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Lara A. Berwanger

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NOTES

WHITE KNIGHT?: CAN THE COMMERCE
CLAUSE SAVE THE RELIGIOUS LAND USE
AND INSTITUTIONALIZED PERSONS ACT?

Lara A. Berwanger*

INTRODUCTION

In 2000, a church that had been operating in the downtown area of Lake Elsinore, California, for more than twelve years began to outgrow its space. Specifically, the church became dissatisfied with its present location when limited parking spaces forced some of its elderly and disabled members to park at a considerable distance from the church. Heads of the church began to look for another building, and decided they wanted to move into a local Food Smarts building. However, the city’s Planning Commission denied the church’s application to purchase the property and move to the new location. Among the reasons the Commission cited for turning down the application were “loss of a needed service . . . , loss of tax revenue, insufficient parking” and the belief that the denial would not be a substantial burden on the church, as it already had a place to operate.

Dissatisfied with the Commission’s decision, the church sued the city of Lake Elsinore to invalidate the zoning rules or compel the city to allow the purchase of the property. The church based its claims on the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), a statute that requires a strict scrutiny analysis of laws

* J.D. Candidate, 2005, Fordham University School of Law. I would like to thank my friends and family, especially my parents Patricia and Joseph, my brother Jason, and my sister Molly, for their constant understanding, love, and support. I am grateful to Father Charles Whelan for his guidance and assistance.

2. Id.
3. Id. at 1166. Food Smarts is a local discount food store and recycling business.
4. Id.
5. Id.
6. Id.
8. For a definition of strict scrutiny, see infra note 27.
that burden religious institutions. On June 24, 2003, Judge Steven Wilson of the United States District Court for the Central District of California decided the case and became the first judge to hold the land use portion of RLUIPA unconstitutional, finding that the statute exceeded Congress's power under the Fourteenth Amendment.

As the issue of RLUIPA's constitutionality reaches the courts, counselors on both sides of the argument are mindful of a basic tenet of constitutional law: "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."

In challenging the statute, opponents of RLUIPA argue that the law violates one or more provisions of the Constitution. For example, opponents have challenged RLUIPA under the Establishment Clause, the Spending Clause, the Tenth

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12. See, e.g., Murphy, 289 F. Supp. 2d at 115 (challenging RLUIPA's constitutionality under Section Five of the Fourteenth Amendment, the Commerce Clause, and the Establishment Clause); Westchester Day Sch., 280 F. Supp. 2d at 234-39 (presenting defendants' argument that RLUIPA was unconstitutional under Section Five of the Fourteenth Amendment, the Commerce Clause, the Establishment Clause and the Tenth Amendment); Elsinore Christian Ctr., 270 F. Supp. 2d at 1163 (noting defendants' argument that RLUIPA is unconstitutional under Section Five of the Fourteenth Amendment).
13. See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). In 1971, the Supreme Court crafted a test for determining whether a statute violates the Establishment Clause. See Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the Lemon test, a statute is a constitutional exercise of congressional authority if the statute (1) has a secular purpose; (2) has a principal effect that neither advances nor inhibits religion; and (3) has no "excessive government entanglement with religion." Id. at 612-13 (quotations omitted). For case law analyzing the land use portion of RLUIPA under the Establishment Clause, see Westchester Day School, 280 F. Supp. 2d at 238 (finding that RLUIPA does not violate the Establishment Clause); Johnson v. Martin, No. 2:00-cv-075, 2002 U.S. Dist. LEXIS 18368 (W.D. Mich. Sept. 26, 2002) (holding that RLUIPA does not violate the Establishment Clause); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 848 (S.D. Ohio 2002) (finding that RLUIPA does not violate the Establishment Clause because it "specifically permits safety and security . . . to outweigh . . . claim[s] to a religious accommodation"). For a more thorough discussion of RLUIPA's analysis under an Establishment Clause challenge, see Shawn P. Bailey, The Establishment Clause and the Religious Land Use and Institutionalized Persons Act of 2000, 16 Regent U. L. Rev. 53 (2003).
14. See U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . ."). For analysis of RLUIPA under the Spending Clause, see Lynn A. Baker & Mitchell N. Berman, Getting Off of the Dole: Why the Court Should Abandon Its Spending Doctrine and How a Too-Clever Congress Could Provoke It to Do So, 78 Ind. L.J. 459 (2003);
Amendment,\textsuperscript{15} and the Fourteenth Amendment.\textsuperscript{16} To date, no case has decided RLUIPA's constitutionality \textit{solely} under the Commerce Clause.\textsuperscript{17} Some courts and commentators have suggested, however, that the Commerce Clause may save RLUIPA if a court cannot find another constitutional basis for upholding the statute.\textsuperscript{18}

This Note examines whether the Commerce Clause can provide support for upholding RLUIPA, and argues that because RLUIPA

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\begin{itemize}
\item \textsuperscript{15} The Tenth Amendment provides that “[t]he 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.” U.S. Const. amend. X; see \textit{Westchester Day Sch.}, 280 F. Supp. 2d at 239 (finding that RLUIPA does not violate the Tenth Amendment). For more discussion on the separation of powers and the Tenth Amendment pertaining to RLUIPA, see Ada-Marie Walsh, Note, \textit{Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary}, 10 Wm. & Mary Bill Rts. J. 189, 211-14 (2001).
\item \textsuperscript{16} Section One of the Fourteenth Amendment states, in pertinent part, that:
\begin{quote}
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\end{quote}
\item \textsuperscript{17} See, e.g., \textit{Westchester Day Sch.}, 280 F. Supp. 2d at 230. The defendants challenged RLUIPA's constitutionality under the Commerce Clause and on three other constitutional bases. Id. at 234-39.
\item \textsuperscript{18} See, e.g., \textit{Elsinore Christian Cir.}, 270 F. Supp. 2d at 1182 (“[RLUIPA] and its legislative history imply an alternative source of congressional authority: the Commerce Clause.”).
\end{itemize}
regulates non-economic, local activity, lacks congressional findings, contains an unsatisfactory jurisdictional element, and violates notions of federalism, the Commerce Clause cannot support a finding that RLUIPA is constitutional. This Note focuses on the land use portion of RLUIPA. Part I of this Note explores the line of congressional legislation leading up to the passage of RLUIPA in 2000 and the legislative history of the Act itself. Part I also analyzes the history of the Supreme Court's Commerce Clause jurisprudence and recent federal appellate court decisions regarding the Commerce Clause. Part II of this Note outlines the arguments for finding RLUIPA constitutional, and the arguments for finding it unconstitutional. Finally, since there have been no appellate cases regarding the validity of RLUIPA under a Commerce Clause analysis,\(^9\) Part III discusses other appellate court Commerce Clause decisions, and uses arguments from Part II to conclude that RLUIPA is not a valid exercise of Congress's Commerce Clause power.

I. SETTING THE STAGE: BACKGROUND OF RLUIPA AND THE COMMERCE CLAUSE

From 1963 to 1990, courts employed a strict scrutiny standard to review any law that substantially burdened religious practices.\(^{20}\) The Supreme Court struck down that standard of review as applied to religion in *Employment Division v. Smith.*\(^{21}\) Instead, the standard the Court developed in *Smith* requires that strict scrutiny will apply only when a law intentionally discriminates against religious practices.\(^{22}\) Since that landmark decision, Congress has attempted to pass legislation\(^{23}\) restoring the strict scrutiny standard\(^{24}\) for laws that

19. To date, no circuit court has taken a position on the issue of whether the land use portion of RLUIPA is constitutional. The circuit courts have instead only heard cases involving the institutionalized persons portion of RLUIPA. *See* Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003) (finding that RLUIPA violates the Establishment Clause because RLUIPA favors religious rights without showing any proof that religious rights are more oppressed than other fundamental rights); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (finding that RLUIPA is a legitimate exercise of congressional Spending Clause authority); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (finding that RLUIPA is a constitutional exercise of Congress's Spending Clause authority). For an analysis of the constitutionality of the institutionalized persons portion of RLUIPA, see Heather Guidry, Comment, *If at First You Don't Succeed...: Can the Commerce and Spending Clauses Support Congress's Latest Attempt at Religious Freedom Legislation?*, 32 Cumb. L. Rev. 419 (2002).


22. *See* id.

substantially burden religious practices even though the law was not enacted in order to create the burden. RLUIPA is the latest statute in that legislative effort.

In the same period that Congress and the Supreme Court shaped the role of strict scrutiny in religion cases, the Court analyzed and altered its Commerce Clause jurisprudence. Because each line of cases is relevant to analyzing RLUIPA, Part I of this Note first examines the Supreme Court's Free Exercise jurisprudence prior to 1990. Then, Part I discusses the flurry of congressional legislation after 1990, including RLUIPA, which attempted to restore a strict scrutiny analysis. Next, this part explores RLUIPA's legislative history and implications. Finally, Part I analyzes the Supreme Court's Commerce Clause jurisprudence before and after 2000, the year of RLUIPA's enactment.

A. The Legislative Path to RLUIPA

In 1993, the House of Representatives attempted to pass legislation to restore a strict scrutiny standard to governmental acts burdening religious groups. However, until RLUIPA, such legislation failed in the Senate, or, if enacted, the Supreme Court determined that it was unconstitutional. This section discusses the statutes the House of Representatives drafted between 1990 and 2000, culminating in RLUIPA.

1. The Religious Freedom Restoration Act

From 1963 to 1990, the Supreme Court subjected any legislation that substantially burdens religious practices to a strict scrutiny accompanying text. For a discussion of RLPA, see infra notes 39-52 and accompanying text.

24. For a definition of strict scrutiny, see infra note 27 and accompanying text.


standard, which requires that the acting government body show that the legislation was necessary to achieve a compelling governmental interest and that the legislation was the least restrictive means of achieving that interest.

27. The version of strict scrutiny that courts used in most free exercise cases between 1963 and 1990 derives from Sherbert v. Verner, 374 U.S. 398 (1963). The Sherbert test covers governmental regulations that impose a substantial burden on a religious group's belief or activity. Id. at 404. To establish that the regulation is constitutional, the acting governmental body must show that the regulation advances a compelling governmental interest and does so by the least restrictive means possible. Id. at 403. The Court again applied strict scrutiny in Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the right of the Amish to freely exercise their religious beliefs by not sending their children to high schools that complied with Wisconsin's compulsory high school curriculum requirement outweighed Wisconsin's interest in mandatory attendance at such high schools).

According to one commentator, the standard is "'strict' in theory and usually 'fatal' in fact." Laurence H. Tribe, American Constitutional Law § 16-6, at 1451 (2d ed. 1988) (citations omitted). The common explanation for the application of a strict scrutiny standard is to avoid deference to Congressional decisions. Id. at 1001. If Congress determines that there is a necessity for a law, courts generally want to defer to that decision, because the Supreme Court considers reviewing the constitutionality of a congressional act to be a grave and delicate duty. Blodgett v. Holden, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring). The seeds of strict scrutiny analysis appear as far back as United States v. Carolene Products Co., 304 U.S. 144 (1938). Writing for the majority, Justice Stone predicted:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, . . . [L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Id. at 152 n.4 (citations omitted). For a deeper analysis of the implications of Carolene Products, see Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 740-46 (1985), reprinted in A Constitutional Law Anthology 42 (Michael J. Glennon ed., 1992). For a more thorough discussion of strict scrutiny analysis, see Banvard, supra note 16.

28. The acting governmental body could be Congress or one of the state legislatures.

29. See, e.g., Yoder, 406 U.S. at 214, 221-22. The Court found no compelling state interest and therefore did not reach the issue of whether the legislation was the least restrictive means of furthering that interest. Id. at 234.


