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## The Religion Clauses and the “Really New” Federalism

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The Religion Clauses and the “Really New” Federalism  
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Martin H. Belsky\*

It had been an axiom of contemporary Constitutional Law that once a provision of the Bill of Rights was “fully” incorporated, such as with the First Amendment,<sup>1</sup> it established a Constitutional minimum.<sup>2</sup> A State could provide, either by constitutional or statutory provision, additional protections to its citizens, so long as this did not create a conflict with other federal law.<sup>3</sup> Another premise, until recently, was that the federal government had the ability by legislation to provide additional or enhanced rights to Americans, and that these rights applied uniformly to residents of all states.<sup>4</sup>

The application of these two principles - at least as applied to First Amendment and Equal Protection type rights - was relatively straightforward. The criteria for determining whether a government act violated the Establishment Clause would be applied to any government actor, whether at the federal, state or local level.<sup>5</sup> The Free Exercise of Religion was protected from violations [defined as significant or substantial interference] by government.<sup>6</sup> Actions by a government entity that might interfere with religious activity had to survive a strict scrutiny review, that is, a showing of a compelling government interest and a proof that restrictions were as narrowly tailored or least restrictive as possible.<sup>7</sup>

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<sup>1</sup>See e.g. Wallace v. Jafree, 472 U.S. 38, 48-49 (1985). For a discussion of the whole topic of incorporation, see Jerrold L. Israel, Selective Incorporation: Revisited, 71 Geo. L. J. 253 (1982).

<sup>2</sup>See John E. Nowak and Ronald D. Rotunda, Constitutional Law § 1.6 at 20 (7<sup>th</sup> Ed. (2004).

<sup>3</sup>See Marie L. Garibaldi, The Rehnquist Court and State Constitutional Law in The Rehnquist Court: A Retrospective at 217, 218 (Martin H. Belsky ed., 2002). A state court’s application of its own law will not be overturned so long as it is not in violation of other federal law and it is clear that its decision is based on an “adequate and independent state ground.” See e.g. Michigan v. Long, 463 U.S. 1032, 1041 (1983); Illinois v. Rodriguez, 497 U.S. 177, 182 (1990).

<sup>4</sup>See e.g. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.)(race, color, religion, sex, and national origin); Americans with Disabilities Act of 1990, 104 Stat. 330 (codified at 42 U.S.C. 12111 et seq.); Age Discrimination in Employment Act of 1967, 81 Stat. 602 (codified at 29 U.S.C. 621 et. sq.).

<sup>5</sup>See Lee v. Weisman, 505 U.S. 577 (1992)(local school policy); Larson v. Valente, 456 U.S. 228 (1982)(Minnesota statute); Tilton v. Richardson, 403 U.S. 672 (1971)(federal statute).

<sup>6</sup>See Sherbert v. Verner, 374 U.S. 398 (1963).

<sup>7</sup>Id. at 403. See Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Board, 480 U.S. 136 (1987); Wisconsin v. Yoder, 406 U.S. 205 (1972).

Discrimination<sup>8</sup> by government based on race, and several other “immutable traits,” also had to sustain a strict Constitutional scrutiny.<sup>9</sup> Other rights were protected by “semi-strict” scrutiny,<sup>10</sup> or a “hard rational basis” [rational basis “with teeth”] review.<sup>11</sup> If these protections were felt not to be adequate, Congress under public pressure could and did enact civil rights statutes, that provided additional national protections against discrimination by public or private players, first as to race, alienage, nationality, religion and gender, and then later as to disability and age.<sup>12</sup> And states were also free to enact their own civil rights statutes providing additional protections, so long as they did not conflict with federal law or policy.<sup>13</sup>

These assumptions were challenged and now, seemingly inverted, by two Supreme Court decisions, most recently *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* [O Centro].<sup>14</sup> Civil rights protections for citizens now depend on whether the violations are by the federal government, the state government or local government. First, First Amendment protections - the “Free Exercise” of Religion, and the “Wall of Separation” between church and state have been limited.<sup>15</sup> Next, federal statutes that provide additional protections are applied differently depending on the level of government. They apply fully to actions by federal officials. But states are free to apply under their own laws a more stringent set of standards for separation of church and state and also to pass neutral and general laws that restrict religious

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<sup>8</sup>Discrimination by the federal government, of course, is not precluded by on the 14<sup>th</sup> Amendment Equal Protection Clause, which only applies to the States. Classification by the federal government “in a way which would violate the equal protection clause . . . will be held to contravene the due process clause of the Fifth Amendment.” Nowak and Rotunda, *supra* note 2, § 14.1 at 681 (citing cases).

<sup>9</sup>See *Loving v. Virginia*, 388 U.S. 1 (1967)(race); *Graham v. Richardson*, 403 U.S. 365 (1971)(alienage).

<sup>10</sup>See *Clark v. Jeter*, 486 U.S. 456 (1988)(illegitimacy); *Mississippi University v. Hogan*, 458 U.S. 718 (1982)(gender).

<sup>11</sup>The phrases “hard rational basis” and “rational basis with teeth” are used to explain rational basis review which seems to use a more stringent analysis than merely accepting any government reason for a discriminatory classification. Justice Marshall called this “second order” rational basis review. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 , 455 (1985)(disability). See also *Romer v. Evans*, 517 U.S. 620 (1996)(sexual orientation).

<sup>12</sup>See citations in note 4, *supra*. See *Heart of Atlanta Motel, Inc v. United States*, 379 U.S. 241 (1964)(race); *City of Los Angeles v. Manhart et al.*, 435 U.S. 702 (1978)(gender); *Hazen Paper Company v. Biggins*, 507 U.S. 604 (1993)(age); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)(disability).

<sup>13</sup>See e.g. *Geduldig v. Aiello* 417 U.S. 484, (1974)(California statute); *Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101 (3<sup>rd</sup> Cir. 1996); *Davidson v. Iona-McGregor Fire Protection & Rescue Dist.*, 674 So. 2d 858 (Fla. Dist. Ct. App. 2d Dist. 1996).

<sup>14</sup>*Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, - U.S. -, 126 S. Ct. 1211 (2006)(O Centro).

<sup>15</sup>See text at notes 37-62, *infra*.

practices.<sup>16</sup>

This article will describe this evolution and particularly the new two-tier process of review under a revised concept of federalism, as indicated by *O Centro*.

