The Religion Clauses and the Really New Federalism

Martin H. Belsky

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol42/iss3/3

This Supreme Court Review Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.
THE RELIGION CLAUSES AND THE "REALLY NEW" FEDERALISM

Martin H. Belsky*

I. INTRODUCTION

It had been a principle of contemporary constitutional law that once a provision of the Bill of Rights was "fully" incorporated, such as with the First Amendment, it established a constitutional minimum. 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. Another principle, 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.

The application of these two principles—at least as applied to First Amendment and Equal Protection 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. The Free Exercise of Religion was protected from violation (defined as significant or substantial interference) by government. 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 proof that restrictions were as narrowly tailored or least restrictive as possible. Discrimination by government based on race, as well as several

* Professor of Law, University of Tulsa College of Law. B.A., Temple University; J.D., Columbia University; Dip., Cambridge University.
2. See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 1.6(c), 20 (7th ed., West 2004).
3. See Marie L. Garibaldi, The Rehnquist Court and State Constitutional Law, in The Rehnquist Court: A Retrospective 217 (Martin H. Belsky ed., Oxford U. Press 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.” Id. at 218. See e.g. Ill. v. Rodriguez, 497 U.S. 177, 182 (1990); Mich. v. Long, 463 U.S. 1032, 1041 (1983).
other "immutable traits," also had to sustain a strict constitutional scrutiny. Other rights were protected by "semi-strict" scrutiny or a "hard rational basis" (rational basis "with teeth") review.

If these protections were felt inadequate, 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. States were also free to enact their own civil rights statutes providing additional protections, so long as the statutes did not conflict with federal law or policy.

These two principles—that the Bill of Rights established a constitutional minimum that states could exceed and the federal government could legislate enhanced rights—were challenged, and now seemingly inverted, by two Supreme Court decisions: Locke v. Davey and, most recently, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal (O Centro). Civil rights protections for citizens now depend on whether the violations are by the federal government, 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. Next, federal statutes that provide additional protections are applied differently now 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. States are also free to pass neutral and general laws that restrict religious practices.

This article describes this evolution, particularly the new two-tier process of review under the revised concept of federalism indicated by O Centro.

---

8. Discrimination by the federal government, of course, is not precluded by the Fourteenth Amendment Equal Protection Clause, which only applies to the States. Nowak & Rotunda, supra n. 2, at § 14.1, 681. 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." Id.


16. Review infra pt. II.

17. Review infra pt. V.
II. \textit{Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal}

Hoasca is a "sacramental tea"\textsuperscript{18} that is "brewed from two plants native to the Amazon River Basin in South America."\textsuperscript{19} Use of hoasca plays a central role\textsuperscript{20} in the religious ceremonies of the O Centro Espirita Beneficente Uniao de Vegetal (UDV).\textsuperscript{21} The UDV church leaders imported the tea from Brazil.\textsuperscript{22} On May 21, 1999, federal customs agents intercepted a shipment of "a substantial quantity" of hoasca.\textsuperscript{23} The federal government threatened prosecution, arguing that possession, use, or sale of the plant violated the Controlled Substance Act.\textsuperscript{24}

UDV then filed suit against federal officials seeking to preclude enforcement.\textsuperscript{25} UDV asked for a preliminary injunction and argued, among other things, that "applying the Controlled Substances Act to UDV's sacramental use of hoasca violate[d] RFRA [the Religious Freedom Restoration Act]."\textsuperscript{26} The district court reviewed the tests of

\begin{itemize}
  \item \textsuperscript{18} 126 S. Ct at 1217.
  \item \textsuperscript{19} \textit{O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft}, 282 F. Supp. 2d 1236, 1240 (D.N.M. 2002).
  \item \textsuperscript{20} 126 S. Ct at 1217 ("Central to UDV's faith is receiving communion through hoasca ").
  \item \textsuperscript{21} The district court described UDV as follows:
    
    Founded in Brazil in 1961, the UDV church 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.
  \item \textsuperscript{22} 282 F. Supp. 2d at 1240.
  \item \textsuperscript{23} \textit{Id.} Three drums of hoasca were seized. 126 S. Ct. at 1217. "A subsequent investigation revealed that UDV had received 14 prior shipments of hoasca." \textit{Id}
  \item \textsuperscript{24} Controlled Substance Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970), as amended, 21 U.S.C. §§ 801–971 (2000). As described by the United States Supreme Court:
    
