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A RESPONSE TO PROFESSOR RUBENFELD

*Jonathan D. Hacker**

Professor Jed Rubenfeld has offered in these pages¹ an ingenious explanation for why the Supreme Court was right to strike down the Religious Freedom Restoration Act (RFRA)² in *City of Boerne v. Flores*.³ Rubenfeld finds in the First Amendment's Establishment Clause a historical and inherent principle he calls "antidisestablishmentarianism": a prohibition on acts of Congress that "disestablish" religion in the several states. Rubenfeld reads the Establishment Clause as proscribing not only congressional acts that "establish" religion but also all congressional acts that "dictate a position on religion for states,"⁴ including laws designed to ensure that states abide by the requirements of the Free Exercise Clause. RFRA was unconstitutional, Rubenfeld argues, because it transgressed this principle. As the title of his Article suggests, Rubenfeld's explanation is so ingenious, in fact, that it did not even occur to the Justices who signed the *Boerne* majority opinion.

In reasoning that Rubenfeld banishes to a footnote,⁵ the Court in *Boerne* modestly held that RFRA exceeded Congress's power to enforce the Fourteenth Amendment under Section 5 of that Amendment, because the RFRA's legislative scheme was not "congruent" or "proportional" to the harm Congress identified in enacting the law.⁶ Importantly, *Boerne* explicitly reaffirms Congress's long-recognized power under Section 5 to pass laws reasonably designed to remedy or deter state actions that violate the Constitution, even if such laws, in their operation, also prohibit actions that are themselves constitutionally permissible.⁷

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1. Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347 (1997).

2. Religious Freedom Restoration Act of 1993, Pub. L. No. 141, 107 Stat. 1488 (1993).

3. 117 S. Ct. 2157 (1997).

4. Rubenfeld, *supra* note 1, at 2357.

5. See *id.* at 2349 n.15.

6. *Boerne*, 117 S. Ct. at 2164, 2171.

7. See *Boerne*, 117 S. Ct. at 2163 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it

The problem with RFRA, according to *Boerne*, was that it was not even *targeted* at unconstitutional state actions. The legislative record generated in support of RFRA was replete with instances in which seemingly neutral laws of general applicability imposed severe “burdens” on religious practices.⁸ But in *Employment Division, Department of Human Resources v. Smith*,⁹ the Court had made clear that a state law of general applicability simply does not violate the First Amendment, no matter how significant its burden on the free exercise of religion, absent some evidence of discriminatory motivation.¹⁰ To the *Boerne* Court, the extensive factual findings underpinning RFRA — all concerning “burdens” on religious practice — failed to reveal any evidence at all of unconstitutional state actions as *Smith* defined them:

It is difficult to maintain that [the state and municipal laws Congress identified in support of RFRA] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress’ concern was with the incidental burdens imposed, not the object or purpose of the legislation.¹¹

Boerne does little more than confirm the lesson of *Smith*: burdens alone — even crushing, destructive burdens — are not enough to render a law affecting religious practices unconstitutional.

Once the Court determined that the legislative record was essentially devoid of examples of constitutional violations as the Court understood them,¹² there was no hope for RFRA at all. Any congressional scheme to remedy or deter constitutional violations goes too far if there are no constitutional violations to remedy or deter.¹³ So of course RFRA lacked “proportionality” and “congruence.” That is all the *Boerne* Court really held.

prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))).

8. See *Boerne*, 117 S. Ct. at 2169.

9. 494 U.S. 872 (1990).

10. See *Smith*, 494 U.S. at 885.

11. *Boerne*, 117 S. Ct. at 2169.

12. See *Boerne*, 117 S. Ct. at 2171 (“Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.”).

13. What Congress needed to do was to build a legislative record demonstrating that state actions that appear to be neutral and generally applicable in fact frequently conceal official animus against religious practices. It may also be enough to show that government actors, when presented with evidence of severe burdens and a proposal for accommodation or exemption, consistently refuse to yield. Because direct evidence of antireligious animus is un-

Rubenfeld's story is much more dramatic. On the one hand, *Boerne* suggests that if Congress were able to build a record demonstrating widespread state animus toward religious practices, and then passed a law requiring states to exempt religious exercisers from the reach of all generally applicable laws imposing an undue burden on such exercises, such a law would be well within Congress's Fourteenth Amendment enforcement power. Rubenfeld, on the other hand, is certain that such a law, and any law like it, would still be unconstitutional, because of the First Amendment's Establishment Clause.¹⁴

As Rubenfeld reads its text and enacting history, the Establishment Clause

does not only prohibit Congress from establishing religion; it prohibits Congress from dictating to the states how to legislate religion. The First Amendment excludes Congress from an entire legislative subject matter. Congress may not dictate a position on religion to individuals, and it may not dictate a position on religion to the states.¹⁵

Thus RFRA's vice was not — as the Court concluded — that it was a response to a nonexistent constitutional problem, or that it was an overreaction to a minor constitutional problem; RFRA “really was unconstitutional” because the First Amendment specifically prohibits Congress from “disestablishing” religion in the several states.