### ***Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal***

Hoasco is a sacramental tea that is brewed from two plants native to the Amazon River Basin in South America. Use of hoasca plays a central role<sup>17</sup> in the religious ceremonies of the O Centro Espirita Beneficente Uniao de Vegetal. [UDV]<sup>18</sup> The Church leaders imported the tea from Brazil. On May 21, 1999, Federal customs agents intercepted a shipment of “a substantial quantity”<sup>19</sup> of hoasco. The federal government threatened prosecution, arguing that possession, use or sale of the plant was in violation of the Controlled Substance Act.<sup>20</sup>

UDV then filed suit against federal officials seeking to preclude enforcement.<sup>21</sup> UDV

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<sup>16</sup>See text at notes 104-138, *infra*.

<sup>17</sup>126 S. Ct. at 1217: “Central to UDV’s faith is receiving communion through *hoasca*. . . “

<sup>18</sup>This description comes from the District Court decision. *O Centro v. Ashcroft*, 282 F. Supp. 2d 1236, 1240 (D.N.M. 2002). The Court, at *id.* describes O Centro as follows:

Founded in Brazil in 1961, the UDV blends Christian theology with traditional indigenous religious beliefs. Church doctrine instructs that hoasca is a sacrament, and UDV members ingest the tea during church services. About 8,000 people belong to the UDV in Brazil. In 1993, the UDV officially established a branch of the church in the United States. The United States branch of the UDV, headquartered in Santa Fe, New Mexico, has about 130 members.

<sup>19</sup>282 F. Supp. At 1240. Three drums of hoasca was seized. “A subsequent investigation revealed that UDV had received 14 prior shipments.” 126 S. Ct. at 1217.

<sup>20</sup>Controlled Substance Act, 84 Stat. 1242, as amended, 21 U.S.C. § 801 *et. seq.* (2000 ed and Supp. I). As described by the Supreme Court, 126 S. Ct. 1217:

[The Act] regulates the importation, manufacture, distribution, and use of psychotropic substances. . . Substances listed in Schedule I of the Act are subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects. . . . One of the plants [in hoasca], *psychotria viridis*, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*. DMT, as well as “any material, compound, mixture, or preparation, which contains any quantity of [DMT],” is listed in Schedule I of the Controlled Substances Act.

<sup>21</sup>126 S.Ct. 1217. As indicated by the District Court, 182 F. Supp. 2d at 1240:

Although the United States has not filed any criminal charges stemming from UDV officials’ possession of hoasca, the government has threatened prosecution for future possession of the tea. In light of the government’s interpretation of the CSA’s application to hoasca, the UDV has ceased using the tea in the United States.

asked for a preliminary injunction, and argued, among other things, that “applying the Controlled Substances Act to the sacramental use of *hoasca* violated the Religious Freedom Restoration Act.”[RFRA]<sup>22</sup> The District Court reviewed the tests of RFRA,<sup>23</sup> and accepted the uncontested claim that application of the Controlled Substances Act was a substantial burden on the practices of the UDV.<sup>24</sup> Then, under RFRA, the burden shifted to the government to show that its actions were “in furtherance of a compelling government interest” and was “the least restrictive means of furthering that compelling government interest.”<sup>25</sup>

The government then claimed three compelling interests:(1) the health and safety of UDV users; (2) the potential diversion of the drug to non-religious use and the risk to those users; and (3) implementation of a treaty.<sup>26</sup> The evidence of risk from use of *hoasca* and of diversion to non-UDV users was “in equipoise,” or “virtually balanced” and therefore the government did not meet its burden of showing a compelling interest.<sup>27</sup>

The government’s third argument was that the United Nations Convention on Psychotropic Substances<sup>28</sup> requires the United States to ban all uses of *hoasca* including ceremonial use. The court found that the treaty did not apply, and thus this also was not a

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<sup>22</sup>126 S. S.Ct. 1217. The Church also argued in the lower courts that the actions by the government violated their rights under the First Amendment, the Equal Protection Clause, and international laws and treaties. They also made a statutory argument that the Controlled Substances Act, in fact, does not apply to *hoasca*. 282 F. Supp. 2d at 1240. The District Court rejected the argument that application of the Controlled Substances Act violated the First Amendment, finding that the statute was a “neutral law of general applicability,” had a rational basis, and thus, under *Employment Division v. Smith* (1990), could be applied to the religious practice of using *hoasca*. 282 F. 2d at 1241-1247. The court also rejected the Equal Protection claim, as there was insufficient showing, at least for a preliminary injunction, of selective prosecution. 282 F. 2d. at 1248. It also rejected a statutory interpretation argument that the Controlled Substances Act did not extend to *hoasca*, *id.* at 1248-1250. Finally, it rejected that *hoasca* had to be allowed for ceremonial use because of international law and comity, Brazilian acceptance of the use of *hoasca*, and international treaties that promote protection of religious freedoms were not bases to reinterpret application of the Controlled Substances Act. *Id.* at 1250-52.

<sup>23</sup>Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

<sup>24</sup>282 F. 2d. at 1241, 1252, 1253. *See also* 126 S.Ct. at 1217 [“At a hearing on the preliminary injunction, the Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV.”] The District Court distinguished other cases where there was some question as to whether use of drugs was really part of a claimants religious beliefs, that the claimant did not “sincerely” hold those beliefs, or where the government’s actions did not, in fact, “substantially burden” the claimant’s religious practice. *Id.* at 1253.

<sup>25</sup>282 F. Supp. 2d at 1252; 126 S.Ct. at 1218. *See* RFRA, 42 U.S.C. § 2000bb-1(b).

<sup>26</sup>282 F. Supp. 2d at 1252-53.

<sup>27</sup>282 F. Supp. 2d at 1262, 1266.

<sup>28</sup>United Nations Convention on Psychotropic Substances, 1971, opened for signature February 21, 1971, 32. U.S. T. 5431019 U.N. T.S. 175. The Treaty was ratified by the United States in 1980. 282 F. Supp. 2d at 1266.

compelling interest.<sup>29</sup> Because it found no compelling interests, the District Court did not reach the issue about whether the ban was the “least restrictive means” of furthering those interests.<sup>30</sup> It ordered a preliminary injunction<sup>31</sup> and that decision was eventually<sup>32</sup> affirmed by the Tenth Circuit.<sup>33</sup>

The United States Supreme Court unanimously affirmed in an opinion by Chief Justice Roberts. Applying the tests of the Religious Freedom Restoration Act, the Court put the burden of proof on the government to show compelling interests to overcome the acknowledged substantial burden on the religious practices of the UDV. In a *de novo* review, the Court said that a general interest in precluding drug usage as indicated by the Controlled Substances Act was not a compelling one.