Courts should use a strict scrutiny analysis to review any legislative program that burdens citizens in a manner that violates individuals' fundamental rights. Tribe, supra note 27, § 16-7, at 1454. The Supreme Court has applied strict scrutiny to analyze denial of welfare benefits, Shapiro v. Thompson, 394 U.S. 618 (1969) (holding unconstitutional provisions in state and federal welfare laws that did not give welfare
In 1990, in a decision that surprised many in its refusal to require exceptions for the exercise of religion, the Supreme Court announced its decision in Employment Division v. Smith. Writing for the Court, Justice Scalia held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." The Court's decision effectively removed the application of a strict scrutiny standard to generally applicable laws.

Congress responded to the Smith decision by passing the Religious Freedom and Restoration Act ("RFRA"). Congress intended to restore a strict scrutiny standard to generally applicable laws that negatively affected religious practices. In enacting the law, Congress relied on its enforcement power in the Fourteenth Amendment to apply the law to the states. But the Supreme Court struck down the application of RFRA to the states in City of Boerne v. Flores, holding that Congress had acted outside the scope of its enforcement power under the Fourteenth Amendment. Congress would have to go back to the drawing board.

32. Id. at 886 n.3.
33. Justice Scalia gave the following examples of "generally applicable laws": compulsory military service, the payment of taxes, health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws. Id. at 888-89 (citations omitted). Justice Scalia then concluded that the protection of religious liberty that the First Amendment provides does not necessitate such a wide application, and rejected the compelling state interest test. Id. The Court, however, did not overrule Sherbert or Yoder. Id. at 882 n.1, 884-85. The Court distinguished Sherbert as involving a built-in mechanism for evaluating individual claims for unemployment benefits. Id. at 884-85. The Court distinguished Yoder by pointing out that more than a mere free exercise claim was involved. Parental rights in education were also at stake. Id. at 882 n.1.
35. Id. § 2000bb(a)(3).
36. For the text of the Fourteenth Amendment, as well as a discussion of congressional power under Section Five of the Fourteenth Amendment, see supra note 16.
37. 521 U.S. 507 (1997). The Boerne Court found that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." Id. at 532. The Court then went on to strike down the law as unconstitutional because "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." Id. at 536.
38. Id. at 516-36.
2. The Religious Liberty Protection Act

The holding in Boerne gave Congress guidance on how to draft a law that could survive a constitutional challenge but still protect religious liberty. Thus, the House of Representatives again attempted to invoke a strict scrutiny standard in the Religious Liberty Protection Act of 1999 ("RLPA"). The Supreme Court in Boerne had led Congress to believe that it needed to cite additional constitutional support for its authority to enact such a law. Available constitutional bases of authority for Congress included the Spending Clause, the Tenth Amendment, the Commerce Clause, and the Establishment Clause, and the Fourteenth Amendment. Therefore, one of the major differences between RLPA and its predecessor, RFRA, was the House of Representatives' articulation of additional constitutional authority in the bill.

On June 15, 2000, the House of Representatives voted to endorse the Religious Liberty Protection Act and sent the bill to the Senate for further approval. The Senate, however, rejected the bill because of concern regarding its broad nature. Some members of the Senate

40. See Boerne, 521 U.S. at 532, 536. Because the Boerne Court found that Congress had violated the separation of powers in enacting the law, Congress added additional bases for authority in enacting future religious statutes in case the statutes violated the separation of powers. See, e.g., 42 U.S.C. § 2000cc.
41. The Spending Clause provides Congress with "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1.
42. The Tenth Amendment prescribes that "[t]he 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." U.S. Const. amend. X.
43. The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.
44. "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I.
46. Id. at 12-18. Another difference was that RLPA required congruence and proportionality of the state's action to the compelling interest. Id. at 13.
expressed concern that the bill might violate civil rights, especially in the area of employment.\(^{49}\)

In light of Congress's failed efforts to alter the legal landscape, *Boerne* and *Smith* allowed the government to burden religious conduct with generally applicable laws without triggering a strict scrutiny analysis requiring a compelling government interest.\(^{51}\) After the failure of RLPA, *Smith* stood as the prevailing law at the turn of the century. Dissatisfied with the legal atmosphere, Congress again tried to overturn *Smith* when it enacted RLIUPA.\(^{52}\)


After the Senate's unfavorable reaction to RLPA, the House of Representatives was less ambitious in expanding religious protection beyond the rule the Court established in *Smith*.\(^{3}\) Congress limited the focus of RLIUPA to two areas: restrictions on land use and on prisoners.\(^{44}\) RLIUPA sharply restricts the application of land use laws that affect religious exercise:

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.\(^{55}\)

Despite its narrow scope, RLIUPA marked another congressional attempt to apply strict scrutiny analysis to legislation substantially burdening religious groups' land use. Congress drafted RLIUPA on the belief that strict scrutiny analysis was the only way to protect religious liberty.\(^{56}\) Congress narrowed the scope of the bill to cover

\(^{49}\) *Id.* ("[T]he legislation stalled in the Senate when legitimate concerns were raised that RLPA, as drafted, would supersede certain civil rights . . . ").

\(^{50}\) "For example, one could foresee conflict between a state’s interest in eliminating sexual discrimination and the freedom of religious institutions to adhere to practices of limiting eligibility for ordination into the clergy based on sex." Evan M. Shapiro, Note, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 Wash. L. Rev. 1255, 1265 (2001) (analyzing RLIUPA under the Court's Commerce Clause jurisprudence, as the issue of RLIUPA's constitutionality under the Commerce Clause had not yet reached the courts).

\(^{51}\) *Id.* at 1264.


\(^{54}\) 42 U.S.C. § 2000cc. This Note discusses only the land use portion of RLIUPA.

\(^{55}\) *Id.* § 2000cc(a)(1).

only land use and institutionalized persons because Congress found
the most evidence of religious burdens in those areas.\textsuperscript{57} Although
RLUIPA narrows the scope of religious protection to those two areas,
the act broadly defines religious exercise. RLUIPA protects "any
exercise of religion, whether or not compelled by, or central to, a
system of religious belief,"\textsuperscript{58} thereby creating a large hurdle for local
governments.\textsuperscript{59}

RLUIPA's implications are far-reaching. Religious groups have
used RLUIPA to challenge local zoning board decisions prohibiting
them from expanding their houses of worship.\textsuperscript{60} RLUIPA may also
apply to "Megachurches."\textsuperscript{61} One woman and the religious sect to
which she belonged, the Fellowship of the Sacred Spirit,\textsuperscript{62} sued the
local government under RLUIPA. The woman had been holding
prayer and song meetings, followed by supper, in her home on
Saturday evenings.\textsuperscript{63} Eventually these meetings snowballed into
services, and neighbors called the local zoning officials to complain
when she erected a blue wooden arc on her front lawn and allowed
visitors who could not find places to park on the street to park on the
lawn.\textsuperscript{64} A zoning official visited the woman, and informed her that she
was violating local ordinances by operating a church and allowing the

many courts consider strict scrutiny to be too harsh a standard for the burdens in
religious land use cases, the courts often fail to apply the standard "with vigor." Id.
Therefore, Tuttle proposes that religious institutions may find a less stringent judicial
test more satisfying. Id.; cf. Von G. Keetch & Matthew K. Richards, \textit{The Need for
Legislation to Enshrine Free Exercise in the Land Use Context}, 32 U.C. Davis L. Rev.
725, 725-26 (1999).

\textsuperscript{57} 146 Cong. Rec. S7774.
\textsuperscript{59} See Walsh, supra note 15, at 198. After listing RLUIPA's numerous possible
applications, Walsh notes that local governments, faced with a RLUIPA challenge
"will have an uphill battle to show they are compelling governmental interests." Id.

\textsuperscript{60} James McCurtis Jr., \textit{Church Files Suit Against Meridian Over School}, Lansing
State J., Dec. 9, 2003, at 1B. The article reports that the Okemos Christian Center in
Meridian Township, Michigan sued the township for violating RLUIPA. Id. The
township refused to allow the center to add a 35,000 square foot extension. Id.

\textsuperscript{61} Jonathan D. Weiss & Randy Lowell, \textit{Supersizing Religion: Megachurches,
"Megachurches" are religious institutions with more than 2,000 members that provide
a slew of other services in addition to the traditional weekly service. Id. Some
examples of other services "Megachurches" provide are McDonald's restaurants,
programs for singles, health clubs, and rock concerts. David B. Zucco, Note, \textit{Super-
Sized with Fries: Regulating Religious Land Use in the Era of Megachurches}, 88 Minn.

\textsuperscript{62} The Fellowship of the Sacred Spirit is a religious sect that links its members
through a website. The members meet locally in their homes for prayer meetings.
Michael S. Giaimo & Dwight Merriam, \textit{Church v. State: Just Pray You're Not Sued

\textsuperscript{63} Id. at 14.
\textsuperscript{64} Id.
members to park on the lawn. The woman agreed to encourage her fellow members to car pool, but refused to stop the weekly meetings. The zoning official issued a cease and desist order. Two days later, he was served a federal writ pursuant to RLUIPA that enjoined the city and the zoning board from enforcing the ordinance against the woman and her group.

The outcome of that suit may be in line with similar cases. In a recent appellate case in Hawaii, the Ninth Circuit held that a city could be liable for violating private land owners’ rights under RLUIPA. Moreover, churches and temples located in historic buildings can use RLUIPA to ignore local zoning laws regarding historic landmarks. RLUIPA allows religious groups to disobey local laws with which other landowners must comply and allows federal courts to overturn zoning decisions that local governments make for their towns. RLUIPA also applies to “religious educational facilities, home religious study, religiously affiliated homeless shelters, and social services.” RLUIPA may even allow religious groups to ignore fire or health codes that substantially burden religious practices and cannot be proven necessary to accomplish compelling governmental objectives.

Congress had both Smith and Boerne in mind when drafting RLUIPA. Language in RLUIPA deliberately contradicts Smith. The Act mandates strict scrutiny “even if the burden results from a rule of general applicability.” Congress used language echoing Justice

65. Id.
66. Id.
67. Id. at 15.
68. Id. If the group is successful in the ensuing litigation, not only will its members be able to continue meeting in a residential area, but the court may order the city to pay the group’s legal fees as well. Id. Trial fees could range from $50,000 to $100,000 or higher. Id. Even for a large city, that is a high price to pay. Id.
69. The city violated RLUIPA by denying a beach access permit to a property owner who conducted weddings at her home and wanted beach access for the ceremonies. Id.
70. See John R. Throop, Facts (and Faith) Help Avoid Conflict, 69 Am. Plan. Ass’n 16, 16 (2003). Throop establishes that churches and preservationists often clash over whether the church may alter a historic building. Id. Because RLUIPA’s scope is far-reaching, it would seem that the statute may give religious groups support for their argument that they do not have to obey any historic landmark restrictions. Giaimo & Merriam, supra note 62, at 16 (“RLUIPA’s scope is broad. Nearly every denial of a permit or enforcement of a land-use regulation against a religious entity can give rise to a claim under the act.”).
73. Walsh, supra note 15, at 190.
74. Id. Although no court has addressed this issue, Walsh believes that health and fire codes possibly fall under RLUIPA’s vast scope. Id.
Scalia's in order to attempt to effectively overrule Smith. Influenced by the message in Boerne that Congress should base its power to legislate on multiple constitutional clauses, Congress derived its power to enact RLUIPA from the Commerce Clause of the United States Constitution. RLUIPA attempts to apply strict scrutiny analysis "in any case in which . . . the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." At issue in this Note is whether this recital of authority is enough to survive a Commerce Clause challenge. Thus, the following section traces the history and application of this critical constitutional provision.

B. The History of the Supreme Court's Commerce Clause Jurisprudence

The Supreme Court's Commerce Clause jurisprudence appeared well settled until 1995. The Court drastically altered its approach to Commerce Clause claims in 1995 and continued to do so through 2000. Today, in the wake of this transformation, the Court's approach to the Commerce Clause is anything but clear, thereby requiring a careful exploration of past and recent trends. Accordingly, this section outlines the history of the Commerce Clause in order to provide a basis for analyzing RLUIPA under the Commerce Clause in Parts II and III of this Note.

