# Religious Liberties

## RLUIPA May Not Pass Constitutional Scrutiny

*By John M. Armentano**

The Religious Land Use and Institutionalized Persons Act of 2000[1] (hereafter, "RLUIPA" or the "Act") enacted on September 22, 2000, represents an undisguised attempt by Congress to circumvent two United States Supreme Court decisions — *City of Boerne v. Flores*[2], which struck down the Religious Freedom Restoration Act ("RFRA")[3], and *Employment Div. Dep't of Human Resources of Oregon v. Smith,*[4] which held that the compelling state interest test did not apply in a First Amendment Free Exercise Clause analysis. In 1993, Congress had enacted RFRA in an effort to override *Smith* and resurrect a strict scrutiny test for all government actions that imposed substantial burdens on religious exercise. RFRA was aimed at state and local laws and/or practices, and provided:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
> Government may substantially burden a person's exercise of religion **only** if it demonstrates that application of the burden to the person - -
>
> (1) is in furtherance of a compelling governmental interest; **and**
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[5] (Emphasis added).

In *City of Boerne* in 1997, the United States Supreme Court held that RFRA was unconstitutional, because its restrictions on state and local governments exceeded congressional authority under the Fourteenth Amendment to the United States Constitution, and because "RFRA contradicts vital principals necessary to maintain separation of powers and the federal balance."[6] Thus, the Court held that RFRA was unconstitutional, not only because it was beyond the power of Congress authorized by the Fourteenth Amendment, but also because the statute was "a considerable Congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[7]

Although Congress shifted the articulated justification for RLUIPA from the Fourteenth Amendment, which was the alleged authority for RFRA, to the Commerce Clause, it did not meaningfully change the intended impact on state and local governments. In other words, although RLUIPA is grounded in the Commerce Clause, rather than the Fourteenth Amendment, it is a similar blatant legislative attempt by Congress to overrule the Supreme Court in both *Smith* and *Boerne* by reinstituting the strict scrutiny test in cases addressing the free exercise of religion. In pertinent part, it provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution
>
> (A) Is in furtherance of a compelling governmental interest; **and**
>
> (B) Is the least restrictive means of furthering that compelling governmental interest.[8] (emphasis added).

Thus, by legislative fiat, Congress is intruding into the traditional prerogatives and authority of the states and their local governments to govern land use. The Act requires the localities to follow Congress' instructions by applying the most demanding test known in constitutional law to the exercise of local land use powers by the lowest governmental entities. The Act may well fall for the same reasons that RFRA did, in addition to other well settled constitutional principals set forth in the Commerce Clause and the Tenth Amendment.

### A. An Analysis of RLUIPA Under the Commerce Clause

When a federal statute such as RLUIPA is alleged to be beyond the authority granted to Congress by the Commerce Clause and to have violated the principals of federalism contained in the Tenth Amendment, it must first be determined whether the activity that is the subject of the legislation is within one of the three broad categories defined by the Court that may be regulated under the Commerce Clause: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, or (3) activities having a substantial relation to interstate commerce.[9]

Clearly, the restrictions placed by RLUIPA upon land use regulation do not address (1) the channels of interstate commerce, or (2) instrumentalities of interstate commerce. If

the activity is analyzed under the third category, the analysis proceeds to determine whether the regulated activity "substantially affects" interstate commerce.[10] In this regard, the Court has emphatically stated that it will not approve an overly broad definition of acts affecting commerce. In *United States v. Morrison,*[11] addressing the Violence Against Women Act, the Court held that Congress did not have authority over the subject matter, inasmuch as the statute before it was not regulating an activity that substantially affected interstate commerce. It observed that, because the statute focused on gender-motivated violence wherever it occurred, rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce, it was unconstitutional, because it was beyond the scope of the commerce power.[12]

In addition, in *U.S. v. Lopez*, the same Court declared that the federal Gun Free School Zones Act was unconstitutional because it also exceeded Congress' power under the Commerce Clause. *Lopez* noted that the Commerce Clause is not boundless and that the law involved was a criminal law which did not involve interstate commerce or any other economic enterprise. It seems that the local, non-economic nature of the regulation was pivotal in the finding of unconstitutionality.