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person” -- the particular claimant whose sincere exercise of religion is being substantially burdened.<sup>34</sup>

Specifically, the Court rejected the “slippery-slope concerns” that could be raised to any

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<sup>29</sup>282 F. Supp. 2d at 1269.

<sup>30</sup>282 F. Supp. at 1269.

<sup>31</sup>“The injunction requires the church to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn particularly susceptible UDV members of the dangers of *hoasca*. The injunction also provides that ‘if [the Government] believes that evidence exists that *hoasca* has negatively affected the health of UDV members,’ or ‘that a shipment of *hoasca* contains particularly dangerous levels of DMT, [the Government] may apply to the Court for an expedited determination of whether the evidence warrants suspension or revocation of [the UDV's authority to use *hoasca*].” *Gonzales v. O Centro*, 124 S.Ct. at 1218.

<sup>32</sup>The government sought and obtained a stay of the district court's order pending appeal. *O Centro v. Ashcroft*, 314 F.3d 463 (10<sup>th</sup> Cir. 2002). The District Court's opinion was first affirmed by a three judge panel, 389 F.3d 973 (10<sup>th</sup> Cir. 2003), and then again by the *en banc* court, which also vacated the prior order staying the injunction. *O Centro v. Ashcroft*, 389 F. 3d 973 (10<sup>th</sup> Cir. 2004).

<sup>33</sup>The per curium opinion represented a divided Tenth Circuit that was split as to the evidentiary standards for the granting of a preliminary injunction and also whether the government had demonstrated compelling interests to justify restriction on the use of *hoasca*. 389 F.3d 973.

<sup>34</sup>128 S. Ct. at 1220. See also *id.* at 1221:

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. Nevertheless, there is no indication that Congress, in classifying DMT considered the harms posed by the particular use at issue here -- the circumscribed, sacramental use of *hoasca* by the UDV.

In applying the compelling interest test, the Court relied on its cases applying the First Amendment Free Exercise standards that existed before *Employment Division v. Smith*, 494 U.S. 110 (1990). See 126 S.Ct. at 1220-21.

argument for an exception to a general law.<sup>35</sup> The Court also rejected the government's arguments that the Convention on Psychotropic Substances itself provided a compelling interest justifying the ban.<sup>36</sup>

The decision seem unremarkable. The Court applied a federal statute promoting religious freedoms. What makes the case interesting is that this Court rejected similar arguments first when applying these same principles as a Constitutional principle, and then later when applying these same principles, under the same statute, to state restrictions.

### **Limiting the Scope of the First Amendment Religion Clauses**

Beginning in the 1960's, the Supreme Court applied the First Amendment Religion Clauses<sup>37</sup> to any government action that attempted to breach the "wall of separation"<sup>38</sup> between church and state [the "Establishment Clause"] or that interfered significantly with a person's exercise of his or her religion [the "Free Exercise Clause"].<sup>39</sup>

Eventually, it established a three-prong *Lemon* test, based on the holding in *Lemon v. Kurtzman*,<sup>40</sup> to review any potential infringements of the Establishment Clause. It also established a strict scrutiny review of any rule that interfered with one's religion or religious practices.<sup>41</sup>

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<sup>35</sup>126 S.Ct. at 1223. The Court continued, *id.*:

The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability."

<sup>36</sup>126 S. Ct. at 1224-25. The Supreme Court rejected the District Court's conclusion that the Treaty did not cover *hoasca*. But found that general statements about the "importance of honoring international obligations" and the need of the United States to maintain its "leadership position" in the "international war on drug" were not sufficient to meet the high government burden.

<sup>37</sup>U.S. Const., Amend. 1.

<sup>38</sup>The "wall of separation" language was used by Thomas Jefferson and quoted in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

<sup>39</sup>*See* Martin H. Belsky, *Antidisestablishmentarianism The Religion Clauses at the End of the Millenium*, 33 Tulsa L. J. 93, 94 (1997) (hereafter Belsky-1997). One commentator described the series of cases decided by the Warren Court on the religion clauses as "energizing" these protections. *See* Stephen M. Feldman, *Please Don't Wish me a Merry Christmas* at 235 (1997).

<sup>40</sup>*Lemon v. Kurtzman*, 403 U.S. 602 (1963). In *Lemon*, the Supreme Court declared unconstitutional Pennsylvania and Rhode Island statutes that provided aid to parochial schools.

<sup>41</sup>Belsky-1997, *supra* note 39 at 94.

The *Lemon* test stated<sup>42</sup> that

- (1) “the statute [or rule] must have a secular purpose,”<sup>43</sup> that is a clear non-religious reason;<sup>44</sup>
- (2) the “principal or primary effect” of the law, rule or regulation or practice had to be one that “neither advances nor inhibits religion,”<sup>45</sup> that is be neutral towards religion and religions;<sup>46</sup> and
- (3) the statute or rule could not foster “an excessive government entanglement with religion,”<sup>47</sup> that is allow government at any level to become intertwined with religious institutions or principles.<sup>48</sup>

The Supreme Court also established a strict scrutiny for challenges to actions by government that placed a “substantial burden” on someone’s religion and therefore violated the Free Exercise Clause.<sup>49</sup> To justify such a restriction, the government had to show both a “compelling government interest,”<sup>50</sup> and also that the restriction had to be the narrowest tailored or least restrictive method to achieve that interest.<sup>51</sup> These tests applied to all government actions - whether specifically directed to religion or not.<sup>52</sup>

Under these two rigorous set of tests, numerous statutes and governmental actions were found unconstitutional.<sup>53</sup> But by the end of the 20<sup>th</sup> Century, a different trend emerged. The make-up of the Supreme Court had changed and so had the level of scrutiny of laws and regulations.<sup>54</sup>

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<sup>42</sup>The following discussion is derived from Belsky-1997, *supra* note 39 at 94-95.

<sup>43</sup>*Lemon*, 403 U.S. at 612.

<sup>44</sup>*See* *Wallace v. Jaffree*, 472 U.S. 38 (1985)(moment of silence statute really intended for prayer); *Epperson v. Arkansas*, 393 U.S. 97 (ban on teaching of evolution lacked non-religious purpose).

<sup>45</sup>*Lemon*, 403 U.S. at 612.

<sup>46</sup>*See* *Abington School District v. Schempp*, 374 U.S. 203 (1963)(mandated reading of bible and Lord’s Prayer in school had primary effect of advancing religion).