1. Congressional Power Under the Commerce Clause Pre-Lopez

Starting in the early 1940s and continuing until 1995, the Supreme Court applied a very lenient test when reviewing legislation under the Commerce Clause. Specifically, the Court asked whether: (1) there was "a rational basis to support Congress'[s] finding that the regulated activity affects interstate commerce" and (2) the "means chosen by Congress [were] reasonably adapted to the end sought to be achieved." In the last decade, however, the Supreme Court, in two
landmark opinions,\(^8^3\) has limited the scope of congressional power under the Commerce Clause, and will no longer allow Congress essentially unchecked authority under that clause.

2. United States v. Lopez

The Supreme Court drastically reined in Congress’s Commerce Clause power in *United States v. Lopez,*\(^8^4\) On March 10, 1992, Alfonso Lopez, a twelfth-grade student, brought a concealed .38 caliber handgun and five bullets with him to school.\(^8^5\) Authorities at the school received a tip that Lopez had a weapon, and confronted him.\(^8^6\) Lopez admitted to carrying a weapon, and police authorities arrested him the next day, charging him with violating the Gun-Free School Zones Act of 1990 ("GFSZA").\(^8^7\) A federal grand jury indicted Lopez, at which point he challenged the constitutionality of § 922(q)
of GFSZA under the Commerce Clause. The District Court rejected his argument and found Lopez guilty under the statute. On appeal, Lopez argued that GFSZA "exceeded Congress'[s] power to legislate under the Commerce Clause." The Supreme Court granted certiorari because of the importance of the issue.

In its opinion, the Court began by noting that Gibbons v. Ogden had recognized that the very language of the Commerce Clause explicitly limits the commerce power. The Court went on to describe the subsequent century of Commerce Clause cases before laying down the test it would adopt as its new standard. To survive a Commerce Clause challenge after Lopez, the law in question must regulate an economic activity that either (1) uses the "channels of interstate commerce," (2) uses "the instrumentalities of interstate commerce or persons or things in interstate commerce," or (3) has a "substantial relation to interstate commerce."

88. Id. Section 922(q)(1)(A) of GFSZA made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Id. (citing 18 U.S.C. § 922(q)(1)(A)).
89. Id. at 552.
90. Id.
91. United States v. Lopez, 511 U.S. 1029 (1994). The Court failed to elaborate on the reasons it viewed the issue as important.
92. 22 U.S. (9 Wheat.) 1 (1824). In Gibbons, New York had attempted to enjoin a federally licensed competitor steamboat operator from operating a New York-to-New Jersey route for which New York had previously held a monopoly. Id. at 2. The New York law restricting the use of the waterway by other steamboat operators conflicted with a federal statute, and New York unsuccessfully argued that the federal statute violated the Commerce Clause. Id. at 186, 197.
93. Lopez, 514 U.S. at 553 (citing Gibbons, 22 U.S. (9 Wheat.) 1 at 194-95). The Court found:

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.... The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

Id.

94. Id. at 558-59. Both proponents and opponents of RLUIPA concede that the law does not fall within the first two categories set forth in Lopez. See, e.g., Reply Brief in Support of Plaintiff's Motion for Reconsideration at 2, Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163 (C.D. Cal. 2003) (No. 01-4842), available at http://www.rluipa.org/cases/Elsinore-TBF-CommerceClauseBrief.pdf. The Becket Fund, a religious advocacy group located in Washington, D.C., submitted the brief. The Fund often files amici curiae briefs in religious litigation. The Fund also hosts a website with a wealth of information on RLUIPA updated daily at www.rluipa.org (last visited Mar. 31, 2004). The Fund is one of the most active supporters of RLUIPA, and focuses its Commerce Clause arguments on the third Lopez category. Therefore, this Note focuses on whether zoning regulations fall
After describing the range of activities appropriate for federal regulation under the Commerce Clause, the *Lopez* Court articulated a pattern or common thread in the Supreme Court's previous Commerce Clause jurisprudence: "Where economic activity substantially affects interstate commerce," the Court will sustain "legislation regulating that activity."95 The Court then went on to strike down GFSZA as unconstitutional for two key reasons. First, the Court held that the statute was criminal by its terms and had nothing to do with either commerce or "economic enterprise."96 Second, the statute contained no jurisdictional element97 which would "ensure[] through case-by-case inquiry, that the firearm possession in question affects interstate commerce."98 Clearly, the lack of a jurisdictional element was of serious concern to the *Lopez* Court.

Also of concern to the Court was the lack of congressional findings showing a link between violence in school zones and interstate commerce.99 When the Court must interpret a statute, and no substantial effect on interstate commerce is apparent to the "naked eye,"100 the Court looks to congressional findings for any link between the regulated conduct and interstate commerce.101 Although the

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97. A jurisdictional element is a part of a statute containing language that requires the government to demonstrate in each proceeding an additional nexus with interstate commerce for an activity to fall within the statute's regulatory scope. *Id.* at 561-62. In other words, a jurisdictional element is a "provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute." *United States v. Rodia*, 194 F.3d 465, 471 (3d Cir. 1999). Congress uses a jurisdictional element to limit the scope of a statute to a particular set of facts that substantially affect interstate commerce. *Lopez*, 514 U.S. at 562.

98. *Lopez*, 514 U.S. at 561. The Court also remarked that it was reluctant to interpret a congressional statute to determine its constitutionality. *Id.* at 562 (quoting *United States v. Five Gambling Devices*, 346 U.S. 441, 448 (1953) (plurality opinion) ("The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative.").

99. *Id.* at 562-63.

100. *Id.* at 563.

101. *Id.* at 562-63.
Court does not require Congress to make formal findings, such findings would aid the Court in such a case. As the Court found that the government had proffered no findings in this case, the Court held that the Gun-Free School Zone Act of 1990 was beyond the scope of Congress's Commerce Clause power. The Court revisited the issue of the Commerce Clause in United States v. Morrison. Part I.B.3. below considers how the Court fine tuned its definition of the Commerce Clause in that case.

3. United States v. Morrison

The Court further limited Congress's power under the Commerce Clause in Morrison. Antonio Morrison was a student at Virginia Tech University and a member of the football team. In the fall of 1994, a female Virginia Tech student, Christy Brzonkala, accused Morrison and another member of the football team, James Crawford, of assaulting and raping her. In early 1995, Brzonkala filed a complaint against Morrison and Crawford under Virginia Tech's sexual assault policy, but ultimately the school dropped the charges against Crawford.

Virginia Tech's judicial committee found Morrison guilty only of "using abusive language." Morrison appealed the conviction through the University's administrative channels, and the University's Senior Vice President set aside the conviction. Virginia Tech did not inform Brzonkala that the Senior Vice President had reversed Morrison's conviction, and when Brzonkala read in a newspaper that Morrison would be returning in the fall of 1995, she withdrew from school.

The following December, Brzonkala filed suit against Crawford, Virginia Tech, and Morrison in the United States District Court for the Western District of Virginia. Brzonkala's complaint against

commerce ... [w]e agree with the [g]overnment that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.

Id. at 562.

102. Id. at 563 ("Congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.").

103. Id. at 562.
104. Id. at 568.
106. Id.
107. Id. at 602.
108. Id.
109. Id. at 603.
110. Id.
111. Id.
112. Id. at 603-04.
113. Id. at 604.
Morrison and Crawford alleged that they had violated § 13981 of the Violence Against Women Act of 1994 ("VAWA"). The district court dismissed Brzonkala’s claims against Morrison and Crawford, holding that Congress lacked authority under both the Commerce Clause and the Fourteenth Amendment to enact such a law. The Fourth Circuit, by a divided vote, affirmed the district court’s ruling on the constitutionality of VAWA. The Supreme Court granted certiorari on whether VAWA fell within Congress’s constitutional powers.

The *Morrison* Court began its Commerce Clause analysis of VAWA by noting the tension between two prevailing concepts in *Lopez*: that the Court is bound to show a strong deference to Congress’s decisions, and that the Commerce Clause places real boundaries on the extent to which Congress may legislate. The Court then explored whether VAWA fit into the third category of congressional power in *Lopez*, namely, the power over economic activity having a substantial relation to interstate commerce. The Court ultimately struck down VAWA on Commerce Clause grounds for two key reasons. First, the Court concluded that "[g]ender motivated crimes of violence are not, in any sense of the phrase, economic activity." Second, the statute contained no jurisdictional element ordering that the federal cause of action arise only when Congress has the power to regulate, namely in situations involving interstate commerce.

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114. Section 13981 states that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b) (2000).
118. *Morrison*, 529 U.S. at 605.
119. *Id.* at 607.
120. *Id.* at 609. Because neither the petitioner nor respondent argued that VAWA fit within the first two categories of congressional power, the Court focused on whether the activity that VAWA regulated fell within Congress’s power "to regulate those activities having a substantial relation to interstate commerce,... i.e., those activities that substantially affect interstate commerce." *Id.* (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937))).
121. *Id.* at 613.
122. *Id.* (citing 42 U.S.C. § 13981 (2000)); cf. 18 U.S.C. § 2261(a)(1). Section 2261(a)(1) is another provision of VAWA that provides an individual remedy within federal jurisdiction for gender-motivated crime:

A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided by subsection (b).

*Morrison*, 529 U.S. at 613 (citing 18 U.S.C. § 2261(a)(1)).

The *Morrison* Court noted that every federal court of appeals to hear the issue
The *Morrison* Court also noted that in drafting the statute, Congress had amassed numerous findings showing the impact of gender-motivated violence on interstate commerce. However, the Court did not allow such findings to change its determination that Congress was acting beyond the scope of its Commerce Clause power. The Court stressed that whether particular activities substantially affect interstate commerce remains ultimately within the discretion of the judicial rather than the legislative branch. Specifically, the congressional findings did not sway the Court because the findings showed only an attenuated link, rather than a direct link, between gender-motivated violence and interstate commerce.

*Morrison* is the most recent Supreme Court case analyzing Congress’s power to legislate under the Commerce Clause. Therefore, as lower courts determine the constitutionality of RLUIPA, they must adhere to the Supreme Court’s decisions in *Morrison* and *Lopez*. Part II of this Note examines whether RLUIPA falls within the Supreme Court’s definition of the Commerce Clause as set forth in *Morrison* and *Lopez*.

II. A DEBATE IS BORN: IS RLUIPA A CONSTITUTIONAL EXERCISE OF CONGRESS’S COMMERCE CLAUSE POWER?

As of March 21, 2004, no federal appellate court has decided whether the land use portion of RLUIPA is a constitutional exercise of congressional authority, under any constitutional doctrine. Most early lower federal court cases focused on provisions other than the Commerce Clause to analyze the constitutionality of the land use portion of RLUIPA. However, courts recently have begun to look to the Commerce Clause to validate RLUIPA when other constitutional provisions fail to support the statute’s constitutionality. Part II of this Note discusses the arguments for and against finding RLUIPA a constitutional exercise of Congress’s Commerce Clause power.

of the constitutionality of this section of VAWA had upheld it even though it is an example of Congress regulating an activity that is criminal in nature because the provision regulates the “use of channels of interstate commerce” and therefore “properly falls within the first of *Lopez*’s categories.” *Id.* at 614 n.5. However, the section of VAWA at issue in *Morrison* differed in that it did not properly fall within any of *Lopez*’s categories. *Id.* (citing United States v. Lankford, 196 F.3d 563, 571-72 (5th Cir. 1999)).