    [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], \textit{psychotria viridis}, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, \textit{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.
  \item \textsuperscript{25} 126 S. Ct. at 1217.
  \item \textsuperscript{26} \textit{Id.} As indicated by the district court,
    
    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.
\end{itemize}
RFRA\textsuperscript{27} and accepted the uncontested claim that application of the Controlled Substances Act was a substantial burden on the practices of UDV.\textsuperscript{28} Then, under RFRA, the burden shifted to the government to show that its actions were "in furtherance of a compelling governmental interest" and were "the least restrictive means of furthering that compelling governmental interest."\textsuperscript{29}

The government 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.\textsuperscript{30} The evidence of risk from use of hoasca and of diversion to non-UDV users was "in equipoise" or "virtually balanced," and, therefore, the district court held the government did not meet its burden of showing a compelling interest.\textsuperscript{31} Regarding the government's third argument, that the United Nations Convention on Psychotropic Substances\textsuperscript{32} requires the United States to ban all uses of hoasca including ceremonial use,\textsuperscript{33} the court found that the treaty did not apply.\textsuperscript{34} Thus, this also was not a compelling interest.\textsuperscript{35} Because it found no compelling interests, the district court did not reach the issue of whether the ban was the "least restrictive means" of furthering those interests.\textsuperscript{36} It ordered a preliminary injunction,\textsuperscript{37} and that decision was eventually\textsuperscript{38} affirmed by the Tenth Circuit Court of Appeals.\textsuperscript{39}

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] believe[s] that evidence exists that hoasca has negatively affected the health of UDV members," or "that a shipment of hoasca contain[s] 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]."

\textsuperscript{37} The per curiam opinion represented a divided Tenth Circuit that was split as to the evidentiary standards for the granting of a preliminary injunction and also as to whether the government had demonstrated protection of religious freedoms were not bases to reinterpret application of the Controlled Substances Act. Id. at 1250–52.

28. 282 F. Supp. 2d at 1241, 1252–53; 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 claimant's religious beliefs when the claimant did not "sincerely" hold those beliefs or when the government's actions did not, in fact, "substantially burden" the claimant's religious practice. Id. at 1253.
30 282 F. Supp. 2d at 1252–53.
31. Id. at 1262, 1266.
32. Id. at 1266 (citing UN Conv. on Psychotropic Substances, 32 U.S.T. 543, 1019 U.N.T.S. 175 (opened for signature Feb. 21, 1971)). The Treaty was ratified by the United States in 1980. Id.
33. Id at 1266.
34. 282 F. Supp. 2d at 1269.
35. Id. at 1269.
36. Id. at 1269–70.
37. Id. at 1270.
38. The government sought and obtained a stay of the district court's order pending appeal. O Centro Espirata Beneficente Uniao De Vegetal v. Ashcroft, 314 F.3d 463 (10th Cir. 2002). The district court's opinion was first affirmed by a three-judge panel, O Centro Espirata Beneficente Uniao De Vegetal v. Ashcroft, 342 F.3d 1170 (10th Cir. 2003), and then again by the en banc court, which also vacated the prior order staying the injunction. O Centro Espirata Beneficente Uniao De Vegetal v Ashcroft, 389 F.3d 973 (10th Cir. 2004).
39. Id The per curiam opinion represented a divided Tenth Circuit that was split as to the evidentiary standards for the granting of a preliminary injunction and also as to whether the government had demonstrated
The United States Supreme Court unanimously affirmed in an opinion by Chief Justice Roberts. Applying the tests of RFRA, 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 held 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.

Specifically, the Court rejected the “slippery-slope concerns” that could be raised to any argument for an exception to a general law. The Court also rejected the government’s arguments that the Convention on Psychotropic Substances itself provided a compelling interest justifying the ban.

The decision seems unremarkable. The Court simply applied a federal statute promoting religious freedoms. What makes the case interesting is that the 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.

III. LIMITING THE SCOPE OF THE FIRST AMENDMENT RELIGION CLAUSES

Beginning in the 1960s, the Supreme Court applied the First Amendment Religion Clauses to any government action that attempted to breach the “wall of separation” between church and state (the Establishment Clause) or that interfered significantly with compelling interests to justify restriction on the use of hoasca.

40. 126 S. Ct. at 1220–24.
41. Id. at 1220.