<sup>47</sup>*Lemon*, 403 U.S. at 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

<sup>48</sup>*See* *Lemon*, 403 U.S. at 613-15 (providing aid to parochial schools would entangle state in parochial school programs). *Compare* *Lynch v. Donnelly*, 465 U.S. 668 (1984)(Christmas exhibit with creche in city park did not entangle city with religion).

<sup>49</sup>*Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In *Sherbert*, the state denied unemployment compensation payments to a Seventh Day Adventist who refused to work in a defense factory.

<sup>50</sup>*Sherbert*, 374 U.S. at 406.

<sup>51</sup>*See* *Church of the Lukumi Babulu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

<sup>52</sup>Thomas C. Berg, On the Permissible Scope of Legal Limitations on the Freedom of Belief in the United States, 19 *Emory Int’l L. Rev.* 1277, 1282 (2005); Toni M. Massaro, Religious Freedom and the “Accommodationist Neutrality”; A Non-Neutral Critique, 84 *Oregon L. Rev.* 935, 949 (2005).

<sup>53</sup>For a description of some of these decisions, see Belsky-1997, *supra* note 39 at 95.

<sup>54</sup>John Witte, Jr., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 *Notre Dame L. Rev.* 471, 418, 425 (1996) (“narrowing” of the Free Exercise clause and “multi-



In a series of decisions, the Court implicitly overruled the the three-part *Lemon* test. The Court now said “that a rule or regulation did not violate the Establishment Clause unless it indicated a government ‘endorsement’ of religion or unless the law actually ‘coerced’ someone to be involved in a religious activity. Neutrality was the key.”<sup>55</sup>

The best example of the impact of this new set of standards can be found in two cases reviewing a New York City program that sent public school teachers into parochial schools.<sup>56</sup> In 1985, in *Aguilar v. Felton*,<sup>57</sup> aspects of the program were found unconstitutional as they represented an “excessive entanglement of church and state” in violation of the *Lemon* test.<sup>58</sup> Twelve years later, the Supreme Court in *Agostini v. Felton*<sup>59</sup> reviewed the same program and applied a less rigorous analysis. “[T]his carefully constrained program . . . cannot reasonably be viewed as an endorsement of religion.”<sup>60</sup> The program was now valid. Whether the governmental program was a state or federal one, if it was “neutral” and did not carry with it the “imprimatur of governmental endorsement,” it was Constitutional.<sup>61</sup>

The Court also restricted the application of the strict scrutiny test for claims of free exercise deprivation.<sup>62</sup> In *Employment Division v. Smith* (1990),<sup>63</sup> members of a Native American Church were denied unemployment benefits after being fired for using peyote as part of an acknowledged legitimate religious ceremony. Use of peyote was a crime under a general state anti-drug law. A majority of the Supreme Court held that the strict scrutiny review test does not apply when an individual is asked to comply with a “neutral law of general applicability.”<sup>64</sup> The review is minimal - a valid or reasonable government purpose is sufficient; no compelling

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principled” reading of the Establishment Clause).

<sup>55</sup>Martin H. Belsky, *Locke v. Davey: States’ Rights Meet the New Establishment Clause*, 40 Tulsa L. Rev. 279, 280 (2004)(hereafter Belsky-2004).

<sup>56</sup>See Belsky-1997, *supra* note 39 at 96-98.

<sup>57</sup>*Aguilar v. Felton*, 473 U.S. 402 (1985).

<sup>58</sup>473 U.S. at 414.

<sup>59</sup>*Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>60</sup>*Id.* at 235.

<sup>61</sup>See *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002)(Ohio Voucher Program); *Mitchell v. Helms*, 530 U.S. 793 (2000)(federal program that supplies funding for materials and equipment to parochial schools).

<sup>62</sup>See Massaro, *supra* note 52 at 949 (weakened protection of Free Exercise rights)

<sup>63</sup>*Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>64</sup>*Id.* at 879.

government interest is needed.<sup>65</sup> This lesser level of review is the test for application of any federal or state neutral and general law.<sup>66</sup>

This was a Constitutional doctrine. Only the Supreme Court could define the scope of the Free Exercise Clause. A later attempt in the Religious Freedom Restoration Act<sup>67</sup> to reassert the “compelling interest” and “narrow tailoring” standard was therefore not valid.<sup>68</sup> As to both Establishment Clause and Free Exercise Clause challenges, this uniformity of treatment to both state and federal actions ran counter to another trend of Supreme Court jurisprudence - the re-emergence of the power of the states.<sup>69</sup>

### **Limiting the Application of Federal Law to State Actions**

In a series of decisions, the Supreme Court, under the leadership of Chief Justice Rehnquist, reversed 60 years of Constitutional history and reestablished a more exacting application of the principle of state sovereignty.<sup>70</sup>

Ever since the New Deal, and until the mid 1990's, the Supreme Court upheld federal statute after federal statute<sup>71</sup> and rejected arguments that Congress's power under the Commerce Clause was limited, or was superceded by the Tenth Amendment.<sup>72</sup>

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<sup>65</sup>Id. at 885.

<sup>66</sup>Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993). See Rupert v. Director, Fish and Wildlife Service, 957 F. 2d 32 (1<sup>st</sup> Cir. 2002)(rational basis review on ban of ceremonial use of eagle feathers under the Federal Eagle Protection Act).

<sup>67</sup>Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*

<sup>68</sup>City of Boerne v. Flores, 521 U.S. 507 (1997).

<sup>69</sup>See Martin H. Belsky, The Rehnquist Court - A Review at the End of the Millennium in The Rehnquist Court: Farewell to the Old Order in the Court 1, 5 (Martin H. Belsky ed., 2002).

<sup>70</sup>David Garrow has indicated that Rehnquist saw implementing broader power to the states as a “mission” that reached all the way back to his time as a clerk to Justice Robert Jackson. See David J. Garrow, William H. Rehnquist in the Mirror of Justices in The Rehnquist Court: Farewell to the Old Order in the Court 274, 276-77 (Martin H. Belsky, ed. 2002).

<sup>71</sup>See Erwin Chemerinsky, Constitutional Law 138 (2<sup>nd</sup> ed. 2005).

