [521 U.S. 507, 530 \(1997\)](#).

¹²⁴ Id.

¹²⁵ [Hibbs](#), [538 U.S. at 734-35](#).

¹²⁶ [Id. at 735](#).

¹²⁷ [Id. at 730](#).

¹²⁸ [Id. at 732](#).

¹²⁹ Id. (quoting H.R. Rep. No. 103-8, at 10-11 (1993)).

¹³⁰ [Id. at 740](#) (quoting [City of Boerne v. Flores](#), [521 U.S. 507, 532 \(1997\)](#)).

Court upheld the FMLA's constitutionality.¹³¹ The Justices who voted to uphold the FMLA in *Hibbs* and who had previously voted to strike down the RFRA in *Boerne* were Justices Rehnquist, Ginsburg, and Stevens.¹³² Presumably the votes of these Justices will be critical if and when the Court takes up a challenge to the RLUIPA.

IV. What *Boerne* and *Hibbs* Mean for the RLUIPA

Under the standard laid out in *Boerne*, and particularly as expanded upon by *Hibbs*, the RLUIPA is a constitutional use of the Fourteenth Amendment's Enforcement Clause. If one considers the *Boerne* and *Hibbs* decisions together, some general rules regarding the scope of congressional power under the Fourteenth Amendment's Enforcement Clause begin to emerge. First, it appears congruence and proportionality between the legislation and its intended effects are essential. In order to be constitutional, the legislation must be narrow enough in scope and application to show that Congress was responding to a real and limited area where constitutional rights were being infringed upon, rather than attempting to expand existing rights. If it is to avoid being struck down, the legislation must enforce existing constitutional protections as interpreted by the Supreme Court. An effort to expand current constitutional protections or to create new ones will very likely be struck down as exceeding congressional authority. Second, the legislation should address specific constitutional violations that Congress can show are actually occurring. A detailed legislative record with evidence of widespread constitutional violations, including modern examples of discrimination, is certainly helpful in this regard, although probably not essential. One way to meet this condition seems to be by means of a comprehensive, nationwide study. The *Hibbs* Court seemed so **[*334]** convinced of the need for legislation, because portions of the FMLA's legislative history showed sex-based discrimination in family and medical leave policies. A similar record of racial or gender discrimination within the area of constitutional rights sought to be protected will also likely contribute to a finding of the legislation's constitutionality. Lastly, limitations placed on the geographical area of application as well as the time of the legislation's effect, with a sunset date or provision for repeal if deprivation of the specific constitutional rights is no longer a problem, are again probably not essential, but may be indicative that the legislative act is not overreaching. Under these emerging standards, the RLUIPA is a constitutional exercise of congressional power.

A. Limitations on the RLUIPA's Scope and Application

The RLUIPA has a very narrow area of application, protecting free exercise in most, but not all, areas of land-use and protecting the religious liberties of institutionalized persons.¹³³ Once the RLUIPA is implicated, there are several significant limitations placed on the way the Act protects religious land-use. For example, religious institutions still must apply for zoning "variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where [they are] available without discrimination or unfair delay."¹³⁴ Although the "use, building, or conversion of real property" is religious exercise for purposes of the Act,¹³⁵ "not every activity carried out by a religious entity" meets the definition.¹³⁶ As an example, the RLUIPA's legislative history cites a scenario where a land-use law burdens a commercial building whose proceeds are used to support religious exercise, and then concludes this scenario would not represent a burden on religious exercise for purposes of the statute.¹³⁷ Even where a certain type of land-use decision falls within the Act's **[*335]** definition, and even where

¹³¹ Id. (quoting [Boerne](#), 521 U.S. at 532).

¹³² See [Hibbs](#), 538 U.S. at 723; [Boerne](#), 521 U.S. at 509.

¹³³ [42 U.S.C. 2000cc](#) to [2000cc-1](#) (2000).

¹³⁴ 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹³⁵ [42 U.S.C. 2000cc-5\(7\)\(b\)](#).