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.

Id. at 1221 (internal citations omitted). In applying the compelling interest test, the Court relied on its cases applying the First Amendment Free Exercise standards that existed before Empl. Div. v. Smith, 494 U.S. 827. See 126 S. Ct. at 1220–21.

42. Id. at 1223. The Court continued: “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.’” Id.

43. Id. at 1224–25. The Court rejected the district court’s conclusion that the treaty did not cover hoasca. Id. However, the Court 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 drugs” were not sufficient to meet the high government burden. 126 S. Ct. at 1225.

44. U.S. Const. amend. I.

45. The “wall of separation” language was used by Thomas Jefferson and quoted in Everson v Bd. of Educ., 330 U.S. 1, 16 (1947).
a person’s exercise of his or her religion (the Free Exercise Clause).\textsuperscript{46} Eventually, it established a three-prong \textit{Lemon} test, based on the holding in \textit{Lemon v. Kurtzman},\textsuperscript{47} 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:\textsuperscript{48} The \textit{Lemon} test stated,\textsuperscript{49}

1. "the statute [or rule] must have a secular legislative purpose,"\textsuperscript{50} that is, a clear non-religious reason;
2. the “principal or primary effect” of the law, rule, regulation, or practice had to be one that “neither advances nor inhibits religion,”\textsuperscript{52} that is, be neutral towards religion and religions;\textsuperscript{53}
3. the statute or rule could not foster “an excessive government entanglement with religion,”\textsuperscript{54} that is, allow government at any level to become intertwined with religious institutions or principles.\textsuperscript{55}

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.\textsuperscript{56} To justify such a restriction, the government had to show both a “compelling government interest”\textsuperscript{57} and also that the restriction was the narrowest tailored or least restrictive method to achieve that interest.\textsuperscript{58} These tests applied to all government actions—whether specifically directed to religion or not.\textsuperscript{59} Under these two rigorous sets of tests, numerous statutes and governmental actions were found unconstitutional.\textsuperscript{60} But by the end of the twentieth century, a different trend emerged. The composition of the Supreme Court had changed and so had the level of scrutiny of laws and regulations.\textsuperscript{61}


\textsuperscript{47} 403 U.S. 602 (1963). In \textit{Lemon}, the Supreme Court declared unconstitutional Pennsylvania and Rhode Island statutes that provided aid to parochial schools.

\textsuperscript{48} Belsky, supra n. 46, at 94.

\textsuperscript{49} The following discussion is derived from \textit{id.} at 94–95.

\textsuperscript{50} \textit{Lemon}, 403 U.S. at 612.


\textsuperscript{52} \textit{Lemon}, 403 U.S. at 612.

\textsuperscript{53} \textit{See} \textit{Abington Sch. Dist. v. Schempp}, 374 U.S. 203 (1963) (mandated reading of Bible and the Lord’s Prayer in school had primary effect of advancing religion)

\textsuperscript{54} \textit{Lemon}, 403 U.S. at 613 (quoting \textit{Walt v. Tax Commn.}, 397 U.S. 664, 674 (1970)).


\textsuperscript{57} \textit{Id.} at 406.


\textsuperscript{60} See Belsky, supra n. 46, at 95 (describing some of these decisions).

\textsuperscript{61} John Witte, Jr., \textit{The Essential Rights and Liberties of Religion in the American Constitutional
In a series of decisions, the Court implicitly overruled the three-part Lemon test. The Court now said "that a rule or regulation does not violate the Establishment Clause unless it indicates a government ‘endorsement’ of religion or unless the law actually ‘coerces’ someone to be involved in a religious activity. Neutrality was the key." 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. In 1985, in Aguilar v. Felton, aspects of the program were found unconstitutional as they represented an "excessive entanglement of church and state" in violation of the Lemon test. Twelve years later, the Supreme Court in Agostini v. Felton reviewed the same program and applied a less rigorous analysis, ultimately holding "this carefully constrained program cannot reasonably be viewed as an endorsement of religion." 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.

The Court also restricted the application of the strict scrutiny test for claims of free exercise deprivation. In Employment Division v. Smith, 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 the strict scrutiny review test does not apply when an individual is asked to comply with a "neutral law of general applicability." The review is minimal—a valid or reasonable government purpose is sufficient; no compelling government interest is needed. This lesser level of review is the test for application of any federal or state neutral and general law.