<sup>72</sup>Article 1, § 8 provides authority for Congress to regulate interstate, Indian and foreign commerce. The Tenth Amendment provides that “The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.” The Supreme Court at one point used this and other Constitutional provisions to restrict the ability of the federal government to enact social and economic legislation. See Hammer v. Dagenhart, 247 U.S. 251; Schechter Poultry v. United States, 295 U.S. 495 (1935). With the New Deal, and the threat of some structural changes in the Court's makeup, the Court expanded federal power under the Clause and limited the Tenth Amendment to being no more than a “truism.” See United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

This deference to the federal government ended<sup>73</sup> with *United States v. Lopez* (1995).<sup>74</sup> In *Lopez*, Chief Justice Rehnquist speaking for a five Justice majority found the Gun-Free School Zones Act of 1990 unconstitutional. That statute made it a federal crime to knowingly possess a gun near in a school zone. The Court held that the statute was beyond Congress's powers under the Commerce Clause. The Commerce Clause power was limited in nature and here there was no showing that the Act regulated activities that had a "substantial relation to interstate commerce."<sup>75</sup>

This new "substantial relation" test was then used to bar application of federal Violence Against Women Act in a civil action for damages against a college whose students allegedly raped Christy Brzonkala.<sup>76</sup> Gender-motivated crimes "are not, in any sense of the phrase, economic activity" and therefore not within the powers of Congress under the Commerce Clause.<sup>77</sup>

Nor could authority be found for such interference into a traditional area of state regulation under the Civil Rights Amendments.<sup>78</sup> Section Five of the Fourteenth Amendment permits Congress to "enforce by appropriate legislation" the Constitutional guarantees found in Section One of that Amendment that no State shall deprive any person of life, liberty, or

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<sup>73</sup>There were some earlier hints about this new "new Federalism" agenda in cases that reviewed a 1974 Amendment to the federal Fair Labor Standards Act extending minimum wage and maximum hours rules to state employees. "The Burger Court briefly flirted with this [state power agenda] in *National League of Cities v. Usery* [426 U.S. 833 (1976)] but ultimately abandoned it in *Garcia v. San Antonio Metropolitan Transit Authority* [496 U.S. 528 (1985)]." Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court*, in *The Rehnquist Court: Farewell to the Old Order in the Court 195, 197* (Martin H. Belsky, ed. 2002). Both decisions were five to four - with Justice Blackmun changing his position as he found the *National League of Cities* tests both "unworkable" and "inconsistent with established principles of federalism." *Garcia*, 496 U.S. at 531.

Justice [later Chief Justice] Rehnquist predicted, 496 U.S. at 579-580:

I join both JUSTICE POWELL's and JUSTICE O'CONNOR's thoughtful dissents. . . . But under any one of these approaches [described by other Justices to preclude application of a federal statute to the states], the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

<sup>74</sup>*United States v. Lopez*, 514 U.S. 549 (1995).

<sup>75</sup>514 U.S. at 642-43. The Court set out a three part test. Commerce Clause authority is limited to three areas: (1) the *channels* of interstate commerce; the (2) the *instrumentalities* of interstate commerce; and (3) activities having a *substantial relation* to interstate commerce or that *substantially affect* interstate commerce. 514 U.S. at 558-59.

<sup>76</sup>*United States v. Morrison*, 529 U.S. 598 (2000).

<sup>77</sup>529 U.S. at 613.

property, without due process or deny any person equal protection of the laws.<sup>79</sup> It is also the vehicle by which the Bill of Rights were incorporated and applied to the states.<sup>80</sup>

In *City of Boerne v. Flores*,<sup>81</sup> and then in *United States v. Morrison* (2000),<sup>82</sup> the United States Supreme Court looked back to some 19<sup>th</sup> Century legislative history,<sup>83</sup> and precedents,<sup>84</sup> to interpret the 14<sup>th</sup> Amendment to provide that “Congress may not expand the scope of rights or create additional rights, but rather only may provide remedies for [pre-existing] rights recognized by the judiciary.”<sup>85</sup>

A second but related change implemented by the Court was to re-invigorate the Tenth Amendment. No longer was that provision a mere “truism.” Federal laws that compel states to enact statutes or regulations or administer federal programs violate state sovereignty, which is the core concept protected by the Tenth Amendment.<sup>86</sup> In *New York v. United States* (1992),<sup>87</sup> Justice O’Connor applied the Tenth Amendment<sup>88</sup> to preclude application of a federal statute that required New York to “take title” to low-level radio-active nuclear waste within its borders. To “commandeer” a state to “govern according to Congress’s instructions,” here to take title to waste, violates the “core sovereignty” inherent in the Tenth Amendment.<sup>89</sup>

Similarly, a federal statute “commanding” state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks,<sup>90</sup> also violated the Tenth Amendment.<sup>91</sup>

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<sup>78</sup>U.S. Const., Amend. XIII, XIV, XV.

<sup>79</sup>U.S. Const., Amend. XIV. *See* *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

<sup>80</sup>*Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

<sup>81</sup>*City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>82</sup>*United States v. Morrison*, 529 U.S. 598 (2000).

<sup>83</sup>*See* *City of Boerne v. Flores*, 521 U.S. at 520-21.

<sup>84</sup>*Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>85</sup>*Chemerinsky*, *supra* note 73 at 197.

<sup>86</sup>*Id.*

<sup>87</sup>*New York v. United States*, 505 U.S. 144 (1992).

<sup>88</sup>Justice O’Connor had suggested a year earlier that she and others on the Court might be re-visiting the impact of the Tenth Amendment in *Gregory v. Ashcroft*, 501 U.S. 452 (1991)(interpretation of a federal statute to not apply to state judges based on federalism and Tenth Amendment concerns).

<sup>89</sup>*New York v. United States*, 505 U.S. at 156-57, 176-77.

<sup>90</sup>*Printz v. United States*, 521 U.S. 898, 902 (1997)

<sup>91</sup>521 U.S. at 935:

Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular

The Tenth Amendment means that “there are things that are truly local in nature, such as intrastate violence, and family law. In those areas and others, Congress, under the Commerce Clause, may not regulate.”<sup>92</sup>

Finally, as part of this “New Federalism,”<sup>93</sup> the Court has used the Eleventh Amendment and the immunity policy implied<sup>94</sup> by that Amendment to bar certain types of federal lawsuits against state or state officials, even when Congress has authorized such suits.<sup>95</sup>

The Court did carve out two exceptions.<sup>96</sup> First, it created a “legal fiction” in *Ex Parte Young* (1908)<sup>97</sup> that one could sue a state official<sup>98</sup> to stop a continuing violation<sup>99</sup> of federal

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problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

<sup>92</sup>Belsky, *supra* note 69 at 6.

<sup>93</sup>“[T]he phrase ‘New Federalism’ . . . connote criticism of central government and imply restoration of power to the States.” Shirley S. Abrahamson & Thomas N. Hilbank, *Federalism in The Burger Court: Counter Revolution or Confirmation* 173 (Bernard Schwartz ed., 1998).