123. *Id.* at 614.
124. *Id.*
125. *Id.* at 615-16.
126. *See infra* Part II.
127. *See, e.g.*, Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163, 1182-83 (C.D. Cal. 2003). After holding that RLUIPA is unconstitutional under the Fourteenth Amendment, Judge Steven Wilson found that RLUIPA may be constitutional under Congress’s Commerce Clause power and ordered the parties to submit briefs in support of their arguments under the Commerce Clause. *Id.*
A. Getting to Yes or the Majority View: RLUIPA Is Constitutional Under the Commerce Clause

The argument that RLUIPA is a valid exercise of Congress's Commerce Clause power revolves around the premise that "[d]ue respect for the decisions of a coordinate branch of Government demands that [the Supreme Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." This principle acts as a presumption that Congress has legislated within its constitutional powers. This section analyzes the argument that RLUIPA is a constitutional exercise of Congress's Commerce Clause power because RLUIPA regulates economic activity, contains a jurisdictional element requiring an additional nexus to interstate commerce, contains sufficient, though limited congressional findings, and has a direct link to interstate commerce.

1. RLUIPA Regulates an Economic Activity

The District Court for the Southern District of New York upheld RLUIPA under a Commerce Clause challenge in Westchester Day School v. Village of Mamaroneck. Under the district court's view, RLUIPA regulates commerce and the economic enterprise of buying and selling land, as well as operating a school on that land. The district court found that "a plaintiff's activities in operating an orthodox Jewish day school is an economic endeavor within the meaning of the Commerce Clause." Furthermore, the Westchester Day School court stated that the argument that churches are non-profit entities and, therefore, are not economic enterprises has no merit because the scope of the Commerce Clause includes such charitable and not-for-profit entities. Such entities fall within the Commerce Clause's scope because they engage substantially in interstate markets such as those for goods and services, as well as the use of interstate transportation and communications, in their acts of raising and distributing profits and revenues. The District Court for

128. Morrison, 529 U.S. at 607 (citing United States v. Lopez, 514 U.S. 549, 568, 577-78 (1995) (Kennedy, J., concurring)). This interpretive principle is perhaps rooted in the Court's belief that "[j]udging the constitutionality of an Act of Congress is properly considered "the gravest and most delicate duty that this Court is called upon to perform."" Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985) (quoting Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (citation omitted)).
129. See Morrison, 529 U.S. at 607.
131. Id.
132. Id. The court operated under the assumption that "[i]n the Commerce Clause dimension, Congress's power over economic activity remains extraordinarily broad." Id.
133. Id. at 237.
134. Id. (citing United States v. Ballinger, 312 F.3d 1264, 1282 (11th Cir. 2002)).
the Central District of Pennsylvania also upheld RLUIPA against a Commerce Clause challenge in *Freedom Baptist Church v. Township of Middletown*, finding that the Act regulated economic activity.\(^\text{135}\)

Similarly, although with a different result, the Supreme Court weighed the economic factor heavily in both *Morrison* and *Lopez*. The Court affirmed the importance of the regulated act being economic in nature in *Morrison*, noting that in cases in which the Court upheld congressional regulation of an activity "based upon the activity's substantial effects on interstate commerce," the act regulated some type of "economic endeavor."\(^\text{136}\) The Supreme Court struck down both GSFZA and VAWA primarily because the Court found that the statutes did not regulate economic activity.\(^\text{137}\) Thus, economic impact has been the most important factor in the Supreme Court's Commerce Clause jurisprudence and can save a statute from a constitutional challenge.

Proponents of RLUIPA and courts that have upheld its constitutionality argue that RLUIPA meets the test of regulating economic activity. The Becket Fund,\(^\text{138}\) one of the strongest proponents of RLUIPA, urges that "RLUIPA, by its very terms, regulates 'economic activity': burdens on the use and development of real property, where the burdens also affect interstate commerce."\(^\text{139}\) In other words, RLUIPA may protect a religious group's purchase or

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\(^{135}\) Freedom Baptist Church v. Township of Middleton, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002). Freedom Baptist Church is a non-denominational religious group of approximately twenty-five members. *Id.* at 859. The Church attempted to enter into a lease to use half of a building in Middletown Township. *Id.* The Zoning Board informed the owners of the building that the town's zoning ordinances forbade the Church to use the property. *Id.* The Zoning Board held a hearing on the issue and allegedly denied the Church's application for the lease. *Id.* The Church brought an action against the township under RLUIPA. *Id.* At a Bible study meeting after the district court decision, the Church's pastor, Rev. Chris Keay, led the congregation in prayer. Adam Liptak, *No-Church Zoning District Faces a Challenge*, N.Y. Times, June 3, 2002, at A10. The pastor asked the other congregants to join him in praying for the "salvation, spiritual growth and health of the 17 people he listed by name," as well as for the "Appeal Court Decision on RLUIPA." *Id.*


\(^{137}\) *See id.* at 615-17 (finding that despite congressional findings, gender-motivated violence was simply not economic in nature and, therefore, striking down VAWA as unconstitutional); *Lopez*, 514 U.S. at 561 (finding that GFSZA was a criminal statute that had no association with economic activity). For further discussion of the economic nature of gender-motivated violence, see *infra* note 193.

\(^{138}\) *See supra* note 94.

\(^{139}\) Reply Brief in Support of Plaintiff's Motion for Reconsideration at 5, Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163 (C.D. Cal. 2003) (No. 01-4842) (citing *Freedom Baptist Church*, 204 F. Supp. 2d at 867-68), available at http://www.rluipa.org/cases/Elsinore-TBF-CommerceClauseBrief.pdf. Moreover, the Becket Fund argues that since RLUIPA has a jurisdictional element, a court does not need to determine whether the regulated activity in question is also generally economic. *Id.* at 2 (citations omitted).
development of real property, and so proponents argue that a court must consider the law as regulating an economic activity.

A recent Fifth Circuit case exemplifies the argument that zoning laws fall within Congress's Commerce Clause power. In Groome Resources Ltd. v. Parish of Jefferson, the Fifth Circuit analyzed the constitutionality of the Fair Housing Amendments Act. The court reviewed the Supreme Court's Commerce Clause jurisprudence, finding a broad definition of economic activity. In urging a similar view of RLUIPA, the Becket Fund also relied on a broad definition of economic activity that would include a construction project and renovation.

Further support for the argument that zoning regulations are economic in nature comes from commentators who argue that halting extensive construction projects has implications affecting all the activities necessary to complete the project, such as the employment of construction workers, the creation of contracts, the buying and transferring of various construction materials interstate, and fundraising. A burden on a construction project that affected these transactions, proponents argue, "would substantially affect interstate commerce." This argument presents a more literal link with interstate economic activity that focuses on the construction process in the life of a building. Even if the argument is over building a simple extension, RLUIPA's supporters argue that the economic effects are grave.

Finally, RLUIPA, in effect, regulates zoning laws, and Congress believed the zoning laws and the Act fell within the appropriate area of congressional power. Transcripts from the congressional hearings preceding the passage of RLUIPA show that Congress

140. See Groome Res. Ltd. v. Parish of Jefferson, 234 F.3d 192, 204-05 (5th Cir. 2000) (finding the Fair Housing Amendments Act constitutional). The court rationalized that any discriminatory act that interfered with the purchase, sale, or rental of residential property was an act that Congress could regulate to assist an economic activity. Id. at 205-06.
141. Id. The Fair Housing Amendments Act makes it illegal to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1)(2000).
142. Groome Res., 234 F.3d at 208. The Fifth Circuit noted that it was "further supported in [its] determination that discrimination infringing on the rental, purchase, and sale of real estate is activity 'economic in nature,' by the broad reading given to 'economic activity' by other courts." Id.
143. Reply Brief at 5-6, Elsinore (No. 01-4842) (citing Campus Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 585 (1997)).
145. See, e.g., id. at 991 (quoting United States v. Lopez, 514 U.S. 549, 559 (1995)).
intended RLUIPA to apply to economic activities. For example, the hearings show a need for legislation addressing religious rights in zoning laws focused solely on the rights to "build, buy or rent." Thus, Congress viewed buying or renting land, and building on land, as economic activity. If the Supreme Court agreed with Congress that RLUIPA regulates economic activities, the Court would next consider whether the Act has a suitable jurisdictional element narrowing the scope. The next section presents that argument.

2. RLUIPA Contains a Jurisdictional Element

Another factor distinguishing RLUIPA from laws the Court has struck down under the Commerce Clause, such as § 13981 of VAWA and GFSZAs, is that RLUIPA contains a jurisdictional element. Section 2(B) of RLUIPA defines the scope of the Act as reaching "any case in which . . . the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability." Proponents of RLUIPA argue that this clause is a jurisdictional hook that limits RLUIPA's reach to activities that fall within Congress's regulatory power under the Commerce Clause.

In contrast, the statutes in both Morrison and Lopez lacked such a jurisdictional element, which is one of the reasons that the Supreme Court invalidated them. The Morrison Court asserted that the lack of a jurisdictional element was essential to its holdings in both Morrison and Lopez: "The second consideration that we found important in analyzing [the statute in Lopez] was that the statute contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.'" Therefore, for a law to survive a Commerce Clause challenge, it should have a satisfactory jurisdictional element that limits the scope of the act to cases which fall within the ambit of the Commerce Clause.

Accordingly, proponents of RLUIPA, such as the Becket Fund,

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149. However, although Congress believes these activities to be economic, the Supreme Court is the final arbiter on that question.
152. United States v. Morrison, 529 U.S. 598, 611-12 (2000) (quoting United States v. Lopez, 514 U.S. 549, 562 (1995)). The Court then went on to hold that like GFSZA, VAWA also cast its net over a "purely intrastate" category of violent crime, and thus did not fall within the scope of Congress's power under the Commerce Clause. Id. at 613.
argue that because RLUIPA contains a jurisdictional element, the law is constitutional under the Commerce Clause. The statute by its own terms, proponents argue, applies solely to activities affecting "commerce with foreign nations, among the several States, or within the Indian tribes." Congress, the argument goes, immunized the statute from a Commerce Clause challenge by inserting the jurisdictional element because any conduct that satisfies § 2000cc(a)(2)(B)'s jurisdictional requirement necessarily satisfies the language of the Commerce Clause. If the facts at bar compel a determination that the activity falls outside the boundaries of the commerce power, the conduct falls outside the reach of RLUIPA as well.

Both the Westchester Day School and Freedom Baptist Church courts noted the presence of the jurisdictional element in upholding RLUIPA. Because the courts found that subsection (a)(2)(B) of RLUIPA contained an adequate jurisdictional element, the courts both held that "defendants [were] reduced to questioning the congressional findings... just as the Supreme Court did in Morrison." Invoking Lopez and Morrison, lower courts consider the presence of a jurisdictional element significant. These courts show deference to Congress, and do not question whether RLUIPA regulates an economic activity. However, they also rely on the questionable proposition that a jurisdictional element saves a statute from a constitutional challenge. Even if the Supreme Court finds RLUIPA's jurisdictional element adequate, the Court may next consider whether Congress needed to show extensive findings that the Act regulates economic activity.

3. Congress Did Not Need to Show Extensive Findings

RLUIPA's legislative history contains only limited congressional findings supporting the assertion that RLUIPA regulates activity in interstate commerce. During the congressional hearings prior to the passage of RLUIPA, Congress heard some evidence that RLUIPA as written regulated economic, interstate activity. For example, Congress noted that testimony by Marc D. Stern showed:

153. See supra text accompanying notes 150-52.
155. Id.
156. Id. at 3-4 (citing United States v. Cummings, 281 F.3d 1046 (9th Cir. 2002)).
159. Marc D. Stern is the co-director of the Commission on Law and Social Action of the American Jewish Congress. He is one of the country's foremost experts on the
In each case, the burden on religious exercise, or removal of that burden, will affect interstate commerce. This will most commonly be proved by showing that the burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods.\textsuperscript{160} Stern's testimony supports Congress's determination that RLUIPA regulates interstate commerce.

Congress specifically found that placing burdens on religious land use, such as construction projects, substantially affects interstate commerce.\textsuperscript{161} This suggests that the activity RLUIPA regulates has a large economic impact.