Not only was RFRA unconstitutional, but *any* congressional enactment designed to deter states from abridging the free exercise of religion — regardless of the evidence of state transgressions — violates the antidisestablishmentarian principle and therefore the Establishment Clause.¹⁶ According to Rubenfeld, laws that protect free exercise disestablish religion, and laws that disestablish religion offend the First Amendment.

Or at least they offend Rubenfeld. I'm not so sure they offend the First Amendment. Not anymore.

I want to suggest in this Correspondence that history has overtaken, and nullified, Rubenfeld's interpretation of the Clause. Far from being “essential to the fundamental constitutional separation of religion and government,”¹⁷ as Rubenfeld claims it to be, in my

likely to be forthcoming, *see Boerne*, 117 S. Ct. at 2169, evidence of a kind of latent animus may be the best hope for supporters of a new RFRA.

14. *See* Rubenfeld, *supra* note 1, at 2349.

15. *Id.* at 2350.

16. *See id.* at 2357 (“A disestablishmentarian law will characteristically vindicate tolerance and free exercise To the extent that states can constitutionally enact laws favoring one religion over others, Congress can make no law instructing them not to do so.”); *id.* at 2374.

17. *Id.* at 2350.

view the antidisestablishmentarian principle today serves no constitutional function whatsoever, and does not stand in the way of responsible congressional efforts to remedy or deter violations of the Free Exercise Clause.

* * *

Rubinfeld argues that antidisestablishmentarianism is part of the very core of the Establishment Clause. He offers a brief but fascinating history of the Founding period, which reveals to the historically uninitiated the prevalence of established religions in and among the several states at the time. Rubinfeld acknowledges that there were “powerful antiestablishment” forces backing the First Amendment, who demanded the Establishment Clause as a guarantee that Congress would not establish a national church.¹⁸ But Rubinfeld also points out that others were loudly voicing antidisestablishment concerns. These members of the founding generation sought “to memorialize Congress’s inability to ‘interfere’ or ‘intermeddle’ with [state] religious establishments.”¹⁹ In the end, the somewhat peculiar final wording of the Establishment Clause — the seemingly ambiguous proscription of congressional acts “*respecting* an establishment of religion”²⁰ — was apparently a sop thrown to the New England states so that they could “insulate their states’ local-establishment systems from federal attack.”²¹

From this history Rubinfeld draws the not unreasonable conclusion that “[r]especting’ means ‘with respect to’ or ‘regarding.’ Congress can make no law *concerning* an establishment of religion.”²² And it follows from this, he says, that “Congress has no power to dictate a position on religion for individuals, and it has no power to dictate a position on religion for states. It has no power to dictate church-state relations at all — where ‘state’ refers to the governments of the several states.”²³

* * *

The logical connection between these points is not airtight, but the formulation makes at least some sense, as far as it goes. It goes

18. *Id.* at 2354.

19. *Id.*

20. U.S. CONST. amend. I (emphasis added).

21. Rubinfeld, *supra* note 1, at 2355-56.

22. *Id.* at 2356.

23. *See id.* at 2377.

no farther, however, than the ratification of the Fourteenth Amendment. The ratification of the Fourteenth Amendment, and the subsequent application of the Establishment Clause to the states,²⁴ formally eradicated the specific concerns underlying the original antidisestablishmentarian aspects of the First Amendment: States no longer have religious establishments with any constitutional claim to protection from federal interference. State religious establishments are gone — and with them, the very basis for the antidisestablishmentarian principle. The rest of the Establishment Clause goes on with the hard work of prohibiting establishments, but what's left of antidisestablishmentarianism is a hollow idea, a principle tilting at windmills.²⁵