¹³⁶ 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹³⁷ Id. The Act also places significant burdens on the portion intended to protect the religious freedom of institutionalized persons, including perhaps most significantly, a provision in the Act stating that it is not intended to amend or repeal the Prison

that decision burdens religious exercise, the RLUIPA is not always, nor automatically, implicated. Only in those cases where the governmental action results in a "substantial burden" will the land-use decision fall within the RLUIPA's scope.¹³⁸ Congress was also careful to make sure the RLUIPA would not be interpreted as an effort to trump the First Amendment's Establishment Clause. The Act makes this clear, stating that it should not "be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion."¹³⁹ Congress has placed significant limitations on the areas of the RLUIPA's application and on the way the Act operates in those limited areas. These limitations should satisfy the objections raised to the RFRA in *Boerne* and are analogous to the FMLA limitations that found the Court's approval in *Hibbs*.

B. The RLUIPA's Detailed and Up-to-Date Legislative History

It is apparent almost immediately upon reading the RLUIPA's legislative history that Congress took to heart Justice Kennedy's criticism in *Boerne* concerning the RFRA's incomplete legislative history. While the *Boerne* Court said the RFRA's legislative history "lacks examples of modern instances of generally applicable laws passed because of religious bigotry," noting that there was no mention of any episode of religious discrimination occurring within the past forty years,¹⁴⁰ the RLUIPA's legislative history is substantially different. Nine congressional hearings on the RLUIPA over the course of three years "addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation."¹⁴¹ In response to Justice Kennedy's criticism that the RFRA's examples of religious discrimination were not current, Congress included in the legislative history of the RLUIPA an additional report detailing a series of new examples of religious discrimination in land-use that had taken place between the time of [*336] the original hearings on the bill and the congressional floor debate and voting.¹⁴²

Like the legislative history of the FMLA, the RLUIPA contains a nationwide study showing that small, non-denominational, or racial minority religious institutions have a much more difficult time with local land-use authorities than do so-called mainline churches.¹⁴³ For example, the study showed that while minority religions represent less than nine percent of the population, they "were involved in over 49% of the cases regarding the right to locate religious buildings at a particular site, and in over 33% of the cases seeking approval of accessory uses" at the site of an existing church, such as homeless shelters or soup kitchens.¹⁴⁴

When smaller, non-denominational, or other unclassified religious groups are taken into account, the study found that, when combined with racial minority organizations, they accounted for more than 68% of new location cases and more than 50% of "accessory use cases."¹⁴⁵ A detailed nationwide study pointing to discriminatory treatment of women in family and medical leave cases seemed to be a major factor that the *Hibbs* Court relied upon to uphold congressional use of Section Five of the Fourteenth Amendment in passing the FMLA.¹⁴⁶ Similarly, the nationwide

Litigation Reform Act of 1995, legislation intended to reduce the number of frivolous lawsuits filed by federal, state, and local prisoners. See [42 U.S.C. 2000cc-2\(e\)](#).

¹³⁸ [42 U.S.C. 2000cc\(a\)\(1\)-\(2\)](#). The term "substantial burden" is not defined in the statute.

¹³⁹ [42 U.S.C. 2000cc-4](#).

¹⁴⁰ [City of Boerne v. Flores, 521 U.S. 507, 530 \(1997\)](#).

¹⁴¹ 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹⁴² 146 Cong. Rec. E1564-67 (daily ed. Sept. 22, 2000) (statement of Rep. Henry J. Hyde).

¹⁴³ Religious Liberty Protection Act of 1998, [supra note 16, at 141-47](#) (statement of W. Cole Durham, Jr., Law Professor, Brigham Young University Law School).

¹⁴⁴ [Id. at 136](#).

¹⁴⁵ *Id.*

study highlighting not only religious discrimination against small, non-denominational, or unknown churches, but racial discrimination toward minority churches, would seem to support the RLUIPA's constitutionality.

Similarly to the way in which Congress designed the FMLA, which according to the Hibbs Court sought to address not only facially discriminatory laws, but also facially neutral laws that lend themselves to discriminatory application,¹⁴⁷ Congress designed the RLUIPA to address land-use laws that are often facially neutral but lend themselves to discriminatory application.¹⁴⁸ By their very nature, zoning and land-use laws are discretionary. Local governments often require variances to zoning codes, special-use permits, individual [*337] approval of site plans, and building permits before they allow development. This process obviously opens the door to individualized governmental assessment which could lead to discriminatory treatment of religious groups. Even in the seminal Smith case, which removed strict scrutiny as the standard for analyzing most free exercise claims, the Court stressed that its decision was simply that it would not apply strict scrutiny to a free exercise claim against a neutral and "generally applicable criminal law."¹⁴⁹ This reasoning further supports the argument that in enacting the RLUIPA, Congress was neither expanding constitutional rights nor creating new ones - the Boerne Court's accusation when Congress enacted the RFRA¹⁵⁰ - but was merely enacting legislation with the intent of protecting existing constitutional rights.