The lack of any further findings does not mean that a court must determine that the Commerce Clause cannot render RLUIPA constitutional. The Supreme Court has clearly stated that it does not require Congress to have findings of a regulated activity's substantial effect on interstate commerce.\textsuperscript{162} The \textit{Lopez} Court stated that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."\textsuperscript{163} Therefore, the lack of congressional findings alone probably will not doom RLUIPA.

Such findings, however, may help the government's case in the face of a constitutional challenge. As the Court noted in \textit{Lopez}, if findings exist, they could "enable [the court] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce,"\textsuperscript{164} even in cases in which the regulated activity, on its face, does not appear to affect interstate commerce.\textsuperscript{165}

The statute in \textit{Morrison} contained extensive findings.\textsuperscript{166} However, the findings alone were not enough to overcome the negative analysis of the other elements.\textsuperscript{167} In \textit{Lopez}, neither GFSZA nor its legislative history contained "congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."\textsuperscript{168}

\footnotesize{\textsuperscript{160} 146 Cong. Rec. S7775 (daily ed. June 16, 1998) (testimony of Marc D. Stern). \textsuperscript{161} See id.; H.R. Rep. No. 106-219, at 28 (1999). \textsuperscript{162} See supra note 102 and accompanying text. \textsuperscript{163} United States v. Lopez, 514 U.S. 549, 562 (1995). \textsuperscript{164} Id. at 563. \textsuperscript{165} Id. at 562-68. \textsuperscript{166} See infra note 221 (establishing the extensive congressional findings of a link between VAWA and economic activity). \textsuperscript{167} United States v. Morrison, 529 U.S. 598, 614 (2000); see also infra note 222 and accompanying text (establishing that the \textit{Morrison} Court did not allow extensive congressional findings to compel a holding that VAWA was constitutional under the Commerce Clause). \textsuperscript{168} Lopez, 514 U.S. at 562.}
Therefore, the Court could not alter its decision to strike down GFSZA as unconstitutional.\textsuperscript{169}

As the Supreme Court’s recent Commerce Clause jurisprudence shows, empirical findings are, at best, only a secondary basis for showing that Congress had Commerce Clause authority to regulate an activity.

4. RLUIPA Has a Direct Link to Interstate Commerce

The two cases upholding the constitutionality of RLUIPA under the Commerce Clause did not discuss at length whether the link between zoning laws and economic activity was attenuated or direct.\textsuperscript{170} The best explanation for the courts’ dismissal of the issue was that RLUIPA regulates zoning ordinances, which these courts saw as constituting interstate commerce by definition, making the Act different from the laws in Lopez and Morrison that the Court held regulated criminal activity.\textsuperscript{171}

\textit{a. The Laws in Question in Lopez and Morrison Had a Very Attenuated Link to Interstate Commerce}

In Lopez and Morrison, the Court found that the links between the statutes and economic activity were too attenuated for the statute to fall within Congress’s Commerce Clause power. The Court in Morrison interpreted Lopez as hinging in part “on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.”\textsuperscript{172} In Lopez, the Court rejected the argument that GFSZA had a link to interstate commerce because the Court feared creating a slippery slope: To hold that such a criminal law was economic under the Commerce Clause would open a door through which Congress could regulate violent crime, as well as any and all activities that have any possibility of leading to violent crime, even if such activities are only tenuously linked to interstate commerce.\textsuperscript{173} The Morrison Court found the slippery slope argument persuasive as well.\textsuperscript{174} Proponents would argue that RLUIPA does not

\begin{itemize}
  \item \textsuperscript{169} Id.
  \item \textsuperscript{171} See Westchester Day Sch., 280 F. Supp. 2d at 237-38; Freedom Baptist Church, 204 F. Supp. 2d at 866.
  \item \textsuperscript{172} Morrison, 529 U.S. at 612 (citing Lopez, 514 U.S. at 563-67).
  \item \textsuperscript{173} See id. at 612-13 (citing Lopez, 514 U.S. at 564) (“We rejected [the argument in Lopez] because [it] would permit Congress to ‘regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.’”).
  \item \textsuperscript{174} Id. at 615-16 (“Petitioner’s reasoning, moreover, will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other
give rise to the slippery slope concerns because it has a direct link to interstate commerce.\textsuperscript{175}

\textbf{b. RLUIPA Directly Affects Interstate Commerce}

The \textit{Freedom Baptist Church} and \textit{Westchester Day School} courts did not spend much time establishing that RLUIPA's link to economic activity was direct.\textsuperscript{176} In \textit{Freedom Baptist Church}, the court focused its analysis instead on the distinction between criminal activity, which Congress does not have authority under the Commerce Clause to regulate, and economic activity, which Congress does have such power to regulate.\textsuperscript{177} The \textit{Freedom Baptist Church} court believed that \textit{Lopez} and \textit{Morrison} placed limitations only on Congress's regulation of criminal activity.\textsuperscript{178} Congress's authority to regulate economic activity remained, to the court, very broad.\textsuperscript{179} The sale or rental of property is an economic endeavor, and so the court found the activity at issue in the case to be economic.\textsuperscript{180}

Likewise, the \textit{Westchester Day} court noted that Congress retained its broad power to regulate economic activity under the Commerce Clause.\textsuperscript{181} Since the court understood economic activity broadly, the court found that the "plaintiff's activities in operating an orthodox Jewish day school is an economic endeavor within the meaning of the areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.").


\textsuperscript{176} See \textit{Westchester Day Sch.}, 280 F. Supp. 2d at 237-38; \textit{Freedom Baptist Church}, 204 F. Supp. 2d at 865-68.

\textsuperscript{177} \textit{Freedom Baptist Church}, 204 F. Supp. 2d at 866. The court noted that the Supreme Court delineated what the \textit{Freedom Baptist Church} court saw to be "a bright line between the exercise of Congress's Commerce Clause power in criminal cases versus its application in those Acts involving regulation of economic activity." \textit{Id.} The \textit{Freedom Baptist} court thus presumed that if a law was not criminal, it would more easily pass muster under a Commerce Clause challenge. \textit{See id.}

\textsuperscript{178} \textit{Id.} at 866-67.

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{Id.} at 866.

\textsuperscript{181} \textit{Westchester Day Sch.}, 280 F. Supp. 2d at 237. The \textit{Westchester Day School} court found that: 

\textit{Morrison} ... left no doubt that the economic regulatory regime [in the Supreme Court's Commerce Clause jurisprudence before 1995] remains very much alive: "Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." \textit{Id.} (quoting United States v. Morrison, 529 U.S. 598, 611 (2000) (citing United States v. Lopez, 514 U.S. 549, 559-60 (1995))).
Commerce Clause," and saw no need to discuss whether the link to interstate commerce and economic activity was direct or attenuated.

5. RLUIPA Does Not Threaten the Dividing Line Between What Is National and What Is Local

The final argument in favor of upholding RLUIPA is that on a purely public policy level, RLUIPA in no way blurs the line between conduct that Congress may regulate and conduct that only the states may regulate. The Becket Fund, in an amicus curiae brief filed in support of RLUIPA in *Elsinore Christian Center v. City of Lake Elsinore*, argued that RLUIPA does not replace local zoning boards with a federal zoning board, nor does it provide religious groups a "blanket exemption" from such systems, because RLUIPA protects only against laws that "both substantially burden religious exercise and tread into national territory by affecting interstate commerce." Thus, proponents argue, RLUIPA does not offend notions of federalism and falls within Congress's power under the Commerce Clause.

Although most of the limited case law in the area has upheld RLUIPA on Commerce Clause grounds, there is tremendous academic support for finding RLUIPA unconstitutional under the Commerce Clause with no other leg to stand on. Accordingly, this Note next discusses the argument for finding that the Commerce Clause cannot serve as a basis for finding RLUIPA constitutional.

B. No Help: The Commerce Clause Does Not Render RLUIPA Constitutional

Although the Supreme Court generally presumes the constitutionality of congressional legislation, "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." In early 2003, Judge Steven Wilson in the...
Central District of California became the first judge to find RLUIPA unconstitutional.\(^{188}\) In a published opinion, Judge Wilson held that Congress had violated its Fourteenth Amendment powers in drafting the legislation, but also stated that Congress may have had the power to draft the Act under the Commerce Clause.\(^{189}\) Judge Wilson noted that neither party had submitted an argument regarding RLUIPA's constitutionality under the Commerce Clause, and he instructed both sides to do so. However, before the oral hearings could occur, Judge Wilson held that RLUIPA violated Congress's power under the Commerce Clause.\(^{190}\) This section explores the reasons for finding that RLUIPA violates Congress's Commerce Clause authority because RLUIPA regulates non-economic, local activity; lacks an adequate jurisdictional element; does not contain sufficient congressional findings; and violates notions of federalism.

1. RLUIPA Does Not Regulate Economic Activity

The primary contention against the constitutionality of RLUIPA is the argument that zoning ordinances do not constitute economic activity. The Supreme Court, in its Commerce Clause jurisprudence, has struck down laws as unconstitutional on the basis that the laws did not regulate economic activity. The \textit{Lopez} Court stressed that the law in question was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."\(^{191}\) Moreover, the \textit{Lopez} Court stated that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."\(^{192}\)

The \textit{Morrison} Court also weighed the economic factor heavily in its analysis of VAWA, concluding that despite congressional findings to the contrary, gender-motivated violence simply is not economic in nature.\(^{193}\)

\(^{188}\) Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163, 1183 (C.D. Cal. 2003). To date, no other courts have declared the land use portion of RLUIPA unconstitutional.

\(^{189}\) See \textit{id.} at 1182 (Judge Wilson stated that "[t]o the extent that RLUIPA is not a valid exercise of Congress's power under the Fourteenth Amendment, the Act and its legislative history imply an alternative source of congressional authority: the Commerce Clause").

\(^{190}\) This decision was unpublished. See \url{www.rluipa.org/cases/Elsinore/html} (last visited Mar. 31, 2004). Part II.B of this Note addresses the reasons that Judge Wilson likely believed that RLUIPA was a violation of Congress's Commerce Clause power.


\(^{192}\) \textit{Id.} at 560.

\(^{193}\) See \textit{United States v. Morrison}, 529 U.S. 598, 611 (2000); see also \textit{Pullen}, supra
Opponents of RLUIPA argue that although "the building of new religious facilities and the expansion of existing religious facilities" have some link to interstate commerce, there is no substantial relationship between the two. Specifically, the only instance when zoning laws affect interstate commerce is during the time in which the religious building is under construction. The building stage, however, is a relatively brief period in the entire life of the building, which can be very long. Because the window in which zoning laws affect interstate commerce is so small, the link to interstate commerce is not substantial enough to bring RLUIPA within Congress's Commerce Clause power.

Opponents of RLUIPA build their argument from the premise that the Supreme Court has defined economic activity in very narrow terms. As one commentator has noted:

[L]and use regulation fails to satisfy the Court's narrow definition of economic activity. Land use regulation itself is not an economic endeavor and does not involve a transaction or the buying and selling of goods. Of course, land use regulation might encourage or prevent future economic transactions, such as the buying and selling of construction materials. Nonetheless, in Lopez and Morrison, the Court held that the economic nature of the activity is key, not the economic effects.

Challengers argue that the Court's narrow definition of economic activity renders RLUIPA unconstitutional.

Moreover, RLUIPA's adversaries claim that the economic considerations involved in land use regulation "merely influence land use regulation." Critics of RLUIPA argue that since non-economic


\[\text{id, supra note 15, at 210.}\]

\[\text{id.}\]

\[\text{See generally Morrison, 529 U.S. at 598; Lopez, 514 U.S. at 549.}\]

\[\text{Shapiro, supra note 50, at 1280 (citations omitted) (emphasis added). Shapiro derives from Lopez the suggestion that "to meet the definition of economic activity, a regulated activity must involve economic enterprise and commercial transactions." Id. at 1279.}\]

\[\text{id. at 1281 (citations omitted) (emphasis added).}\]
factors are equally important in land use regulation, a court would err in classifying zoning regulation as economic. A zoning law study by the American Law Institute supports this argument. The Standard Zoning Enabling Act suggests that concern for public safety and aesthetics was the original catalyst for land use zoning. Because opponents of RLUIPA argue that the Act does not regulate economic activity, they do not reach the argument of whether RLUIPA regulates interstate activity. To support the non-economic characterization of RLUIPA, opponents add that the Act’s jurisdictional element is too general.