But the Fourteenth Amendment did more than prohibit state religious establishments; it also gave persons the right to be free from state interference in the free exercise of their religions.²⁶ When the original antidisestablishmentarian principle developed, the Free Exercise Clause of the First Amendment did not apply to the states.²⁷ States could — and did — interfere with the free exercise of religion whenever they wanted. The Fourteenth Amendment changed all of that. The Amendment meant that, for the first time, the right to the free exercise of religion was a right protected against infringement by any of the several states. In this sense, the Fourteenth Amendment did no more or less with respect to the federal right of free religious exercise than it did with respect to other federal rights: it applied them as against the states and empowered Congress to enforce them by remedying or deterring violations.²⁸ It is thus a perfectly straightforward interpretation of the Fourteenth

24. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 215-16 (1963) (“The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact laws [respecting an establishment of religion].” (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940))); *Everson v. Board of Education*, 330 U.S. 1 (1947). In fact, all formal state establishments were apparently eradicated well prior to the ratification of the Fourteenth Amendment. See SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (1902). The incorporation of the Establishment Clause against the states through the Fourteenth Amendment merely formalized a reality in the evolution of the concept of religious liberty in this nation that had taken place decades earlier.

25. Justice Brennan once observed that antidisestablishmentarianism had “become historical anachronism by 1868.” *Schempp*, 374 U.S. at 255 (Brennan, J., concurring). See *infra* note 29.

26. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

27. See, e.g., *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845) (explaining that a municipal law allegedly abridging free exercise of religion presents no cognizable federal constitutional question).

28. See *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 503 (1982) (“The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction

Amendment to conclude that Section 5 authorizes Congress to pass a law enforcing the right to free exercise, so long as it does so within the usual confines of its Section 5 powers.²⁹

Rubinfeld tries to defeat this logic by insisting on a special privilege for the antidisestablishmentarian principle in the hierarchy of federal rights. Rubinfeld argues that the Fourteenth Amendment's shift of power away from the states and toward the federal government did not actually affect the antidisestablishmentarian principle because the principle is *and always was* about something much deeper than federal-state relations:

[A]s I have tried to show throughout, the First Amendment's antidisestablishmentarian component is not and never was merely a protection of federalism. It is not merely a states' rights or state sovereignty provision. First Amendment antidisestablishmentarianism is a bulwark of religious freedom. It is a bulwark of the fundamental principle of separation . . . between the national government and religious affairs.³⁰

Era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power.”)

29. This analysis is consistent with the view articulated by Justice Brennan in *Schempp*. Responding to an earlier incarnation of the argument that an antidisestablishmentarian principle survived and even trumped the Fourteenth Amendment — that incorporation of the Establishment Clause against the states via the Fourteenth Amendment was “conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches,” *Schempp*, 374 U.S. at 254 — Justice Brennan explained:

Whether or not such was the understanding of the Framers and whether such a purpose would have inhibited the absorption of the Establishment Clause at the threshold of the Nineteenth Century are questions not dispositive of our present inquiry. For it is clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments. Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause to any greater degree than it would, for example, have deterred the absorption of the Free Exercise Clause. That no organ of the Federal Government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable. It is equally plain, on the other hand, that the Fourteenth Amendment created a panoply of new federal rights for the protection of citizens of the various States. And among those rights was freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.

Schempp, 374 U.S. at 254-55 (citations and footnotes omitted). Also included among the “panoply of new federal rights” was the freedom from state governmental interference in the free exercise of religion. And Congress's new power to enforce this right would surely trump the “historical anachronism” of antidisestablishmentarianism.

Chief Justice Rehnquist has also made the related point that the dramatic change in intergovernmental powers since the founding era makes it impossible to tell how the original founders would view the meaning of the Establishment Clause today: “Because those who drafted and adopted the First Amendment could not have foreseen either the growth of social welfare legislation or the incorporation of the First Amendment into the Fourteenth Amendment, we simply do not know how they would view the scope of the two Clauses.” *Thomas v. Review Bd.*, 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting).

30. Rubinfeld, *supra* note 1, at 2375-76.

On this basis, Rubinfeld is able to assert that “[t]he erosion of state sovereignty effected by the Fourteenth Amendment furnishes no reason to erode the religious liberty protected by the First.”³¹ Indeed, Rubinfeld explains, it would actually be “profoundly perverse”³² to read the Fourteenth Amendment — which enhanced the separation of church and state by prohibiting state establishments — in a way that would “*cut back* on a fundamental element of the constitutional separation between religion and government.”³³

The problem with this argument is that it is simply not supported by the very historical evidence Rubinfeld reports at the outset of his article. The history he recites is quite specific: certain members of the founding generation were concerned about protecting their state establishments and therefore insisted on the “respecting” language in the Establishment Clause. As Rubinfeld himself tells the story, the fight against disestablishment was a narrow, focused commitment to saving formal state establishments. It is wrong to say, as Rubinfeld does, that the antidisestablishmentarian principle was not “merely a protection of federalism” and “not merely a states’ rights or state sovereignty provision.” The history of the period shows that antidisestablishmentarianism became part of the First Amendment as a result of parochial Realpolitik and not a debate over the meaning and content of religious liberty. In short, antidisestablishmentarianism was *only* a “protection of federalism” and *only* a “states’ rights or state sovereignty provision.”