<sup>94</sup>The history of the Eleventh Amendment has been described often. Article III, § 2 of the Constitution provides that the judicial power of the United States extends to suits “between a state and Citizens of another State” and “between a state, and the Citizens thereof, and foreign States, Citizens, or subjects.” In *Chisholm v. Georgia*, 2 Dall. 419 (1793), the Supreme Court held that this provision permitted a citizen of one state to sue another state in federal court, without that state's consent. States responded by securing passage of the Eleventh Amendment to take away the judicial power of the federal courts in such cases. The Amendment bars suits “against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Despite this explicit language, in *Hans v. Louisiana*, 134 U.S. 1 (1890) (1890), the Supreme Court interpreted the provision to bar suits by a citizen against his or her own state under a federal statute and not just in federal court, but in any court. *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>95</sup>Belsky, *supra* note 69 note at 6.

<sup>96</sup>It could be argued that there is a third exception. If the state, by clear and unmistakable action, waives its immunity, it can be sued for damages and other monetary relief. *See* *College Savings Bank*, 527 U.S. 666 (1999); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

<sup>97</sup>*Ex parte Young*, 209 U.S. 123 (1909).

<sup>98</sup>The “fiction” means that the individual has to be sued in his or her own name. *See e.g.* *Papasan v. Allain*, 478 U.S. 265, 276 (1986):

Where the State itself or one of its agencies or departments is not named as defendant and where a state official is named instead, the Eleventh Amendment status of the suit is less straightforward. [*Ex parte Young*’s] . . . holding was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity.

<sup>99</sup>This exception only applied to prospective action. Actions for damages or retroactive payments are still barred, as they must be paid out of the state fisc. *Edelman v. Jordan*, 415 U.S. 651 (1974). Whether something is a retroactive payment or damages or merely incidental to a request for prospective relief is a balancing/policy question. *Papasan v. Allain*, 478 U.S. 265, (1986)(trust income is retroactive monetary damages and barred); *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977)(payments ancillary to injunctive order). And if a state official is

law,<sup>100</sup> because that officer had to be acting without authority by the state (“*ultra vires*”).

The second exception is when the Eleventh Amendment policy is superceded by another Constitutional provision. Originally, it was held that an individual could sue a state whenever such a suit was authorized by a federal statute, enacted by Congress under the authority granted by any provision of the Constitution.<sup>101</sup> However, in 1996, the Court held that general provisions of the Constitution did not authorize such suits.

Congress could only “abrogate the immunity” by laws passed pursuant to Section 5 of the Fourteenth Amendment, which was enacted *after* the Eleventh Amendment and which gave Congress explicitly the “power to enforce, by appropriate legislation, the provisions of this article.”<sup>102</sup> Even if a law did seem to be implementing a specific Fourteenth Amendment guarantee, such as the Religion provisions of the First Amendment incorporated under the Due Process Clause, or the Equal Protection Clause, it could not abrogate the state’s immunity unless it was shown that there is “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>103</sup>

These Eleventh Amendment premised restrictions provide the final vehicle to implement the “New Federalism.” Even if there was authority for Congress to enact a law, and there were no restrictions imposed by the Tenth Amendment, implementation at the state level could still be limited by narrowing the scope of enforcement. Two sets of standards could result - one for the federal government and another one for the states.

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sued in his or her individual private capacity, there is no immunity bar. *Hafer v. Melo*, 502 U.S. 21 (1991).

<sup>100</sup>At one point, it was believed that one could sue for violation of any law, but this was limited to violations of federal law in *Pennhurst v. Halderman*, 465 U.S. 89 (1984).

<sup>101</sup>*Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)(general Commerce Clause authority).

<sup>102</sup>*Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996). If a law did not fit explicitly within the scope of the 14<sup>th</sup> Amendment protections and thus within Congress’s § 5 powers, it could not be used to sue the state. *Id.* (Indian Commerce Clause). *See also* *Florida PrePaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)(Patent Clause).

<sup>103</sup>*See* *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (Free Exercise); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 82-83 (2000)(Age Discrimination). *See also* *Board of Trustees v. Garrett*, 531 U.S. 201(Disability Act compliance). When such “congruence and proportionality” was shown, immunity could be abrogated. *See* *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)(violation of Family and Medical Leave Act of 1993; history of gender discrimination); *Tennessee v. Lane*, 541 U.S. 509 (2004)(Disability Act; Access to Courthouse; Congressional showing of inaccessibility to state office buildings).

### C. The Really New Federalism - *Locke and O Centro*

As indicated above, the Supreme Court has relaxed its standards for reviewing actions by the government that might violate the Establishment Clause of the First Amendment.<sup>104</sup> As a result, both federal and state laws that provided for vouchers and other faith-based services were found to be “neutral” and not a basis for finding constitutional invalidity.<sup>105</sup> In addition, providing “faith-based” services was now a key element of federal policy.<sup>106</sup>

I believed, as did many other scholars, “that the federal courts would not allow state laws to be upheld that were inconsistent with federal policy, as expressed by the federal legislature, and approved by the Supreme Court.”<sup>107</sup>

Yet, this is precisely the holding of *Locke v. Davey*.<sup>108</sup> In that case, the Court reviewed a Washington state provision that barred the giving of any state money for religious “worship, exercise or instruction.”<sup>109</sup> Many states had passed constitutional provisions like this, titled “Blaine Amendments,”<sup>110</sup> in the late 1800’s, barring funding for parochial schools and other religious uses. They were attempts to keep public funds as far away from use by new immigrant [mostly Catholic] groups.<sup>111</sup>

[T]he traditional wisdom before *Locke v. Davey* was that these [Blaine] laws, developed in a time of and in response to religious prejudice, could not survive. They were inconsistent with the Supreme Court’s jurisprudence providing for a less restrictive review of First Amendment bars to funding of religious entities

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<sup>104</sup>See text at notes 55-61, *supra*.

<sup>105</sup>See e.g. *Mitchell v. Helms*, 530 U.S. 793 (2000)(federal funds to schools); *Zelman v. Harris*, 536 U.S. 639 (2002)(state voucher program)

<sup>106</sup>See Exec. Order 13279, 67 Fed. Reg. 77141 (December 12, 2002).

<sup>107</sup>Belsky-2004, *supra* note 55 at 281 [citing other authors]

<sup>108</sup>*Locke v. Davey*, 540 U.S. 712 (2004). Much of the analysis in this discussion of *Locke* comes from my 2004 article, *supra* note 55 at 282-85 .

<sup>109</sup>Washington Constitution, Art. 1, § 11.