2. The Jurisdictional Element of RLUIPA Is Not Restrictive Enough

The Supreme Court requires that to be constitutional, a statute must not only contain a jurisdictional element, but also the jurisdictional element must adequately narrow the scope of the law so that a court can decide on a “case-by-case” basis that the activity the law regulates affects interstate commerce. The lack of an effective jurisdictional element was essential to the Supreme Court striking down GFSZA and VAWA. Although RLUIPA contains a jurisdictional element, challengers argue that the language Congress used is too broad to sufficiently bar cases that are not within the scope of the Commerce Clause from falling within RLUIPA. Notably, Congress could have drafted RLUIPA more narrowly to avoid any constitutional challenge. Congress could have limited RLUIPA’s scope “to the construction of new religious facilities or the expansion of existing facilities.” Critics of RLUIPA argue that if Congress had limited jurisdiction in this way, courts could adequately analyze RLUIPA challenges on a “case-by-case” basis. Understandably, critics would argue that the Westchester Day School and Freedom Baptist courts did not appropriately apply Lopez, since the courts did

200. Id. (citations omitted).
201. Id. (citations omitted).
202. Id. (citations omitted).
204. See United States v. Morrison, 529 U.S. 598, 611-12 (citing Lopez, 514 U.S. at 562) (“The second consideration that we found important in analyzing [the statute in Lopez] was that the statute contained ‘no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.’”).
205. For a definition of “jurisdictional element,” see supra note 97.
206. Section 2(B) of RLUIPA defines the scope of the Act as reaching “any case in which... th[e] substantial burden would affect, commerce with the foreign nations, among the several States, or with the Indian tribes, even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000cc(a)(2)(B) (2000).
208. Id.
not inquire into the effectiveness of RLUIPA's jurisdictional element.209

Absent a narrower jurisdictional element that would include the preceding language, however, critics worry that RLUIPA is too broad and presents an opportunity for Congress to regulate activities reserved for state regulation.210 This slippery slope argument expresses concern that Congress will encroach upon activities traditionally within state jurisdiction. For example, RLUIPA allows religious groups to ignore historical landmark laws, which are paradigmatic local areas of regulation.211 According to critics of RLUIPA, the statute's broad language, combined with the lack of a substantial effect upon interstate commerce and the absence of an effective jurisdictional element, necessitates the finding that RLUIPA does not fit into the third category of economic activities that Congress has the authority to regulate.212

3. The Congressional Findings Are Inadequate

Congress does not need to present findings of a link between the activity and interstate commerce,213 but if a statute's constitutionality is extremely doubtful, courts require findings to uphold the statute to which a constitutional challenge is presented.214 Critics of RLUIPA argue that this Act necessitates more extensive congressional findings.215 RLUIPA's opponents distrust Congress's rationale in enacting the statute and so argue that a court reviewing RLUIPA needs congressional findings to uphold the statute as constitutional.216

Notably, when a statute facing a Commerce Clause challenge violates the other Lopez prongs of analysis, as many believe RLUIPA does, the Supreme Court will turn to congressional findings, if any, to

209. See Westchester Day Sch. v. Vill. of Mamaroneck, 280 F. Supp. 2d 230, 238 (S.D.N.Y. 2003) (noting the presence of a jurisdictional element and failing to inquire whether it narrowed the scope of the law to activities arising under the Commerce Clause); see also Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002) (holding that because there was a jurisdictional element in RLUIPA, "defendants [were] reduced to question[ing]... the congressional findings... just as the Supreme Court did in Morrison").

210. Freedom Baptist Church, 204 F. Supp. 2d at 867 (citations omitted).

211. See Throop, supra note 70, at 16.

212. Id. (citations omitted); see supra note 94 and accompanying text.


214. See United States v. Lopez, 514 U.S. 549, 557 n.2 (1995) (noting that congressional findings from the discussion of whether to enact the law are necessary, as the courts demand the findings to gain insight into Congress's thought process.).


216. The Lopez Court hinted at such a lack of confidence: "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Lopez, 514 U.S. at 557 n.2. (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)).
seek out evidence of a substantial effect on interstate commerce. Although the record of congressional hearings before the drafting and passage of RLUIPA shows almost no findings that the exercise of religion has a relationship to interstate commerce. Although the few findings that exist show a link to economic activity, critics call these findings insufficient:

First, the RLUIPA is not limited to the building of new churches or the physical expansion of existing churches. The RLUIPA applies to any land use function such as permits for increased occupancy or a variance to change the use of the property. These types of land use functions have no relation to interstate commerce and their constitutionality cannot be [easily] resurrected by one commercial application of the RLUIPA.

Moreover, comparatively, the findings are not examples of extensive congressional findings. If the congressional findings are insufficient, they cannot save RLUIPA from a judicial determination of unconstitutionality if a court finds that RLUIPA does not regulate interstate commerce and does not have a sufficient jurisdictional element.

Even if the congressional findings were sufficient, the Supreme Court would still probably not uphold RLUIPA based on the findings alone. Although Congress showed findings of a link between gender-motivated violence and interstate commerce in passing VAWA, these findings did not sway the Court from the conclusion that VAWA violated Congress’s Commerce Clause power. The Morrison Court noted that:

217. See Walsh, supra note 15, at 209. In Lopez, after finding that the challenged act had no substantial effect on interstate commerce “visible to the naked eye,” the Court turned to congressional findings to search for evidence of the Act’s substantial relation to interstate commerce. Although not formally required to make factual findings about a particular law’s relationship to interstate commerce, the Court strongly suggested that such a finding should be made when promulgating a law whose relation to interstate commerce is not obvious. Id. (citations omitted).

218. See 146 Cong. Rec. S7774, S7776-77 (2000); see also infra note 221 (establishing that Congress heard extensive testimony of the link between gender-motivated violence and economic activity before passing VAWA).

219. See supra notes 160-61 and accompanying text.

220. Walsh, supra note 15, at 210 (citation omitted).

In contrast with the lack of congressional findings that we faced in Lopez, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.222

In short, because of RLUIPA's shortcomings, a court would need more extensive congressional findings to uphold RLUIPA as constitutional because of the lack of a sufficient jurisdictional element, and the attenuated link between RLUIPA and interstate commerce.

4. The Link Between RLUIPA and Interstate Commerce Is Attenuated

Just as proponents for RLUIPA assert that its effect on interstate commerce is direct rather than attenuated, opponents of the Act argue the opposite. Critics of RLUIPA operate under the assumption that land use is not economic in nature. Therefore, the link between the activity RLUIPA regulates and interstate commerce is as attenuated as the link between the behaviors VAWA and GFSZA regulated.223 Challengers argue that the only time when land use regulation has any relation to interstate commerce is the short period when a religious group is building a structure. The building process represents a very limited time in the life of a building.224

Moreover, critics note that "Congress's reasoning in support of RLUIPA is similar to the 'but-for causal chain' the Court rejected when evaluating the GFSZA."225 According to the opponents of RLUIPA, the thought process would proceed along these lines:

[In considering a land use ordinance restricting the ability of a church to expand, a court would first have to infer that a church

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223. See, e.g., id.; United States v. Lopez, 514 U.S. 549 (1995). The Morrison Court interpreted Lopez as hinging "in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated." Morrison, 529 U.S. at 612 (citing Lopez, 514 U.S. at 563-67). The Lopez Court feared that finding that GFSZA-regulated economic activity would lead to a slippery slope by which Congress could regulate far more activities. Lopez, 514 U.S. at 563-64 (rejecting the argument that GFSZA might have a link to economic activity, because agreeing with that argument would allow Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce"). The Morrison Court also noted its awareness of the slippery slope the Court's holding could create if the Court agreed with Congress. Morrison, 529 U.S. at 612-13. As the Court stated, "Petitioners' reasoning, moreover, will not limit Congress to regulating violence, but may . . . be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." Id. at 615-16.
225. Shapiro, supra note 50, at 1284.
intended to expand. The court would then have to make the additional inference that the church's inability to expand would somehow affect interstate commerce, perhaps by decreasing the demand for interstate labor or interstate supplies. Thus, the number and type of inferences one has to make to conclude that a religious land use regulation affects interstate commerce is similar to the reasoning the U.S. Supreme Court rejected in *Lopez* and *Morrison*. Critics find the rationale for finding that land use is connected to interstate commerce too attenuated to qualify as a legitimate use of Congress's Commerce Clause authority.

5. RLUIPA Is Congress's Attempt to Legislate Beyond Its Commerce Clause Power

The final argument against the constitutionality of RLUIPA sounds in public policy: that RLUIPA is a congressional attempt to violate the separation between church and state. As one critic of the law has noted, "[RLUIPA] is a bill that would cause James Madison and the other authors of the Constitution who abominated government meddling in religion to gyrate in their crypts. And what is worse, it sails under the false banner of promoting the free exercise of religion." Critics also protest that the law treats religious groups more favorably than the average land owner. The Act therefore violates principles of equality because equality dictates that courts treat religious uses the "same as other uses." From a zoning standpoint, courts should base their treatment of religious groups on the way the groups impact the community in which they are located.

Finally, critics of RLUIPA worry about the public policy implications of passing such a law. Critics believe that RLUIPA places too strenuous a burden on local governments—a burden that is nearly impossible to overcome. Critics argue that RLUIPA is so powerful that a town would find using its zoning laws to stop a church or temple's expansion impossible. Towns would also have no way of preventing a religious group from destroying a historical landmark to create more parking spaces.

Moreover, critics believe that local governments have substantial reasons to enforce zoning laws against religious institutions. Religious

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226. *Id.* at 1285 (citations omitted).
229. *Id.*
231. *Id.*
congregations, they claim, are either "so successful that they need to expand," or they fall victim to a sort of factionalism.\textsuperscript{232} This factionalism involves subsets of the congregation breaking apart to form new congregations that wish to create their own church, yet still wish to remain close to the original church. The result is that one church soon breeds a new church within the vicinity.\textsuperscript{233} In short, religious organizations ultimately succumb to one of two fates: "gigantism" or "mitosis."\textsuperscript{234} The problem for a locality is that the churches inevitably take up more land, and most religious organizations "typically, do not pay local property taxes."\textsuperscript{235}

Perhaps this rationale is the reason that RLUIPA's main opponents are "municipalities and local government associations—groups which stand to lose the most if religious organizations can just ignore zoning laws."\textsuperscript{236} Critics are troubled because RLUIPA allows one specific type of property owner to ignore "regulations written to protect the common good."\textsuperscript{237} These concerns show that critics object to RLUIPA's virtually unlimited protection of religious institutions which in turn may affect other segments of the community.

The arguments of RLUIPA's opponents more closely track the Supreme Court's analysis of the Commerce Clause in \textit{Lopez} and \textit{Morrison}. While Congress has improved upon the fatal flaws of RFRA,\textsuperscript{238} RLUIPA arguably also applies in cases that are not within Congress's Commerce Clause power.

This part presented arguments supporting and opposing a finding of appropriate congressional power under the Commerce Clause with respect to RLUIPA. Part III argues that RLUIPA is not an appropriate exercise of Congress's Commerce Clause power.