While the text of the RLUIPA is not limited to specific geographical areas, which the Boerne Court indicated would provide evidence Congress had not overreached,¹⁵¹ the RLUIPA's legislative history addresses this apparent defect. The Voting Rights Act, which the Court upheld as an appropriate use of the Enforcement Clause in Section Five of the Fourteenth Amendment in *South Carolina v. Katzenbach*,¹⁵² was limited to geographical areas of the country where voting discrimination was most prominent.¹⁵³ The Boerne Court cited this limitation as evidence that Congress's reaction to voting discrimination in *Katzenbach* was proportionate and congruent to the evil it sought to address, while pointing out that the RFRA contained [*338] no such limitation.¹⁵⁴ However, the Boerne Court was clear that Section Five legislation does not necessarily have to be limited to specific geographical areas.

¹⁴⁶ See [Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 \(2003\)](#).

¹⁴⁷ [Id. at 732-34](#).

¹⁴⁸ 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹⁴⁹ [Employment Div. v. Smith, 494 U.S. 872, 884-85 \(1990\)](#). The Court stated:

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment Our decisions in the unemployment cases stand for the proposition 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.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct.

[Id. at 884](#) (emphasis added) (citations omitted).

¹⁵⁰ [City of Boerne v. Flores, 521 U.S. 507, 532 \(1997\)](#).

¹⁵¹ [Id. at 532-33](#).

¹⁵² [South Carolina v. Katzenbach, 383 U.S. 301, 337 \(1966\)](#).

¹⁵³ [Id. at 315-16](#).

¹⁵⁴ [Boerne, 521 U.S. at 532-33](#).

¹⁵⁵ The RLUIPA's legislative history addresses this possible weakness, stating that Congress did not limit the Act's application to specific geographical areas of the country because "discrimination against religious uses [of land] is a nationwide problem" that is often covert, since local governments can cite pretextual concerns such as traffic, noise, or safety. ¹⁵⁶ Congress said the nationwide prevalence of the problem made it impossible to make individual, jurisdiction-specific findings. ¹⁵⁷ Also, the Voting Rights Act was a response to a special set of circumstances - racial discrimination in voting during the 1960s. Congress could much more easily limit application of that legislation to specific jurisdictions since much of the racial discrimination in voting occurred in the South.

Responding to the challenge of Boerne, Congress included a very detailed, broad, and current legislative history for the RLUIPA. It conducted nine hearings over three years; it updated the record with specific examples of religious discrimination in land-use that had occurred during the time between the hearings and the vote; and it considered a nationwide study indicating disparate treatment of minority, small, and unknown religious denominations. The RLUIPA's legislative history, like the legislative history approved in Hibbs, is detailed and current enough to overcome the Supreme Court's objections that crippled the RFRA in the Boerne decision.

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V. Lower Court Decisions on the RLUIPA's Constitutionality Under the Fourteenth Amendment's Enforcement Clause

Given the recent history between Congress and the Court over what protection will be afforded to religious liberty, and given the inconsistent rulings in the lower courts, it seems inevitable that the Supreme Court will have the final word on the RLUIPA's constitutionality. ¹⁵⁸ To date, the RLUIPA's land-use provisions have been expressly upheld as consistent with congressional power under the Enforcement Clause in Section Five of the Fourteenth Amendment in at least six published opinions. ¹⁵⁹ Furthermore, the application of the Act has been upheld as constitutional several times. ¹⁶⁰ Only one judge, Stephen V. Wilson of the U.S. District Court for the Central District of California, has found the RLUIPA's land-use provisions to be an unconstitutional use of congressional power under the Enforcement Clause of the Fourteenth Amendment. ¹⁶¹

¹⁵⁵ [Id. at 533](#) ("This is not to say, of course, that 5 legislation requires termination dates, geographic restrictions, or egregious predicates.").