In analyzing RLUIPA in the *Lopez* framework, it should fail to establish legislative authority over the subject matter, as defined by the three broad categories stated in *Lopez*. This Act relates to local land use regulation, not to a channel of interstate commerce, and not to an instrumentality of interstate commerce. As such, it cannot be found to "substantially affect" interstate commerce, because, like the overly broad statute in *Morrison*, it focuses on land use regulation wherever it occurs, rather than on land use regulation directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce.[13] Thus, RLUIPA cannot be based upon the Commerce Clause.

**B. An Analysis of RLUIPA Under the Tenth Amendment**

The Tenth Amendment to the United States Constitution provides:

> 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 principles of federalism embodied in the Tenth Amendment impose significant limitations on legislation enacted under Commerce Clause powers in order to retain the balance of power between states and the federal government.[14] Serving in the gatekeeper role and limiting the extent of federal power, the Tenth Amendment, a part of the original Bill of Rights, is not an impotent catch-all residuary clause, or a general statement of a truism. It is the barrier built by the founders of our nation between that which is national and that which is local.[15]

If it is first determined under a Commerce Clause analysis that Congress has legislative authority over the subject matter of the legislation, it still remains to be determined whether the statute violates the principles of federalism contained in the Tenth Amendment by requiring the states to compel or prohibit certain acts.[16] Thus, assuming arguendo that RLUIPA is a proper exercise of the Commerce Power (*i.e.*, that it regulates a channel of interstate commerce, an instrumentality of interstate commerce, a person or thing in interstate commerce, or an activity having a substantial relation to interstate commerce), we proceed to the Tenth Amendment analysis.

In *New York v. United States* and *Printz v. United States*, the Supreme Court held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the core principles of federalism contained in the Tenth Amendment. Under the provisions of the Low Level Radioactive Waste Policy Act that were held to be unconstitutional in *New York*, Congress was found to have "commandeered" the state legislative process by requiring the states to either accept ownership of radioactive waste generated within their borders or to regulate it, according to the instructions of Congress by providing for the disposal of all internally generated radioactive waste. This was held to be "inconsistent with the Constitution's division of authority between federal and state governments," in violation of the Tenth Amendment.[17] The Court stated:

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, **the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions.**[18] (emphasis added.)

In *Printz*, the Court invalidated a provision of the Brady Act, which commanded "state and local enforcement officers to conduct background checks on prospective handgun purchasers."[19] The Court, drawing on the Federalist Papers, reaffirmed that the Tenth Amendment "prohibits the exercise of powers not delegated to the United States," by stating:

> The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. Preservation of the States as independent political entities being the price of union, . . . the Framers rejected the concept of a central government that would act upon and through the States, and instead

designed a system in which the State and Federal Governments would exercise concurrent authority over the people - - who were, in Hamilton's words, "the only proper objects of government." . . . "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" - - "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. . . . As Madison expressed it: "**[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.**"[20] (emphasis added.)

In *Morrison*, the Court stated that it has "**always**...rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power."[21] The *Morrison* Court recognized criminal law and family law as areas of "traditional state regulation" and restated a warning that was originally set forth in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[22] :

> [E]ven [our] modern-era precedents which have expanded Congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Loughlin Steel,* the Court warned that the scope of the interstate commerce power "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate **the distinction between what is national and what is local** and create a completely centralized government."[23] (emphasis added.)