\textbf{III. RLUIPA VIOLATES THE COMMERCE CLAUSE}

This Note argues that the Commerce Clause cannot serve as a basis for RLUIPA's constitutionality. This part first examines appellate courts' treatment of the Commerce Clause after the watershed Supreme Court decision of 2000.\textsuperscript{239} Next, this part finds that, given

\begin{itemize}
  \item \textsuperscript{232} \textit{Id.}
  \item \textsuperscript{233} \textit{See id.}
  \item \textsuperscript{234} \textit{Id.}
  \item \textsuperscript{235} \textit{Id.}
  \item \textsuperscript{236} Opposition to RLUIPA, \textit{supra} note 228.
  \item \textsuperscript{237} \textit{Id.} (quoting Jane Hague, the President of the National Association of Counties).
  \item \textsuperscript{238} Congress improved its religious legislation with RLUIPA because RLUIPA includes additional sources of congressional power and has a narrower scope than RFRA, as it covers only land use and institutionalized persons. \textit{See} 42 U.S.C. \textsection 2000bb (1993).
  \item \textsuperscript{239} \textit{See} United States v. Morrison, 529 U.S. 598 (2000). This decision solidified the message that the Supreme Court's future Commerce Clause jurisprudence would
such treatment, and the *Lopez* and *Morrison* decisions, RLUIPA does not regulate only economic, interstate activity, but also regulates local, non-economic activity. Finally, Part III contends that RLUIPA does not have a sufficient jurisdictional element and creates a slippery slope for congressional Commerce Clause authority.

In *Lopez*, the Supreme Court identified three categories of activity that Congress could regulate under the Commerce Clause: activity that either (1) uses the "channels of interstate commerce"; (2) uses "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; or (3) has a "substantial relation to interstate commerce." If zoning regulations, such as the land use portion of RLUIPA, fall within Congress's Commerce Clause regulatory scope, they must do so under the third category. But it is not clear that RLUIPA satisfies even this standard. The Supreme Court, in *Lopez*, articulated the four factors it would consider to determine the constitutionality of a statute under the third category of Commerce Clause regulation: (1) whether the statute regulates economic activity; (2) whether the statute has a jurisdictional element that sufficiently narrows its scope; (3) whether the regulated activity has a direct link to interstate commerce; and (4) whether there are legislative findings to support Congress's determination that the law in question falls within the ambit of the Commerce Clause.

Because RLUIPA overrides local zoning laws, the constitutionality of the land use portion of RLUIPA under the Commerce Clause necessarily turns upon whether the Supreme Court would categorize zoning laws as an activity Congress may regulate. This Note argues no. Although many cases arising under RLUIPA will involve interstate commerce and economic activity, RLUIPA also regulates activity that is not economic and has a tenuous link to interstate commerce. Moreover, RLUIPA's jurisdictional element is overbroad. Finally, Congress did not set forth extensive findings.

hold congressional statutes to a much more stringent standard when facing a Commerce Clause challenge.

241. See supra note 146 and accompanying text (establishing that RLUIPA regulates zoning laws).
242. See supra note 94 (establishing that RLUIPA can regulate only activity falling within the third category of *Lopez*).
244. See supra notes 60-74 and accompanying text (establishing that religious groups can invoke RLUIPA to ignore zoning laws).
245. See supra note 146 and accompanying text (establishing that RLUIPA regulates zoning laws).
246. See supra Part II.A. (presenting the argument for finding that the Commerce Clause supports RLUIPA's constitutionality).
247. See infra notes 295-307 and accompanying text (establishing that RLUIPA regulates activity that is not economic).
248. See infra notes 308-13 and accompanying text (showing that RLUIPA's jurisdictional element does not sufficiently narrow its scope).
to justify RLUIPA as an appropriate exercise of Commerce Clause power. Therefore, this Note concludes that any court reviewing RLUIPA must find that the Act does not fall within Congress's Commerce Clause power.

A. Recent Commerce Clause Cases

Although there have been no federal circuit court decisions addressing the constitutionality of the land use portion of RLUIPA, several appellate courts have evaluated the constitutionality of other statutes under the Commerce Clause since 2000. This section examines how appellate courts have interpreted statutes and analyzed jurisdictional elements under the Commerce Clause post-Lopez.

1. The Eleventh Circuit's Interpretation of Lopez and Morrison

Several appellate courts have upheld congressional statutes in the face of Commerce Clause challenges on the basis of the statutes' jurisdictional elements. Notably, courts have upheld statutes involving gun possession and mandating child support under the Commerce Clause—laws that at first glance have little relation to interstate commerce. However, in United States v. Monts, the court identified a much more direct link between child support payments and economic activity than exists with RLUIPA in the other two instances, the courts misread Lopez. For example, after finding that a particular law contained a jurisdictional element, the Eleventh Circuit in United States v. Pritchett did not engage in further analysis to support its conclusion that the law fell within the third category of Lopez, that is, that it had a "substantial relation to interstate

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249. See infra notes 314-24 and accompanying text (arguing that the congressional findings to support RLUIPA's link to interstate commerce are inadequate).

250. See, e.g., United States v. Pritchett, 327 F.3d 1183 (11th Cir. 2003) (upholding a statute prohibiting receiving and possessing a stolen firearm); United States v. Jackubowski, No. 02-3621, 2003 WL 2013054 (7th Cir. Apr. 30, 2003) (upholding a law that prohibits a felon from possessing a gun); United States v. Monts, 311 F.3d 993 (10th Cir. 2002) (finding that a statute making failure to pay child support for a child residing in another state a criminal offense is constitutional under the Commerce Clause). For a definition of "jurisdictional element," see supra note 97.


252. Monts, 311 F.3d at 996-97.

253. See id. at 993.

254. 327 F.3d at 1183.

255. For example, the court did not determine whether the jurisdictional element was sufficient to limit the scope of the statute to interstate economic activity. Cf. United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003). There, the Ninth Circuit accurately noted that "[t]he Supreme Court's decisions in Lopez and Morrison however, reject the view that a jurisdictional element, standing alone, serves to shield a statute from constitutional infirmities under the Commerce Clause." Id. at 1125.

256. Pritchett, 327 F.3d at 1185-86.
The Eleventh Circuit noted that it did not read anything in *Lopez* to suggest that the lower courts should no longer rely on the finding that a statute contains a "minimal nexus" with interstate commerce to find that statute constitutional. The Eleventh Circuit's analysis of *Lopez* is flawed because the court completely ignored language in both *Lopez* and *Morrison* suggesting that a court must consider other factors in addition to the jurisdictional element when deciding whether a statute is constitutional under the Commerce Clause. The *Morrison* Court noted that a jurisdictional element "may establish that the enactment is in pursuance of Congress'[s] regulation of interstate commerce," or that it may provide support for such a conclusion. The Court did not say that mere existence of a jurisdictional element ensured that the jurisdictional element was adequate. Because the Eleventh Circuit relied solely on the jurisdictional element of the statute, the law upheld in that case cannot serve as an adequate benchmark for determining whether zoning laws fall within Congress's regulatory scope. *Lopez* mandates that courts must determine the adequacy of a jurisdictional element. Because RLUIPA's jurisdictional element does not sufficiently limit the scope of the Act, a court should find that RLUIPA cannot survive a Commerce Clause challenge.

2. Other Commerce Clause Interpretations

The Tenth Circuit in *Monts* upheld the constitutionality of the Child Support Recovery Act ("CSRA"), and the Deadbeat Parents Punishment Act ("DPPA"). A woman sued her ex-husband under the Acts, and he, in turn, challenged their constitutionality. The
Tenth Circuit held that the statutes were constitutional because they involved the "regulation of a court-ordered obligation to pay money in interstate commerce." Conversely, zoning ordinances do not directly address interstate commerce. Zoning laws and RLUIPA regulate non-economic, local activity, such as parking and having people congregate in a home.

Moreover, the Tenth Circuit deemed the Acts' jurisdictional elements sufficient because they "require[ed] as an essential element that the defendant reside in a different state than the child for whom support is owed." That jurisdictional element differs from RLUIPA's in that it explicitly limits its scope to two parties residing in different states. The jurisdictional elements in CSRA and DPPA guard against the creation of a slippery slope: Congress is not regulating any activity that remains in a locality. RLUIPA, on the other hand, threatens the line between what is national and what is local, and its jurisdictional element does not prevent the Act from applying in cases involving local activity.

Moreover, CSRA and DPPA apply only in situations when an economic transaction—the payment of child support—is involved. Conversely, RLUIPA applies in non-economic situations, such as when a member of a religious group sues under the statute to enjoin a local zoning order that he refrain from having other members of his religious group congregate in his home.

Had Congress limited the scope of RLUIPA, the Act might also

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County court ordered Monts to pay child support of fifty dollars a week to Cooper. Id. Monts moved out of New York State around that time and paid no child support. Id. After several failed attempts to enforce the child support order, Cooper located Monts in Virginia and enforced the order in that state. Id.

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Cf. 42 U.S.C. § 2000cc(a)(2) (2001) (applying if the offensive conduct affects commerce "among the several States").

To prevail on the claim, a religious group suing under RLUIPA need only allege that if the locality had allowed them to undertake the construction project in question, they may have ordered materials from another state. See supra notes 144-45 and accompanying text (presenting argument that halting extensive construction projects has implications affecting interstate commerce).

See supra note 211 and accompanying text (establishing that RLUIPA allows Congress to regulate activity that the states traditionally regulate).

See supra notes 60-74 and accompanying text (giving examples of RLUIPA applying in cases involving local activity). For an example of a way Congress could have written RLUIPA's jurisdictional element to narrow its scope, see text accompanying supra note 207.

See supra note 207-08 (arguing that RLUIPA's jurisdictional element is too
be closely linked to interstate commerce. However, RLUIPA regulates activity that is local and not economic and therefore, violates the Commerce Clause.

The jurisdictional element and scope of RLUIPA more closely resemble a child pornography law that the Ninth Circuit struck down as unconstitutional as applied in United States v. McCoy. In McCoy, the government prosecuted the defendant, Rhonda McCoy, for violation of the statute, and she challenged the statute's constitutionality.

The Ninth Circuit focused its Commerce Clause analysis on whether the statute fell within the Lopez category. The Ninth Circuit also tailored its analysis to resolve only whether the government's application of the statute in that case had violated the Commerce Clause. The court found that the McCoy photo had no economic impact on interstate commerce as the McCoys were not going to sell the photograph and there was no link, attenuated or otherwise, between the McCoys's conduct and interstate commerce.

Congress could have limited the scope of RLUIPA to apply strictly to construction projects, or to the sale and purchase of land, thereby ensuring that the Act would regulate only interstate commerce.

279. See supra notes 194-202 and accompanying text (establishing that RLUIPA regulates non-economic, local activity).

280. 18 U.S.C. § 2252(a)(4)(B) provides in relevant part:

[A]ny person who: knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

Id. 281. 323 F.3d 1114 (9th Cir. 2003).

282. Id. at 1115. In April 2000, Rhonda, her husband, and Kala, their ten-year-old daughter, were painting Easter eggs and taking photographs. Id. In one photograph, Rhonda and Kala appeared partially unclothed with their genitals exposed. Id. Two months later, a manager for the Naval Fleet Exchange came across the picture after Rhonda dropped the film off for development. Id. The manager contacted the U.S. Naval Criminal Investigation Service who, along with the FBI and San Diego Police Department, conducted a search of Rhonda's home pursuant to a search warrant. Id. The government filed charges against Rhonda in January of 2001. Id. at 1116.

283. Id.

284. Id. at 1117.

285. Id.

286. Id. at 1122.

287. See id. at 1122-23 ("[S]imple intrastate possession of home-grown child pornography not intended for distribution or exchange is 'not, in any sense of the phrase, economic activity.'" (quoting United States v. Morrison, 529 U.S. 598, 613 (2000))).
and that the jurisdictional element failed to limit the reach of the statute.\textsuperscript{288} The Ninth Circuit declined to decide the constitutionality of the statute on its face,\textsuperscript{289} but held that the application of the statute in that case was unconstitutional.\textsuperscript{290}

RLUIPA is similar to the statute in \textit{McCoy} because the jurisdictional element in RLUIPA does not ensure that the statute will apply only in circumstances affecting interstate commerce.\textsuperscript{291} Moreover, while RLUIPA will cover situations which are economic and involve interstate commerce,\textsuperscript{292} importantly, it will also cover situations which are non-economic and do not involve actors or activities in multiple states.\textsuperscript{293} For example, individuals can invoke RLUIPA to override occupancy laws, which are local and non-economic.\textsuperscript{294} Therefore, in theory, an appellate court could narrow a RLUIPA issue before it and focus its analysis on whether the particular application of RLUIPA in that case is constitutional, avoiding the question of whether the statute can stand. If, however, a court decides to review the Act itself, the court must conclude that Congress exceeded its Commerce Clause power in passing RLUIPA.