¹⁵⁶ 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹⁵⁷ *Id.*

¹⁵⁸ Again, it should be noted that although the RLUIPA protects both land-use and the religious liberties of institutionalized persons and it was enacted under Section Five of the Fourteenth Amendment, the Commerce Clause, and the Spending Power, this note focuses primarily on the statute's constitutionality under the Fourteenth Amendment's Enforcement Clause as it relates to land-use.

¹⁵⁹ See [Castle Hills First Baptist Church v. City of Castle Hills](#), No. SA-01-CA-1149-*RF*, 2004 WL 546792 (*W.D. Tex. Mar. 17, 2004*); [United States v. Maui County](#), 298 F. Supp. 2d 1010 (*D. Haw. 2003*); [Murphy v. Zoning Comm'n of New Milford](#), 289 F. Supp. 2d 87 (*D. Conn. 2003*); [Westchester Day Sch. v. Vill. of Mamaroneck](#), 280 F. Supp. 2d 230 (*S.D.N.Y. 2003*), vacated on other grounds, 2004 U.S. App. LEXIS 20327 (2d Cir. 2004); [Christ Universal Mission Church v. City of Chicago](#), No. 01 C 1429, 2002 U.S. Dist. LEXIS 22917 (*N.D. Ill. Sept. 11, 2002*), rev'd on other grounds, 362 F.3d 423 (7th Cir. 2004); [Freedom Baptist Church v. Township of Middletown](#), 204 F. Supp. 2d 857 (*E.D. Pa. 2002*).

¹⁶⁰ See, e.g., [Civil Liberties for Urban Believers v. City of Chicago](#), 342 F.3d 752 (7th Cir. 2003), cert. denied, 2004 U.S. LEXIS 4152 (June 7, 2004); [Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Township](#), 675 N.W.2d 271 (*Mich. Ct. App. 2003*).

¹⁶¹ [Elsinore Christian Ctr. v. City of Lake Elsinore](#), 291 F. Supp. 2d 1083 (*C.D. Cal. 2003*). This is the only known published opinion finding the RLUIPA's land-use provisions unconstitutional under the Fourteenth Amendment's Enforcement Clause. In a second case considered by Judge Wilson, [Missionaries of Charity Bros. v. City of Los Angeles](#), No. CV-01-8115-SVW (*C.D. Cal. July 11, 2003*) (on file with the Ave Maria Law Review), Judge Wilson issued an unpublished opinion noting that he had

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A. Freedom Baptist Church v. Township of Middletown

A number of courts have upheld the RLUIPA's constitutionality under Section Five of the Fourteenth Amendment in the land-use context.¹⁶² One case which fairly represents the reasoning of the courts in these cases is *Freedom Baptist Church v. Township of Middletown*.¹⁶³ In *Freedom Baptist*, the Eastern District of Pennsylvania found the RLUIPA "constitutes the kind of congruent and, above all, proportional remedy Congress is empowered to adopt under 5 of the Fourteenth Amendment."¹⁶⁴ In *Freedom Baptist*, a church seeking a variance to the Middletown Township zoning ordinance alleged the ordinance treated religious uses differently from similar secular uses and made it nearly impossible to meet the "onerous" standards the township required in order to obtain a required variance.¹⁶⁵ The church had already leased a portion of an office building and begun holding services when it was informed by township officials that the church services were in violation of the zoning ordinance.¹⁶⁶ The church noted that of the seventeen zoning districts within the township, religious worship was not a permitted use in any of them.¹⁶⁷ Religious worship was allowed as a "conditional use" in some districts, requiring a variance to the township zoning ordinance.¹⁶⁸ However, a variance was available only if the church met strict requirements that, according to the church, made it effectively impossible to locate within the township.¹⁶⁹ The township defended the suit by alleging the RLUIPA was an unconstitutional use of the Enforcement Clause of the Fourteenth Amendment.¹⁷⁰

In upholding the statute, the Court noted the RLUIPA's limited applicability¹⁷¹ and pointed out that its requirements did nothing more than codify existing protections afforded by Supreme Court [*341] jurisprudence.¹⁷² The Court then compared the RLUIPA to the RFRA, struck down in *Boerne*, saying the RLUIPA "critically differs from the RFRA" because it limits itself to cases in which governments make individualized assessments and does not reach cases involving neutral laws of general applicability.¹⁷³ The Court noted that this limitation met the Smith standard, and the "RLUIPA thus cannot be regarded as in any way hostile to Smith, as the RFRA undoubtedly was."¹⁷⁴ The Court also noted the RLUIPA was not hostile to *Boerne* because rather than the "'sweeping coverage' ... that ensured that statute's 'intrusion at every level of government, displacing laws and prohibiting official actions of

previously found the RLUIPA unconstitutional in the *Lake Elsinore* decision, and ordering the parties to submit briefs regarding the statute's constitutionality.