<sup>110</sup>These State laws are called “Blaine Amendments” because they are based on a proposed federal Constitutional Amendment proposed by Democratic Presidential aspirant James G. Blaine. In 1876, the proposed Amendment overwhelmingly passed the House but did not reach the 2/3 requirement in the Senate. Michael McConnell, John Garvey, & Thomas Berg, *Religion and the Constitution* at 452-53 (2002). This law became the model for state laws and Congress “demanded the inclusion of such provisions as a condition to statehood in the Dakotas, Montana, Washington, and new Mexico. By 1890, 29 states had enacted some form of this provision.” *Id.* at 457.

<sup>111</sup>See *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000)(concurrence of Justice Thomas). See also Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 *Fordham L. Rev.* 493, 495 (2003). For a survey of the various Blaine provisions, see Mark DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 *Harv. J. L. & Pub. Pol’y* 551, 556-602 (2003).

and programs. Specifically, under a free speech analysis or free exercise analysis, biased restrictions on state funding could not possibly be considered a "compelling governmental interest" under the required "strict scrutiny" review.<sup>112</sup>

Washington state had a scholarship program to assist academically gifted students and Joshua Davey wanted one of these scholarships to study to be a minister.<sup>113</sup>

The Supreme Court, in an opinion by Chief Justice Rehnquist, upheld the Washington State constitutional provision and the ban on use of these state funds to Davey. The United States Constitution had to allow a "play in the joints."

These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. . . Yet we have long said that "there is room for play in the joints" between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.<sup>114</sup>

The Court rejected a challenge under the Free Exercise Clause. Despite the history of the enactment of these types of laws, it was "facially neutral" to religion. The state merely decided not to fund a certain type of education.<sup>115</sup> It rejected<sup>116</sup> the argument by dissenting Justices Scalia and Thomas that the Washington law "discriminated against religion."<sup>117</sup>

It is inconceivable that a federal law, based on an animus to religion, would be upheld.<sup>118</sup>

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<sup>112</sup>Belsky, *supra* note 55 at 282.

<sup>113</sup>Davey, 540 U.S. at 715, 717.

<sup>114</sup>Davey, 540 U.S. at 718-19.

<sup>115</sup>540 U.S. at 720-21.

<sup>116</sup>540 U.S. at 721.

<sup>117</sup>Justice Scalia's opinion, joined in by Justice Thomas, 540 U.S. at 726. Upholding the law was inconsistent with recent Supreme Court precedent and not even a "close call" to allow a "play in the joints." *Id.* at 728. Justice Thomas added that a "degree in theology does not necessarily implicate religious devotion or faith." 540 U.S. at 734.

<sup>118</sup>Four years before *Locke*, Justice Thomas, writing for the plurality in *Mitchell v. Helms*, 530 U.S. 793 (2000), overturned a lower court decision, and upheld a federal statute providing funds to sectarian schools. He specifically considered and rejected the premise behind Blaine laws, arguing that these laws were based on "pervasive hostility to the Catholic church and Catholics in general." 530 U.S. at 828-29. Justice Kennedy joined that opinion, as did Chief Justice Rehnquist, who both joined the majority in *Locke*. Justice O'Connor concurred. As I indicated in my 2004 article, for them the difference was the "balance between the new Supreme court precedents on the application of the religion clauses and state authority and sovereignty." Belsky-2004, *supra* note 55 at 285. *see id.* at 285-92 (reviewing the jurisprudence on these issues by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy). *See also* Chief Justice Rehnquist's analysis in *Locke*, 540 U.S. at 722:

And the subject of religion is one in which both the United States and state constitutions embody distinct views--in favor of free exercise, but opposed to establishment--that find no counterpart with respect to other callings or professions. That a State would deal differently with religious



The balance here is the desire by a majority of the Court to balance “state’s rights” with the new First Amendment jurisprudence.<sup>119</sup> That same desire led to the decision in 2006 in *O Centro*.

As indicated earlier,<sup>120</sup> in *Employment Division v. Smith*, the Supreme Court rejected a strict scrutiny review of “neutral laws of general applicability” that might interfere with religious practices.<sup>121</sup> In response to public pressure, Congress passed a statute that restored that test to any law that substantially interfered with a religious practice.<sup>122</sup> This is the Religious Freedom Restoration Act (RFRA).<sup>123</sup> The explicit purpose of the statute was to overrule *Employment Division* in all its aspects.<sup>124</sup> There is no mention of making any distinction between federal or state laws. It was intended to provide the strict scrutiny testing to both.<sup>125</sup>

In *City of Boerne v. Flores*, Justice Kennedy for the Court, citing Congressional reports, stated that Congress relied on its Fourteenth Amendment enforcement power in enacting RFRA.<sup>126</sup> He said that Congress had no power to do this. Writing for six Justices, he found RFRA unconstitutional. RFRA is not "a proper exercise of Congress' remedial or preventive power."<sup>127</sup> By attempting to make a "substantive change" in constitutional protections,<sup>128</sup> Congress, in RFRA, violated "vital principles necessary to maintain separation of powers and the federal balance."<sup>129</sup>

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education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

<sup>119</sup>See Belsky-2004, *supra* note 55. Technically, Chief Justice Rehnquist in his opinion limited the scope of *Locke* to the funding of the training of ministers and did not address the more general application of Blaine-type Amendments. *Locke*, 540 U.S. at 720, 723, n.7. Most commentators and at least one court believe that the Court would and will uphold other state laws barring religious activity and funding, based on the federalism balance. See Belsky-2004, *supra* at 293-94.

<sup>120</sup>See text at notes 62-68, *supra*.

<sup>121</sup>Belsky-1997, *supra* note 39 at 95-96.

<sup>122</sup>*Id.* at 98.

<sup>123</sup>42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

<sup>124</sup>42 U.S.C. § 2000bb - 4 (b).

<sup>125</sup>RFRA, 42 U.S. C. 2000 bb - 2(1); *Employment Division*, 521 U.S. at 516. See Note, No RFRA Allowed, The Status of the Religious Freedom Restoration Act’s Federal Application in the Wake of *City of Boerne v. Flores*, 98 Colum. L. Rev. 1410, 1411 (1998).

<sup>126</sup>521 U.S. at 516 (citing both a Senate and House Report).

<sup>127</sup>521 U.S. at 529.

<sup>128</sup>521 U.S. at 532.

<sup>129</sup>521 U.S. at 536. Justice O'Connor wrote a dissent arguing that *Employment Division* was "gravely at odds with our earlier free exercise decisions." 521 U.S. at 548. Therefore, the Court should use the *Flores* case to reconsider and overrule *Employment Division*. 521 U.S. at 544-565. Justices Souter and Breyer also wrote dissenting opinions. 521 U.S. at 565.