Indeed, the Founders would have had no reason at all to think about antidisestablishmentarianism as the general inoculation against federal enforcement of free exercise that Rubinfeld makes it out to be. As noted earlier, at the time of the drafting and ratification of the First Amendment, the individual federal right to be free from state abridgments of the free exercise of religion simply did not exist. Nor was there an obvious constitutional basis at the time for a congressional enactment enforcing this nonexistent right. Congressional interference with states’ abridgments of free exercise assumes either a right to be protected — which did not exist — or congressional power to act — which probably did not exist — or both. Under these historical circumstances, the inference that the Founders saw in the Establishment Clause an abiding prophylactic

31. *Id.* at 2376.

32. *Id.*

33. *Id.* at 2377.

against congressional enforcement of the Free Exercise Clause is unsupportable.

History, then, reveals nothing “fundamental” at all about the antidisestablishmentarian principle — as Rubinfeld elucidates it — to the First Amendment’s Religion Clauses. There is therefore nothing especially “perverse” about interpreting the Fourteenth Amendment as empowering Congress to enforce the federal right against state abridgments of the free exercise of religion.

Rubinfeld’s interpretation of the Establishment Clause appears to suffer from a logical error that infects his view of the Clause’s history and meaning. Rubinfeld’s analysis strictly equates laws that deter free exercise violations with laws that interfere with state establishments of religions. Doctrinally, however, the two are not equivalent. A state action that infringes the federal right of free exercise does not necessarily establish state religion. Thus, a congressional enactment designed to deter state actions that abridge the federal right of free exercise does not necessarily deter state establishments — or “disestablish” religion.

Nor is the doctrinal disjunction between laws deterring free exercise violations and laws disestablishing religion merely an empty modern formalism. As I have attempted to show (on the basis of the evidence Rubinfeld has collected), the Founders were concerned only about congressional laws disestablishing formal state religious institutions and practices; they had no reason at the time to anticipate congressional laws enforcing the Free Exercise Clause. Rubinfeld’s view of the historical record overlooks this distinction:

Some Americans of the founding era — including such towering figures as Jefferson and Madison — believed that *all* government should keep its hands, to the greatest extent possible, out of the domain of religion. Others believed, on the contrary, that state or local government had the authority to intercede directly in religious life. But both parties agreed that the national government should be kept out. Virtually everyone agreed that vesting Congress with a power to intermeddle in religious matters was a core evil to be avoided.³⁴

Once again, Rubinfeld seems to draw too much from the historical evidence he reports at the outset of the article. By his own account, the *specific* “evil” that “everyone” sought to avoid was nothing more than Congress’s establishment of a national church or religion. And the “towering figures” of early American liberalism who sought to keep Congress out of the “domain of religion” intended only to keep Congress from establishing religion. Such a commit-

34. *Id.* at 2377 (footnotes omitted).

ment is not necessarily inconsistent with allowing Congress to make sure that states, too, keep out of the domain of religion — so long as such supervision does not amount to the kind of congressional act of establishment that was, in fact, universally reviled.

In short, neither history nor logic compels the heavy reading of the Establishment Clause that Rubinfeld pursues.³⁵ The most important point is that the story of congressional enforcement of the Free Exercise Clause was written by the Fourteenth Amendment generation, and that the original Founders had little or nothing to say about such matters. As with congressional enforcement of every other federal constitutional right, then, it is to basic Fourteenth Amendment principles that one ought to turn — as the *Boerne* Court did — to interpret and adjudicate congressional efforts to enforce the federal right to the free exercise of religion.