Minimal review of both state and federal actions was now a constitutional doctrine. Only the Supreme Court could define the scope of the Free Exercise Clause, and a later attempt by Congress in RFRA to reassert the "compelling interest" and "narrow


63. Id.
64. See Belsky, supra n. 46, at 96–98.
66. Id. at 414.
68. Id. at 235.
70. See Massaro, supra n. 59, at 949 (weakened protection of free exercise rights).
71. 494 U.S. 872.
72. Id. at 874.
73. Id.
74. Id. at 879 (quoting U.S. v. Lee, 455 U.S. 252, 263 n. 3 (1982))
75. Id. at 885.
76. See Lukumi, 508 U.S. at 531; Rupert v. Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 2002) (rational basis review on ban of ceremonial use of eagle feathers under the federal Bald Eagle Protection Act).
tailoring” standard was, therefore, not valid. However, as to both Establishment Clause and Free Exercise Clause challenges, this uniformity of treatment of both state and federal actions ran counter to another trend of Supreme Court jurisprudence—the re-emergence of the power of the states.

IV. 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 sixty years of constitutional history and reestablished a more exacting application of the principle of state sovereignty. Ever since the New Deal, and until the mid-1990s, the Supreme Court upheld federal statute after federal statute and rejected arguments that Congress’s power under the Commerce Clause was limited or superceded by the Tenth Amendment.

This deference to the federal government ended with United States v. Lopez. 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 or in a school zone. The Court held that the statute was beyond Congress’s powers under the Commerce Clause. The Commerce Clause power


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.

The "really new" federalism was limited in nature, and here there was no showing that the Act regulated activities that had a "substantial relation to interstate commerce." 86

Then, in United States v. Morrison, this new "substantial relation" test was used to bar application of the federal Violence Against Women Act in a civil action for damages against a college whose student athletes allegedly raped a female student. 87 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. 88

Nor could the Civil Rights Amendments 89 provide any authority for such interference into a traditional area of state regulation. 90 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 property, without due process of law; nor deny to any person ... equal protection of the laws." 91 It is also the vehicle by which the Bill of Rights was incorporated and applied to the states. 92 In Morrison, as well as an earlier decided case, City of Boerne v. Flores, 93 the Supreme Court looked back to nineteenth-century legislative history 94 and precedents 95 to interpret the Fourteenth 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." 96

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. 97 In New York v. United States, 98 Justice O'Connor applied the Tenth Amendment 99 to preclude application of a federal statute that required New York to "take title" to low-level radioactive nuclear waste within its borders. To "commandeer[]" a state 100 to "govern according to Congress's instructions," 101 here to take title to waste, violates "the core of state sovereignty" inherent in the Tenth Amendment. 102

86. Id at 662–63. The Court set out a test limiting Commerce Clause authority to three areas: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and (3) activities having a substantial relation to interstate commerce or that substantially affect interstate commerce. Id at 558–59.
88. Id at 613.
89. U.S. Const amend. XIII, XIV, XV.
90. See Morrison, 529 U.S. at 619–27.
91. U.S. Const. amend. XIV, § 1; see Boerne, 521 U.S. at 516–17.
93. 521 U.S. 507.
94. Id at 520–21.
95. Morrison, 529 U.S. at 621–22 (reviewing holding in Civil Rights Cases, 109 U.S. 3 (1883)).
96. Chemerinsky, supra n. 83, at 197.
97. Id.
99. 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. See Gregory v. Ashcroft, 501 U.S. 452, 463–64 (1991) (interpretation of a federal statute to not apply to state judges based on federalism and Tenth Amendment concerns).
100. New York, 505 U.S. at 177.
101. Id at 162.
102. Id at 177
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\(^1\) also violated the Tenth Amendment.\(^2\) 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."\(^3\) Finally, as part of this "New Federalism,"\(^4\) the Court has used the Eleventh Amendment and its implied immunity policy\(^5\) to bar certain types of federal lawsuits against state or state officials, even when Congress has authorized such suits.\(^6\)

The Court did carve out two exceptions.\(^7\) First, it created a "legal fiction" in *Ex Parte Young*\(^8\) that one could sue a state official\(^9\) to stop a continuing violation\(^10\) of

---

2. *Id.* at 935. The Court emphasized its holding in *New York:*

> 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 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.