Justice Kennedy in *City of Boerne* is highly critical of the power of Congress to enact the statute at all.<sup>130</sup> And although the Congress did rely on the 14<sup>th</sup> Amendment, it also relied on Congressional power to “enforce the free exercise clause.”<sup>131</sup>

Most courts, reviewing the decision soon after its issuance, believed that the Court had declared RFRA unconstitutional to all government action.<sup>132</sup> Even if the decision could be found to be ambiguous,<sup>133</sup> it certainly was at least an issue whether RFRA could apply to federal actions.<sup>134</sup> In a later decision,<sup>135</sup> reviewing the validity of the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),<sup>136</sup> the Court noted that the issue of application of RFRA to the federal government was not yet decided.<sup>137</sup>

Yet, when Chief Justice Roberts reviewed a federal statute under RFRA in *O Centro*, he did not even mention *City of Boerne*. For a unanimous Court,<sup>138</sup> he just went ahead and applied the compelling interest test.

### ***Conclusion***

An adage, which I have used before,<sup>139</sup> states that “Where you stand depends on where you sit.” Perhaps a variation can be “where and how you practice your religion depends on

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<sup>130</sup>421 U.S. at 532:

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U.S.C. § 2000bb-2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. § 2000bb-3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

<sup>131</sup>Senate Report No. 103-111 at 13-14 (1993); H. R. Report No. 103-88 at 9 (1993)(necessary and proper clauses and the 1<sup>st</sup> Amendment).

<sup>132</sup>See Columbia Note, *supra* note 125 at 1413.

<sup>133</sup>See *id.* at 1411-13.

<sup>134</sup>For an argument in favor of applying RFRA to federal actions, see Columbia Note, *supra* note 125.

<sup>135</sup>*Cutter v. Wilkinson*, 544 U.S. 709 (2005). The implications of this decision will be discussed later. See text at notes 142-146, *infra*.<sup>2</sup>

<sup>136</sup>114 Stat. 804, 42 U.S.C. § 2000cc-1 *et. seq.*

<sup>137</sup>*Id.* at 715, n.2. *Cutter* dealt with the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 804, 42 U.S.C. § 2000cc-1(a). This statute was passed in partial response to *City of Boerne v. Flores*.

<sup>138</sup>Justice Alito did not participate.

<sup>139</sup>Martin H. Belsky, A Practical and Pragmatic Approach to Freedom of Conscience, 76 *U. Colo. L. Rev.* 1057 (2005).

where you live and what is the government entity involved.” If you are in a state with a so-called “Blaine Amendment,” funding by a state for a religious program may be barred, but funding by the federal government would not be. That is the holding of *Locke v. Davey*.

If you are in a state that passes a law barring a religious practice, that state only needs to show that the law was a “neutral one” of “general applicability” and it will be upheld. If the federal government attempts to apply a similar law to the same practice, it would have to show a compelling interest for that rule and that the application of the rule was as narrow as possible. That is the holding of *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.

Whether we call this a “play in the joints,”<sup>140</sup> or allowing the states to “act as laboratories,”<sup>141</sup> it seems discomfoting to have separate sets of rules when dealing with basic aspects of our lives, such as those dealing with how we can or cannot practice our religion.

Some reconciliation of these sets of policies - at least as far as the free exercise of religion is concerned - may be possible.<sup>142</sup> In 2000, Congress passed Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>143</sup> This statute was an attempt to partially respond to *City of Boerne v. Flores*. Two areas, prisons and land use regulation, were selected where the compelling government interest/least restrictive means test could be applied to substantial burdens on religion.

Congress documented in hearings over three years the special need for this legislation.<sup>144</sup> Congress, believing that *City of Boerne* applied to all government actions, then stipulated that this statute would apply to all government actions, state *and* federal.<sup>145</sup>

The Supreme Court reviewed the application of this statute to an Ohio prison rule restricting exercise of a religious practice by a minority religious group. The Court, in an unanimous opinion, upheld RLUIPA’s application of the compelling government interest/least restrictive means test to stop the state of Ohio from applying a “neutral law.” At least as to

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<sup>140</sup>Locke, 540 U.S. at 718; Cutter v. Wilkinson, 544 U.S. at 713.

<sup>141</sup>United States v. Lopez, 514 U.S. 549, 581 (1995); New State Ice Co. v. Lebanon, 285 U.S. 262, 311 (1932)(Justice Brandeis dissenting).

<sup>142</sup>Of course, another way to reconcile two sets of standards is to have the states include, in their own laws and constitutions, a RFRA. Many states have, in fact, enacted their own religious freedom acts. See Note, O Centro v. Ashcroft: American Indians’ efforts to Secure Religious Freedoms Are Paving the Way for Other Minority religious Groups, 28 Am. Indian L. Rev. 327, 333 (2003/2004).

<sup>143</sup>114 Stat. 804, 42 U.S.C. §§ 2000cc-1.

<sup>144</sup>Cutter, 544 U.S. at 716.

prisons, this law was not in violation of the Establishment Clause. The Court did not consider the source of authority for the statute [as it had in *City of Flores*].

While technical distinctions can be made between the justifications for RLUIPA and RFRA,<sup>146</sup> it may be that the Court is willing to reconsider the whole premise of RFRA and allow Congress, with sufficient justification for specific cases, to re-establish the strict scrutiny review to an increasing number of situations and all jurisdictions. Hopefully, the Court will agree soon to hear this a case on the application of RLUIPA to a land-use decision.<sup>147</sup> Perhaps that decision will indicate whether - again at least on the free exercise aspect - one set of standards will be applied.

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<sup>145</sup>42 U.S. C. § 2000cc-1(a)(1)

<sup>146</sup>The Court said that RLUIPA was based on the Commerce and Spending Clauses, and did not address whether RLUIPA exceeded Congress's legislative powers. 544 U.S. at 718, n.7. In addition, it was limited to prison cases and was based on extensive hearings.

<sup>147</sup>See e.g. Congregation Kol Ami v. Abington Township, 309 F.3d 120 93<sup>rd</sup> Cir. 2002); Primera Iglesia Bautista Hispano v. Froward County, - F.3rd -, 74 Law Week 1781 (11<sup>th</sup> Cir. 2006). See Edwin P. Voss & Meredith Ladd, Recent Developments Under the Religious Land Use and Institutionalized Persons Act, 37 Urban Lawyer 449 (2005).