¹⁶² See *infra* note 204.

¹⁶³ [*Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 \(E.D. Pa. 2002\)](#).

¹⁶⁴ [*Id.* at 874](#).

¹⁶⁵ [*Id.* at 859](#).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See [*id.* at 858](#).

¹⁷¹ [*Id.* at 860-61](#).

¹⁷² [*Id.* at 868-71](#).

¹⁷³ [*Id.* at 873](#).

¹⁷⁴ *Id.*

almost every description and regardless of subject matter." ¹⁷⁵ The RLUIPA "is targeted solely to low visibility decisions with the obvious - and, for Congress, unacceptable - concomitant risk of idiosyncratic application." ¹⁷⁶ Ultimately, the Court found the RLUIPA constitutional as a congruent and proportional remedy to constitutional violations. ¹⁷⁷

B. Lake Elsinore Christian Center v. City of Lake Elsinore

On June 24, 2003, Judge Stephen V. Wilson of the U.S. District Court for the Central District of California became the first and, presently, the only judge to declare the RLUIPA's land-use provisions unconstitutional under Section Five of the Fourteenth Amendment. ¹⁷⁸ In *Lake Elsinore Christian Center v. City of Lake Elsinore*, ¹⁷⁹ the Elsinore Christian Center invoked the RLUIPA in a suit seeking either to invalidate applicable zoning rules or to require the city to issue a required special-use permit. ¹⁸⁰ The church had operated at a location in "downtown Lake Elsinore, an economically depressed area characterized by urban blight," for more than twelve years, but on account of its growth was seeking a larger building in the downtown [*342] area. ¹⁸¹ The church also lacked on-sight parking, which often meant a walk of a "considerable distance" to services - a particular concern for elderly and disabled church members. ¹⁸² Seeking to remedy these problems, the church entered into an agreement to purchase a building three blocks away. ¹⁸³ The building the church sought to buy was occupied at the time by a discount food store and recycling business. ¹⁸⁴ In the zoning district where the church sought to move, the zoning regulations allowed, as a matter of right, stores and shops, health clubs, "personal service establishments," restaurants, and dance and music schools. ¹⁸⁵ Churches were allowed only subject to a conditional-use permit. ¹⁸⁶ Oddly enough, the church's current facility was in the same zoning district as the new building it sought to occupy. ¹⁸⁷ When the church applied for a special-use permit, city staff recommended approval, subject to twenty-six conditions to which the church leaders consented. ¹⁸⁸ However, the city's planning commission denied the application, referring to the loss of the food store and the recycling business, the loss of tax revenue, and inadequate parking (although the

¹⁷⁵ *Id.* (quoting [City of Boerne v. Flores, 521 U.S. 507, 532 \(1997\)](#)).

¹⁷⁶ *Id.* at 873-74.

¹⁷⁷ *Id.* at 874.

¹⁷⁸ David Rosenzweig, *Ruling on Religious Land Use Is on Hold*, L.A. Times, Aug. 12, 2003, California Metro, at 5; News Release, The Becket Fund for Religious Liberty, *Federal Judge Allows Appeal for RLUIPA Constitutionality Ruling* (Dec. 22, 2003), <http://rluipa.com/media/2003/TBF122203b.html> (on file with the Ave Maria Law Review).

¹⁷⁹ [291 F. Supp. 2d 1083 \(C.D. Cal. 2003\)](#).

¹⁸⁰ *Id.* at 1086-87.