*Id.*

5. 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, or the Citizens thereof, and foreign States, Citizens, or Subjects." In *Chisholm v. Georgia*, 2 U.S. 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. La.*, 134 U.S. 1 (1890), the Supreme Court interpreted the provision to bar suits by a citizen against his or her own state under a federal statute in any court, not just in federal court, but in any court. *Alden v. Me.*, 527 U.S. 706, 746-47 (1999) (citing and quoting *Hans*, 134 U.S. at 10).
9. The "fiction" means that the individual has to be sued in his or her own name. For example, in *Papasan v. Allain*, the Court held:

> 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 was 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.

10. This exception only applied to prospective action. Actions for damages or retroactive payments are still barred because they must be paid out of the state's treasury. *Edelman v Jordan*, 415 U.S. 651, 677 (1974). Whether something is a retroactive payment or damages or merely incidental to a request for prospective relief is a balancing/policy question. *See e.g. Papasan*, 478 U.S. at 279-80 (trust income is retroactive monetary damages and barred); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (payments ancillary to injunctive order). If a state official is sued in his or her individual private capacity, there is no immunity bar. *Hafer v. Melo*, 502 U.S. 21 (1991).
federal law because that officer had to be acting without authority by the state ("ultra vires"). The second exception is when the Eleventh Amendment policy is superseded by another constitutional provision. Originally, an individual could sue a state when such a suit was authorized by a federal statute, enacted by Congress under the authority granted by any provision of the Constitution. 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 five of the Fourteenth Amendment, which was enacted after the Eleventh Amendment and which explicitly gave Congress the "power to enforce, by appropriate legislation, the provisions of this article." 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 "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" were shown.

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 for the states.

V. 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. As a result, both federal and state laws that provided for vouchers and other faith-based services were found to be "neutral," not a basis for finding constitutional invalidity. In addition, providing "faith-based" services was now a key element of federal policy. 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." Yet, this is precisely the

113. 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).
115. *Seminole Tribe v. Fla.*, 517 U.S. 44, 59 (1996) (Indian Commerce Clause). If a law did not fit explicitly within the scope of the Fourteenth Amendment protections and thus within Congress's § 5 powers, it could not be used to sue the state. *Id; see also College Sav. Bank, 527 U.S. 627 (Patent Clause)*.
117. Review supra notes 63 to 69 and accompanying text.
120. Belsky, *supra* n. 62, at 281 (footnotes omitted, citing other authors).
holding of Locke v. Davey. In that case, the Court reviewed a Washington state provision that barred the giving of any state money for "religious worship, exercise or instruction." In the late 1800s, many states had passed similar constitutional provisions, entitled "Blaine Amendments," barring funding for parochial schools and other religious uses. These provisions were attempts to keep public funds far away from use by new immigrant (mostly Catholic) groups. The 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 limitations to funding of religious entities 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.

The State of Washington had a scholarship program to assist academically gifted students, and Joshua Davey wanted one of these scholarships to study to be a minister. The Supreme Court, in an opinion by Chief Justice Rehnquist, upheld Washington's constitutional provision and the ban on use of these state funds by 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.

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. The Court also rejected the argument by dissenting Justices Scalia and Thomas that the Washington law "discriminated against religion."

---

122. Wash. Const. art. 1, § 11; see also Locke, 540 U.S. at 716 (noting the provision at issue codifies the State's constitutional prohibition).
123. These state laws are called "Blaine Amendments" because they are based on a federal constitutional amendment proposed by Republican presidential aspirant James G. Blaine. In 1876, the proposed amendment overwhelmingly passed the House but did not reach the two-thirds requirement in the Senate. Michael W. McConnell, John H. Garvey & Thomas C. Berg, Religion and the Constitution 452–53 (Aspen Law & Bus. 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, some 29 states had enacted some form of [this provision]." Id. at 457.
126. Locke, 540 U.S. at 715, 717.
127. Id. at 718–19 (citations omitted).
128. Id. at 720–21.
129. Id. at 721.
130. Id. at 726 (Scalia & Thomas, JJ., dissenting). Upholding the law was inconsistent with recent Supreme
It is inconceivable that a federal law based on an animus to religion would be upheld. The difference here, with respect to a state law, is the desire by a majority of the Court to balance "state's rights" with the new First Amendment jurisprudence. That same desire led to the decision in 2006 in O Centro.