\textbf{B. The Commerce Clause Does Not Save RLUIPA}

RLUIPA does not satisfy any of the four factors the Supreme Court used in \textit{Lopez} to determine whether GFSZA was constitutional under the Commerce Clause. Specifically, RLUIPA does not regulate economic activity, has only an attenuated link to interstate commerce, has an insufficient jurisdictional element, and violates notions of federalism. This section argues that because RLUIPA does not satisfy any of the factors the \textit{Lopez} Court articulated, it lacks support under the Commerce Clause.

\begin{itemize}
\item \textsuperscript{288} \textit{Id.} at 1124.
\item The language of the jurisdictional hook in question here fails totally to achieve that purpose. It not only fails to limit the reach of the statute to any category or categories of cases that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually \textit{every} case imaginable, so long as any modern-day photographic equipment or material has been used.
\item \textit{Id.}
\item \textsuperscript{289} \textit{Id.} at 1132.
\item \textsuperscript{290} \textit{Id.} at 1131.
\item \textsuperscript{291} \textit{See supra} notes 60-74, 207-12 and accompanying text.
\item \textsuperscript{292} \textit{See} 42 U.S.C. § 2000cc (2000). For example, RLUIPA would apply in a case in which a zoning law prevented a religious group from continuing an ongoing building project. The group may well be ordering materials and supplies, as well as using builders from other states. In that case, the Commerce Clause clearly allows Congress to regulate such an activity, as it is economic in nature and involves multiple states.
\item \textsuperscript{293} \textit{See supra} notes 60-74 and accompanying text.
\item \textsuperscript{294} \textit{See supra} notes 60-74 and accompanying text (showing examples of non-economic, local activity that RLUIPA regulates).
\end{itemize}
1. RLUIPA Regulates Non-Economic, Local Activity

The Supreme Court in *Lopez* and *Morrison* sharply limited the definition of economic activity. As one commentator noted, "to meet the definition of economic activity, a regulated activity must involve economic enterprise and commercial transactions." There are many instances of land use which do not necessarily involve commercial transactions or economic enterprise. For example, no economic enterprise is involved if the land use laws regulate where cars may park, how many people may be in the building at once, or what sort of conduct may occur on the land. Those situations do not affect commerce, whether interstate or otherwise. By encompassing such conduct, the statute regulates non-economic activity and, therefore, falls outside the scope of the Commerce Clause.

In upholding RLUIPA against Commerce Clause challenges, the two district courts to uphold RLUIPA failed to apply an appropriately narrow definition of economic activity. The courts in *Westchester Day School v. Village of Mamaroneck* and *Freedom Baptist Church v. Township of Middletown* erred in holding that RLUIPA regulates economic activity because they did not take into account all of the ways religious groups can apply RLUIPA. The courts assumed that RLUIPA would apply only to situations involving interstate commerce and did not properly analyze the Act's jurisdictional element. RLUIPA has far-reaching implications, and individuals can invoke the statute in situations where there is no economic activity.
Supporters of RLUIPA argue that the Act regulates economic activity, because religious groups can invoke the Act against zoning laws that would keep them from beginning a construction project, or cause them to halt a construction project already underway. However, other applications of RLUIPA have no connection to economic activity. For example, if an individual invokes RLUIPA to prevent the congregation of people in a private home for weekly prayer, no economic transactions are involved. RLUIPA's regulation of non-economic activity, such as this, takes it, by definition, outside of the ambit of the Commerce Clause.

2. RLUIPA's Jurisdictional Element Does Not Sufficiently Narrow Its Scope

The simple fact that RLUIPA has a jurisdictional element does not guarantee its constitutionality. The Lopez Court instructed lower courts to inquire whether a law in question has a jurisdictional element, and, if so, whether that jurisdictional element adequately limits the scope of the law to situations arising under the Commerce Clause. RLUIPA violates the Commerce Clause because its jurisdictional element does not sufficiently narrow the scope of the law to economic activities.

The scope of RLUIPA reaches "any case in which... the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability." As written, this jurisdictional element permits Congress to regulate local zoning decisions which have no impact on other states or even on intrastate commerce. For example, under the Act, churches can invoke RLUIPA to ignore fire codes that mandate that the church not have more than a certain number of people inside the building at one time. Fire codes...
regulating occupancy have, at best, a tenuous link to interstate commerce. Primarily—if not totally—local governments enact them to protect the public safety. Congress could have drafted RLUIPA more narrowly to avoid any constitutional challenges, such as by limiting the scope of the law only to the construction of new religious facilities. The overbreadth of the jurisdictional element drafted takes RLUIPA beyond the scope of activity the Commerce Clause covers.

3. The Congressional Findings Are Inadequate

Although the Supreme Court does not require Congress to make empirical findings, the Court will look to congressional findings for effects on interstate commerce if the constitutionality of a law is ambiguous. Because RLUIPA fails to pass constitutional muster on any other Commerce Clause grounds, the Court would need to look to congressional findings. However, the paucity of such findings in this case means that they cannot save RLUIPA from being found unconstitutional.

In no case has the Supreme Court allowed the presence of extensive congressional findings to overcome a finding that a statute did not satisfy any of the other categories to render it constitutional. Although there are congressional findings of RLUIPA’s effect on interstate commerce, these findings will not suffice to render RLUIPA constitutional. Congress heard extensive testimony on the prejudice religious groups face, but only a few examples of how the Act would actually regulate economic activity.

Even if supporters of RLUIPA are correct in characterizing the

313. Walsh, supra note 15, at 210-11.
314. See supra notes 162-65 and accompanying text (outlining when the Court will look to congressional findings).
316. United States v. Morrison, 529 U.S. 598, 614 (2000) (“[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”). For a description of the findings, see supra notes 160, 221.
317. See supra notes 213-22 and accompanying text (establishing the inadequacy of the congressional findings for RLUIPA).
318. See 146 Cong. Rec. S7774, S7774-75 (daily ed. July 27, 2000) (statement of Marc D. Stern). The Senate noted that according to Marc D. Stern’s testimony: [I]n each case, the burden on religious exercise, or removal of that burden, will affect interstate commerce. This will most commonly be proved by showing that the burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods.
Id. at S7775. For an argument that these findings are not an example of extensive legislative findings, see supra note 221 (comparing the legislative findings for RLUIPA with the congressional findings for VAWA, and showing that RLUIPA’s legislative findings are not extensive).
legislative findings as "extensive," such findings would not guarantee a finding of constitutionality. The Morrison Court found that Congress had heard extensive testimony of VAWA's link to economic activity before passing the Act. However, that evidence was not enough to alter the Court's finding that VAWA violated the Commerce Clause. Congress heard far less testimony before passing RLUIPA than it did before passing VAWA. Thus, it follows that the legislative findings accompanying RLUIPA will be ineffective. In the absence of overwhelming empirical evidence, the Court does not defer to Congress's determinations that a law falls within Congress's Commerce Clause power. Thus, the findings accompanying RLUIPA cannot overcome the fact that RLUIPA does not regulate only economic activity, and has an insufficient jurisdictional element. The congressional findings cannot alter the holding that RLUIPA is not constitutional under the Commerce Clause.

4. RLUIPA Violates Principles of Federalism

The Commerce Clause ensures that Congress cannot regulate activities that belong to the states. In enacting RLUIPA, Congress encroached upon territory that states had traditionally regulated—their local zoning laws. Jack McKeown, the zoning officer of Middletown Township and defendant in Freedom Baptist Church v. Middletown Township, explained the problem in his own words: "One way to understand it . . . is that, traditionally, religious . . . uses were neighborhood oriented, so most zoning made provisions for religious . . . uses within residential neighborhoods." Congress violates principles of federalism in attempting to regulate activities

319. Storzer & Picarello, Jr., supra note 144, at 992.
320. Morrison, 529 U.S. at 614.
321. Id. The Court did not allow the existence of findings to alter its conclusion because "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question." Id. (alteration in original) (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring))).
322. See Lopez, 514 U.S. at 557 n.2 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (quoting Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring))).
323. See supra notes 303-07 and accompanying text (establishing that RLUIPA regulates non-economic activity).
324. See supra notes 308-13 and accompanying text (establishing that RLUIPA's jurisdictional element is insufficient).
325. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (establishing that the Commerce Clause does not provide Congress with the power to regulate activity occurring within a single state unless the activity affects interstate commerce).
that local zoning boards traditionally regulate. As such, RLUIPA is an example of Congress usurping state power.

Furthermore, local governments have difficulty defeating RLUIPA challenges. RLUIPA places a strenuous burden on local governments because the statute requires strict scrutiny analysis. Local governments must show a compelling interest and that the action taken was the least restrictive means of furthering that interest. Moreover, the effects of finding that small towns violated RLUIPA can be devastating to them, because the litigation and possible damage awards can be large. As a result, RLUIPA takes localities' right to control their own zoning laws away from them.

Moreover, a finding that the Commerce Clause cannot support RLUIPA may clarify the Court's Commerce Clause jurisprudence. The decision would show lower courts that civil laws may also fail to fall within the ambit of the Commerce Clause. That message would also register with Congress, which could be more careful in drafting future legislation under its Commerce Clause power. Finally, such a finding would also alert Congress that they cannot overturn Court decisions with legislation.

Finally, RLUIPA allows religious groups to bypass many laws that are in the public's best interest, such as historical landmark protections and health and fire codes. Although Congress enacted the land use portion of RLUIPA to overcome burdens on religious groups, the Act actually provides too much protection. RLUIPA gives unequal protection to religious groups in the face of zoning regulations that affect all landowners. Hence, RLUIPA also violates notions of equal protection. Because RLUIPA violates notions of Equal Protection and federalism, and because it fails under all four Lopez factors, RLUIPA must fall.

328. Ross K. Baker, supra note 227, at B7. But see Giaimo & Merriam, supra note 62. Giaimo and Merriam propose strategies for local zoning offices to overcome a RLUIPA challenge. Id. at 16. Among the strategies suggested are proving that the restriction furthers a "compelling governmental interest" by providing strong evidence, forcing the plaintiff to show that the regulation in question presents a substantial burden on them, amending the zoning process to "grant administrative relief to applicants who demonstrate a RLUIPA right," and engaging in communication with the offending party to try to resolve the issue before someone files suit. Id. at 16-17; see also Hook, supra note 14. Hook suggests other tactics for local governments defending against RLUIPA challenges. Hook also provides strategies for religious groups to obtain victories in RLUIPA cases. Id. at 855-58.

329. See supra note 69 and accompanying text (establishing that courts have held cities financially liable for RLUIPA violations).

330. See supra notes 71-74 (showing that religious groups can invoke RLUIPA to ignore historical landmark protections, as well as health and fire codes).


332. U.S. Const. amend XIV, § 1.
CONCLUSION

Congress’s most recent attempt to protect religious groups from governmental burdens exceeded its constitutional authority. RLUIPA does not regulate only economic activity and does not contain a satisfactory jurisdictional element. Moreover, RLUIPA has an attenuated link to interstate commerce and lacks adequate legislative findings to support its constitutionality. Finally, RLUIPA violates notions of federalism and the Equal Protection Clause. Federal appellate courts hearing challenges to RLUIPA’s constitutionality must find that the Act does not fall within the ambit of Congress’s Commerce Clause power. And Congress must go back to the drawing board if it wishes to enact a religious freedom statute that respects state and local governments and the United States Constitution.