¹⁸¹ *Id.* at 1086.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

church's existing facility had no on-site parking).¹⁸⁹ An appeal of the planning commission's decision was later rejected by the city council.¹⁹⁰

1. Lake Elsinore's Holding

Before considering the RLUIPA's constitutionality, Judge Wilson applied the statute, finding the city's proffered reasons for denying the permit were not in furtherance of a compelling governmental interest and were not the least restrictive means available.¹⁹¹ But Judge Wilson then considered the RLUIPA's constitutionality, declaring it exceeded Congress's authority under Section Five of the Fourteenth Amendment.¹⁹² Judge Wilson noted that the RLUIPA was [***343**] more narrow in scope than the RFRA,¹⁹³ but he stated that the RLUIPA, like the RFRA, was not confined to a specific type of law "'with a long history ...' of effecting unconstitutional discrimination."¹⁹⁴ Judge Wilson also noted that the RLUIPA did not have limitations based on geography or duration, as the provisions upheld in the Voting Rights Act cases did.¹⁹⁵ Though Judge Wilson acknowledged that these limitations were not strictly required, he did assert that such limitations would ensure that the means chosen by Congress were proportionate to legitimate ends.¹⁹⁶ In addition, he stated that the RLUIPA's strict scrutiny standard "places a virtually insuperable barrier before states and municipalities attempting to justify actions that, far more often than not, are neither motivated by religious bigotry nor burdensome on central religious practice or beliefs."¹⁹⁷

The judge reasoned that Congress

has effectively redefined the First Amendment rights it is purporting to enforce. The result is likely to be, as in this case, that many land use decisions will be invalidated despite being legitimately motivated and generic in effect, simply because the aggrieved landowner is a religious actor. Even assuming Congress has identified an area where there is a persistent minority of unconstitutional rules and decisions, the landscape is not so pervaded by religious bigotry that this blunderbuss of a remedy can be described as "congruent and proportional" to the perceived injury.¹⁹⁸

Finding the statute unconstitutional, Judge Wilson granted summary judgment in favor of the city.¹⁹⁹ Later, while granting a motion by the church for re-consideration, Judge Wilson also declared the RLUIPA to be unconstitutional under the Commerce Clause, saying the RLUIPA "regulates land use law and not economic conduct."²⁰⁰ Judge

¹⁸⁹ [Id. at 1086-87.](#)

¹⁹⁰ [Id. at 1087.](#)

¹⁹¹ [Id. at 1096.](#)

¹⁹² [Id. at 1102.](#)

¹⁹³ [Id. at 1101.](#)

¹⁹⁴ Id. (quoting [City of Boerne v. Flores, 521 U.S. 507, 533 \(1997\)](#)).

¹⁹⁵ Id.

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ [Id. at 1102.](#)

¹⁹⁹ [Id. at 1104.](#)

²⁰⁰ [Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1103 \(C.D. Cal. 2003\)](#). Because this note focuses primarily on Section Five of the Fourteenth Amendment, it will not consider the Court's arguments on the Commerce Clause.

[*344] Wilson subsequently granted the church's request to take an interlocutory appeal of his ruling that the RLUIPA is unconstitutional to the U.S. Court of Appeals for the Ninth Circuit. ²⁰¹ The Ninth Circuit has accepted the interlocutory appeal and has yet to hear the case. ²⁰²

2. Where Lake Elsinore Got It Wrong

Judge Wilson's ruling is at odds with the ruling of the district court in *Freedom Baptist*, ²⁰³ not to mention at least four other cases upholding the RLUIPA. ²⁰⁴ Upon closer examination, the judge's rationale is unconvincing. Judge Wilson cited three basic reasons why the RLUIPA exceeds congressional authority under Section Five of the Fourteenth Amendment. First, he said the RLUIPA is not limited to a specific type of law "'with a long history ...' of effecting unconstitutional discrimination." ²⁰⁵ Of course, it is hard to imagine a more specific type of law, or a more narrow area of application, than land-use regulations and zoning laws. Even though Congress expressly sought to enact legislation that would correct constitutional infirmities in the RFRA, as detailed by the Boerne opinion, ²⁰⁶ the bill that became the RLUIPA shrank considerably during the process of congressional negotiation. In fact, one of its co-sponsors declared on the Senate Floor that he "would have preferred a broader bill than the one before us today," but prudential considerations caused him to agree to "move forward on this more limited, albeit critical, effort." ²⁰⁷ Second, as previously noted, Congress had a very specific legislative [*345] record showing that zoning and land-use laws did, in fact, have a long history of effecting unconstitutional religious discrimination. ²⁰⁸