But what of Rubinfeld's claim that giving full force and effect to the Fourteenth Amendment as applied to the First would be tantamount to "repealing" the Establishment Clause? To begin with, as I have argued, it certainly would not be "repealing" any aspect of the First Amendment that the Fourteenth Amendment did not already totally eviscerate by abolishing state establishments. More to the point, it also would not repeal any aspect of the text of the Clause. It is clear, of course, that the Establishment Clause has survived, and even prospered, since the Fourteenth Amendment relieved the Clause of its antidisestablishmentarian baggage. The Amendment did not change the words of the Clause: it still says "Congress shall make no law respecting an establishment of religion." What the Fourteenth Amendment did was to change profoundly the *meaning* of these words. As a result of the Fourteenth Amendment, the same language that used to enjoin only Congress now enjoins state legislatures as well, and means at least that states, like Congress, cannot make laws "respecting an establishment of religion." If antidisestablishmentarianism were inherent in these

35. Rubinfeld also proposes a couple of wild hypotheticals he says could constitutionally result unless we read the Establishment Clause his way. He warns that Congress might be allowed to enact a law forcing states to permit marriage between any persons or as many persons as they wish, or forcing states to ensure that parents expose their children to more than one religion. As to the first: if, in fact, Congress turned up extensive evidence that marriage laws were passed out of *actual animus toward certain religions*, then I suppose such a law *would* be constitutional under *Boerne*. Such a record would likely be impossible to generate, however, so antidisestablishmentarianism is not needed to save the day. And if it were true that hatred of minority religions was so pervasive that it motivated such common laws, then I would not be particularly troubled if Congress got involved to provide an antidote to such venom. As to the second: such a law would blatantly violate the free exercise rights of nonconsenting adult parents, so (once again) the antidisestablishmentarian principle serves only to pile on.

words, the Establishment Clause would mean — in the wake of incorporation — that states could not disestablish their own state religions.³⁶ The words of the Clause do not compel this ridiculous result, which demonstrates that the antidisestablishmentarian principle is hardly inherent in the words of the Establishment Clause. Giving effect to the Fourteenth Amendment, then, in no way “repeals” the Establishment Clause. To the contrary, the text of the Clause continues to provide a meaningful and vital restraint on attempts by Congress — and, after incorporation, the states and all other government actors — to establish religion.

* * *

For all of these reasons, then, I believe Rubenfeld is wrong to treat Congress’s power to enforce the Free Exercise Clause via Section 5 of the Fourteenth Amendment as dismissively as he does.³⁷ Any effort by Congress to enforce the Free Exercise Clause, he breezes, would disestablish religion, and anything that disestablishes religion violates the Establishment Clause, and Congress cannot do anything under Section 5 that violates another constitutional provision. But, as I have suggested, the Establishment Clause does not (and never really did) prohibit the free-exercise-enforcing laws Rubenfeld here labels disestablishments. These days the Clause prohibits establishments, and has nothing to say about whether Congress has the power under Section 5 to ensure that states obey

36. In a slightly different context, Rubenfeld does contrive the argument that antidisestablishmentarianism could apply to the states by, for example, precluding a state from passing a law that required parents to expose their children to more than one religion:

Insofar as parents in essence establish a religion within the family, this statute could be seen as an attempt to disestablish religion within the sphere of parental authority. Just as the First Amendment bars Congress from dictating church-state relations, a Fourteenth Amendment antidisestablishmentarian principle could bar states from dictating church-family relations.

Rubenfeld, *supra* note 1, at 2379 n.124. Far from proving any aspect of Rubenfeld’s case, however, this example demonstrates the lengths to which Rubenfeld must stretch the notions of “establishment” and “disestablishment” to give his principle any modern relevance. On its face this hypothetical has nothing whatsoever to do with the kinds of formal state establishments, or with the disestablishing laws, he says the Founders were worried about. What is more, the hypothetical law — forcing religious observance on unconsenting adults — is another blatant violation of the Free Exercise Clause. The hypothetical starkly reveals antidisestablishmentarianism for what it is: a useless First Amendment appendage, which at best gets in the way of other First Amendment principles that actually perform substantive functions.

37. *See id.* at 2374 (“Did RFRA “enforce” free exercise rights within the meaning of section 5? That question, interesting as it is, turns out to be irrelevant. Even if yesterday’s RFRA or tomorrow’s new and improved RFRA came within the terms of section 5, it would still violate the Establishment Clause and hence be unconstitutional.”).

their (post-Fourteenth-Amendment) duty not to abridge the free exercise of religion.

The question whether Congress properly exercised its Section 5 powers in enacting RFRA, or might properly do so in the future in enacting a different law on the basis of different findings, is a question that turns on the scope and limits of its Section 5 powers, as the *Boerne* Court recognized. It does not turn on an interpretation of the First Amendment beholden to anachronistic concerns about protecting official state churches. The First Amendment today is much more complicated, and much more important, than that.