**C. <u>Land Use Regulation Is A Local Function</u>**

The Court has long recognized land use regulation as an area of traditional state regulation, <u>i.e.</u>, a police power belonging to state and local governments. In *Lucas v. South Carolina Coastal Council,*[24] it noted that its "takings" jurisprudence has traditionally been guided by the understandings of its citizens regarding the content of, and the state's power over, the "bundle of rights" persons acquire when they obtain title to real property:

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power."[25]

The reasoning that the Court expressed in *City Boerne v. Flores*, in striking down RFRA, applies as well to RLUIPA: Congress's discretion is not unlimited, . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. . . . **RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance**.[26] (emphasis added.)

As in *New York*, because the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions, the Constitution should not be understood to confer upon Congress the ability to require the states to impose or implement land use regulations according to Congress' instructions, as provided in RLUIPA.[27] With regard to RLUIPA, the courts should follow the guidance in *Printz,* and the limitations created by our Founders, which hold that local and municipal authorities form distinct and independent portions of the balance between federal and state powers, and those local and municipal authorities are no more subject to Congress within their respective spheres, than Congress is subject to the local and municipal authorities, within its own sphere.[28]

The regulation of land use is every bit as much an area of traditional state regulation as criminal law or family law was in *Lopez* and *Morrison.*[29] As recognized by the Supreme Court in other cases, an analysis of RLUIPA must recognize that there is a functional relationship between the states' positive responsibility to protect and enhance the well-being of its citizens, their use of the police powers to these ends, and state and local governments' land use controls as a traditional means to achieve these fundamental goals.[30]

Given the Court's special solicitude for "areas of traditional state regulation," expressed in *Morrison* as extending to state police powers generally, and including criminal law, family law and issues of marriage, divorce, and child rearing, coupled with the Court's continuing recognition of the right of states to exercise their police powers, particularly their land use regulatory powers, what is more local than regulation of local land use? Such questions have always been in the local domain. As the Court stated in *Lopez*, to hold otherwise would be to "obliterate the distinction between what it is national and what it is local."[31]

Since the adoption of RLUIPA two cases have been decided at the Federal District Court Level, both holding that

RLUIPA is a constitutional exercise of congressional power. e.g. *Freedom Baptist Church of Delaware County v. Township of Middletown*, [32] and *Cottonwood Christian Center v. Cypress Redevelopment Agency.*[33] Neither of these cases contains a detailed analysis of the Commerce Clause and the Tenth Amendment issues. For example, in *Cottonwood* the Court simply gratuitously observed that plaintiff had not attacked the constitutionality of RLUIPA. Nevertheless, it went on to say in pure dicta with no analysis that, because RLUIPA was based on the spending and commerce clauses, it would appear to have avoided the pitfalls of its predecessor. This is hardly an analysis of the constitutional magnitude required in cases of this type.

With respect to *Freedom Baptist* the Court examined the issues and noted that the Congress had authority to act under the Commerce Clause and that RLUIPA differed critically from RFRA in that the latter had sweeping coverage that ensured Congressional intrusion at every level of government. It seems that when dealing with the regulation of land use at the lowest level of government for the federal government to dictate that the zoning authority must employ a strict scrutiny standard in religious use situations in and of itself is a similar intrusion which violates the Tenth Amendment.

Neither of these cases has reached a circuit court of appeals for decision. In both *Lopez* and *Morrison,* as seen above, the Supreme Court invoked bedrock notions of federalism observing that the Constitution creates a federal government of enumerated powers and even Congress' power under the Commerce Clause was subject to some limits. When analyzing these cases applying RLUIPA in light of *Printz, Morrison* and *Lopez,* it seems clear that notions of federalism indeed come into play and that the Supreme Court may very well hold that RLUIPA is in the same category as gun free zones (the Brady Act), and the Violence Against Women Statute. To permit the federal government to intrude into the town hall debates and to dictate what uses of land are permitted and to what extent they are permitted to regulate at the local level is a total disregard of the comprehensive planning process, which is the sine qua non for a rational, well considered zoning ordinance. After all, what can be more truly local than determining land use in one's neighborhood particularly when the land use is based upon a well considered comprehensive plan for the entire community and all impacts, including environmental impacts, have been considered. To suddenly have the federal government give certain uses greater protection from otherwise legal regulation to which others are subject may not be upheld by the Supreme Court, especially in light of the clear admonition in *Jones & Laughlin Steel* and restated in *Morrison*: that the Court should not "obliterate the distinction between what is national and what is local and create a completely centralized government."