The third reason advanced by Judge Wilson was that the RLUIPA, unlike the Voting Rights Act upheld in *Katzenbach*, did not place limitations on geographical area of application or on duration. ²⁰⁹ Judge Wilson correctly pointed out that the elements of geographical application or duration were not dispositive, but suggested that Congress had effectively redefined the rights it claimed to be protecting when it took into account the application of the strict scrutiny standard and insufficient religious bigotry. ²¹⁰ As argued above, it is unlikely that the Supreme Court will hold that in enacting the RLUIPA Congress defined new rights; more likely, the Court will hold that Congress has simply enacted legislation protecting existing rights. Another problem with Judge Wilson's reasoning is his argument that the RLUIPA violates the standard in *Smith*. This argument is seemingly at odds with *Smith* itself, which removed strict scrutiny as the level of analysis when neutral criminal laws of general applicability allegedly burden religious exercise. ²¹¹ *Smith*, however, did not remove strict scrutiny with regard to governmental

²⁰¹ The Becket Fund for Religious Liberty, *supra* note 178.

²⁰² *Elsinore Christian Ctr. v. City of Lake Elsinore*, No. CV-01-04842-SVW (9th Cir. Feb. 23, 2004) (on file with the Ave Maria Law Review) (court order granting interlocutory appeal).

²⁰³ [*Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 \(E.D. Pa. 2002\)](#).

²⁰⁴ [*United States v. Maui County*, 298 F. Supp. 2d 1010 \(D. Haw. 2003\)](#); [*Murphy v. Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87 \(D. Conn. 2003\)](#); [*Westchester Day Sch. v. Vill. of Mamaroneck*, 280 F. Supp. 2d 230 \(S.D.N.Y. 2003\)](#), vacated on other grounds, [2004 U.S. App. LEXIS 20327 \(2d Cir. 2004\)](#); [*Christ Universal Mission Church v. City of Chicago*, No. 01 C 1429, 2002 U.S. Dist. LEXIS 22917 \(N.D. Ill. Sept. 11, 2002\)](#), rev'd on other grounds, [362 F.3d 423 \(7th Cir. 2004\)](#).

²⁰⁵ [*Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1101](#) (quoting [*City of Boerne v. Flores*, 521 U.S. 507, 533 \(1997\)](#)).

²⁰⁶ See H.R. Rep. No. 106-219, at 4-5, 9 (1999).

²⁰⁷ [*Freedom Baptist Church*, 204 F. Supp. 2d at 861-62](#) (quoting 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (statement of Sen. Hatch)).

²⁰⁸ See H.R. Rep. No. 106-219, at 9-12 (1999); 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

²⁰⁹ [*Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1101](#).

²¹⁰ [*Id.* at 1101-02](#).

actions that call for individualized assessments. ²¹² As demonstrated above, zoning and land-use laws seem to be precisely the type of laws the Smith court had in mind when it discussed individualized assessments.

VI. Zoning and Historic Preservation Laws as Laws of General Applicability

Aside from the ruling in Lake Elsinore, one other significant argument against the RLUIPA's constitutionality must be overcome. In his Boerne discussion of the RFRA's incomplete record of legislative history, Justice Kennedy said that the emphasis of congressional hearings prior to the RFRA's enactment "was on laws of general applicability which place incidental burdens on religion... and on zoning regulations and historic preservation laws **[*346]** (like the one at issue here), which, as an incident of their normal operation, have adverse effects on churches and synagogues." ²¹³

While Justice Kennedy's parting shot about zoning laws in Boerne may look ominous for the RLUIPA, one should not assume this automatically prevents Congress from using Section Five of the Fourteenth Amendment to protect religious exercise against these types of laws. First, and most notably, Justice Kennedy's statement was in dicta. It had nothing to do with the holding of the case - that Congress had exceeded its authority under the Fourteenth Amendment's Enforcement Clause because Congress had not shown that the RFRA was congruent and proportional to a known harm, and because the RFRA was an "attempt [at] a substantive change in constitutional protections." ²¹⁴ The second problem with Justice Kennedy's statement is that it reflects a misunderstanding of the Smith holding. Justice Kennedy was apparently paraphrasing Smith when he said the emphasis of congressional hearings on the RFRA was on laws of "general applicability." ²¹⁵ But there is evidence from Smith itself that Justice Kennedy might have been misapplying that standard. In declining to apply the strict scrutiny standard in Smith, Justice Scalia said:

The Sherbert test [strict scrutiny for infringements on free exercise], it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in Roy, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment... Our decisions in the unemployment cases stand for the proposition 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.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition ... ²¹⁶

[*347] The Smith case, of course, had nothing to say about zoning, because it was a free exercise challenge to Oregon's criminal drug laws. But under the Smith decision, particularly in light of the above-quoted language, the Court would not refuse to apply strict scrutiny to free exercise challenges to laws or programs with "individualized governmental assessment," especially in those instances where "a system of individual exemptions" invites consideration of "particular circumstances." ²¹⁷ These descriptors apply to zoning laws perhaps more so than to

²¹¹ See [Employment Div. v. Smith, 494 U.S. 872, 884 \(1990\)](#).

²¹² See *id.*

²¹³ [City of Boerne v. Flores, 521 U.S. 507, 530-31 \(1997\)](#).

²¹⁴ See [id. at 532-36](#).

²¹⁵ [Id. at 530](#). The term and concept of "general applicability" apparently comes from *United States v. Lee* and was adopted by Justice Scalia in the Smith case where the Court refused to apply strict scrutiny to a "generally applicable" criminal prohibition. [Smith, 494 U.S. at 879](#) (quoting [United States v. Lee, 455 U.S. 252, 263 n.3 \(1982\)](#) (Stevens, J., concurring)).

²¹⁶ [Smith, 494 U.S. at 884](#) (quoting [Bowen v. Roy, 476 U.S. 693, 708 \(1986\)](#)).

any other action of government. Zoning boards, planning commissions, and city councils independently consider applications for special-use permits, zoning variances, conditional uses, and site-plan approval. If these hearings and applications are not individualized assessments, it is hard to imagine a governmental action that would so qualify. At the very least, Congress determined that zoning and land-use laws lend themselves to individualized assessment.²¹⁸ Whether the Court will defer to that judgment remains to be seen.

Conclusion

The practical effects of denying churches and other religious institutions the ability to purchase, develop, and use land are profound. The very act of worship, particularly communal worship involving an entire religious body, necessarily requires a physical space within the jurisdiction of some local government. However, maliciously or not, local government officials are employing land-use, zoning, and historic preservation laws to put roadblocks in the way of religious groups seeking to acquire, develop, or use worship space.²¹⁹ Congressional leaders determined that widespread deprivations of the First Amendment right to the free exercise of religion were taking place in the context of municipal zoning and land-use decisions, and they wanted to do something about it.²²⁰ In enacting the RLUIPA, Congress addressed every meaningful criticism or complaint the Supreme Court made when it struck down the RFRA, the RLUIPA's predecessor statute. Instead of overly broad protections, the RLUIPA was restricted to cover only land-use and the free exercise of religion **[*348]** for institutionalized persons.²²¹ In addition to limitations on the Act's scope, Congress placed considerable limitations on the application of the Act once its protections were triggered.²²² The Act did not attempt to alter or expand constitutional rights, but sought to stop infringements against existing rights. Congress's response was proportional and congruent to an actual harm that it documented through a lengthy, detailed, and up-to-date legislative history. And Congress expressly said it was not attempting to alter Supreme Court decisions regarding the Establishment Clause.²²³

The RLUIPA is a congruent and proportional remedy under Section Five of the Fourteenth Amendment. Given the applicable standard defined by the Supreme Court in *Boerne* and *Hibbs*, the Act is narrow in scope and limited in application. It is supported by a detailed legislative history proving Congress was responding to real and serious threats to constitutional protections. The Act does not seek to alter or expand existing constitutional rights, but rather provides a statutory enforcement mechanism to ensure their protection. Like the FMLA, upheld in *Hibbs*, the RLUIPA is proportionate and congruent to the evil it seeks to address and is a constitutional use of the Fourteenth Amendment's Enforcement Clause.

²¹⁷ [Id. at 884.](#)

²¹⁸ 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See [42 U.S.C. 2000cc](#) to [2000cc-1](#) (2000).

²²² See *id.*; see also *supra* notes 133-39 and accompanying text.

²²³ [42 U.S.C. 2000cc-4.](#)