As indicated earlier, 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. In response to public pressure, Congress passed RFRA, a statute restoring that test to any law that substantially interfered with a religious practice. The explicit purpose of the RFRA was to overrule Employment Division in all its aspects. There is no mention of making any distinction between federal or state laws. It was intended to apply strict scrutiny to both.

In City of Boerne v. Flores, Justice Kennedy for the Court, citing congressional reports, stated, "Congress relied on its Fourteenth Amendment enforcement power in enacting" RFRA. He said that Congress had no power to do this. Writing for six Justices, he found RFRA unconstitutional, not "a proper exercise of Congress' remedial or preventive power." By attempting to make a "substantive change" in constitutional protections, Congress, in RFRA, had violated "vital principles necessary to maintain Court precedent and not even a "close call" to allow a "play in the joints." 540 U.S. at 728. Justice Thomas added that "[a degree in] theology does not necessarily implicate religious devotion or faith." Id. at 734.

Four years before Locke, Justice Thomas, writing for the plurality in Mitchell v. Helms, overturned a lower court decision and upheld a federal statute providing funds to sectarian schools. 530 U.S. 793. 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." Id 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 on Locke, for these justices the difference was the "balance between the new Supreme Court precedents on the application of the religion clauses and state authority and sovereignty." Belsky, supra n. 62, 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:

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

540 U.S. at 722.

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 laws. 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, supra n. 62, at 293-94.

131. Review supra notes 70 to 76 and accompanying text.
133. Id. at 98.
134. See Belsky, supra n. 62. Id at § 2000bb(a)(4) & (b).
136. 521 U.S. at 516 (citing both Senate and House reports).
137. Id at 529.
138. Id at 532.
separation of powers and the federal balance." Justice Kennedy in *City of Boerne* is highly critical of the power of Congress to enact the statute at all. And although the Congress did rely on the Fourteenth Amendment, it also relied on congressional power to "enforce the free exercise clause."

Most courts reviewing the decision soon after its issuance believed the Court had declared RFRA unconstitutional for all government action. Even if the decision could be found to be ambiguous, it certainly was at least an issue whether RFRA could apply to federal actions. In a later decision reviewing the validity of the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), the Court noted that the issue of application of RFRA to the federal government was not yet decided. 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, he just went ahead and applied the compelling interest test.

VI. Conclusion

An adage, which I have used before, states, "where you stand depends on where you sit." Perhaps a variation can be "where and how you practice your religion depends on where you live and what government entity is 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

142. Id. at 536. Justice O’Connor wrote a dissent arguing that *Employment Division* was "gravely at odds with our earlier free exercise decisions." Id. at 548. Therefore, the Court should use the *Boerne* case to reconsider and overrule *Employment Division*. 521 U.S. at 544-65. Justices Souter and Breyer also wrote dissenting opinions. Id at 565-66.

143. Id. at 532. Justice Kennedy argued,

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.

Id.


146. See id.

147. For an argument in favor of applying RFRA to federal actions, review Blatnik, *supra* note 138.


150. *Cutter*, 544 U.S. at 715 n. 2. *Cutter* dealt with RLUIPA, which was passed in partial response to *Boerne*. Id. at 715.

151. Justice Alito did not participate.

152. 126 S. Ct. at 1225.

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 *O Centro*. Whether we call this a "play in the joints" or allowing the states to "act as laboratories," it is discomforting to have separate sets of rules when dealing with basic aspects of our lives, such as how we can or cannot practice our religions.

Some reconciliation of these sets of policies—at least as far as the free exercise of religion is concerned—may be possible. In 2000, Congress passed RLUIPA. 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. Congress, believing that *City of Boerne* applied to all government actions, then stipulated that RLUIPA would apply to all government actions, state and federal.

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. In an unanimous opinion, the Court 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 prisons, this law did not violate the Establishment Clause. The Court did not consider the source of authority for the statute (as it had in *City of Boerne*).

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

---

156. Of course, another way to reconcile two sets of standards is to have the states include a RFRA in their own laws and constitutions. Many states have, in fact, enacted their own religious freedom acts. See Christopher Andrew Eason, Student Author, *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).
160. *Id* at 724.
161. The Court said that RLUIPA was based on the Commerce and Spending Clauses and did not address whether RLUIPA exceeded Congress's legislative powers. *Id* at 718 n. 7. In addition, the Act was limited to prison cases and was based on extensive hearings.