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**Footnotes**

[1] 42 U.S.C. § 2000cc et seq.
[2] 521 U.S. 507, 117 S. Ct. 2157 (1997).
[3] 42 U.S.C. § 2000bb et seq.
[4] 494 U.S. 872, 110 S. Ct. 1595 (1990), *reh'g. den.,* 496 U.S. 913, 110 S. Ct. 2605 (1990).
[5] 42 U.S.C. § 2000bb-1.
[6] *City of Boerne v. Flores,* 117 S. Ct. at 2172 (emphasis added).
[7] *Id.* at 534 (emphasis added).
[8] 42 U.S.C. § 2000cc(a)(1).
[9] *See United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624 (1995).
[10] *See Lopez*, 514 U.S. at 559, 115 S.Ct. at 1629-30.
[11] 529 U.S. 598, 120 S. Ct. 1740 (2000).
[12] *See Morrison*, 120 S.Ct. at 1749.
[13] *See Morrison*, 120 S.Ct. at 1749.
[14] *See Printz v. United States*, 521 U.S. 898, 924, 935, 117 S. Ct. 2365, 2379, 2384 (1997); *New York v. United States*, 505 U.S. 144, 155-57, 177, 112 S. Ct. 2408, 2417-18, 2429 (1992).
[15] *The Federalist*, Nos. 15 and 39.
[16] *Printz,* 117 S.Ct. at 2379.
[17] *New York v. United States,* 505 U.S. at 175-78, 112 S. Ct. at 2428-29.
[18] 505 U.S. at 162, 112 S. Ct. at 2421 (citing *Coyle v. Smith*, 221 U.S. 559, 565, 31 S. Ct. 688, 689 (1911)) (emphasis supplied).
[19] 521 U.S. at 902.
[20] 521 U.S. at 919-20, 117 S. Ct. at 2379 (quoting The Federalist Nos. 15 and 39) (citations omitted) (emphasis added).
[21] *Morrison,* 120 S. Ct. at 1754 (quoting *Lopez* 514 U.S. at 584-85, 115 S. Ct. 1624) (emphasis supplied).
[22] 301 U.S. 1, 37, 57 S. Ct. 615 (1937), and was echoed in *Lopez*, 514 U.S. at 556-57, 115 S. Ct. at 1628-29.
[23] *Morrison,* 120 S. Ct. at 1748-49 (quoting *Lopez*, quoting *Jones*) (emphasis added).
[24] 505 U.S. 1003, 1027, 112 S. Ct. 2886, 2899 (1992).
[25] *Id*. (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158 (1922)).
[26] *City of Boerne v. Flores*, 117 S. Ct. at 2172 (citations omitted) (emphasis added).
[27] *See* 505 U.S. at 162, 112 S. Ct. at 2421.
[28] *See Printz*, 117 S. Ct. at 2377.
[29] *See Morrison,* 120 S. Ct. at 1753.
[30] S*ee Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978), *reh'g den.*, 439 U.S. 883, 99 S. Ct. 226 (1978); *Agins v. Tiburon,* 447 U.S. 255, 100 S. Ct. 2138 (1980); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143 (1915).
[31] *See, e.g., Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S. Ct. 1536 (1974), *Berman v. Parker,* 348 U.S. 26, 75 S. Ct. 98 (1954), and *Lucas, supra.*
[32] 204 F. Supp. 2d 857 (E.D.P.A. 2002).
[33] 218 F. Supp. 2d 1203 (C.D. Cal.2002).