Why *Guru Nanak* is Another Nail in the Coffin of *West Coast Hotel v. Parrish*

by John Ryskamp

We are naturally led to the conclusion that the Ninth Circuit's recent decision in *Guru Nanak v. Sutter*[1] is a simple misreading of *Oregon v. Smith*,[2] just as RLUIPA—which the Ninth Circuit just upheld—misused *Smith*. But something odd is going on when neither counsel nor Court argues this. What it means is that there such a consensus that the scrutiny regime still operates, that there is no need to discuss it, and no one ever thinks about it. That is a serious mistake. RLUIPA challenges the foundation of the scrutiny regime, and the Supreme Court has done so as well. This suggests that those who would defend the scrutiny regime, either need to start arguing it explicitly, or join in its abandonment and start arguing the facts. Counsel opposing RLUIPA in *Nanak* certainly do not realize what is going on. They did not even argue that RLUIPA involved a misuse of *Smith*. And in a companion Ninth Circuit RLUIPA case, *Christian Center v. Elsinore*, there has been a persistent failure of those who would defend the scrutiny regime, to either argue in its defense, or to argue under the new Constitutional regime the Supreme Court has inaugurated.

Nanak revolves around this section of RLUIPA, which elevates, to strict scrutiny, the level of scrutiny for exercise of religion in the following circumstance: a "substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." And here is the crucial passage from the *Nanak* decision: "We decide that the County made an individualized assessment of Guru Nanak's [application for a zoning permit to build a church], thereby making RLUIPA applicable, and that the County's denial of Guru Nanak's application constituted a substantial burden, as that phrase is defined by RLUIPA. Because RLUIPA applies to this case, we address RLUIPA's constitutionality pursuant to Section Five of the Fourteenth Amendment, and decide that RLUIPA is a congruent and proportional exercise of congressional power pursuant to the Fourteenth Amendment."[3]

This is a flagrant misconstruction of *Oregon v. Smith*. What counsel opposing RLUIPA did not point out is that the use of "individualized assessments" in RLUIPA, assumes—or rather, presumes—that health and welfare regulation affecting an exercise of religion is a policy of affecting an exercise of religion. That is not *Smith*. *Smith* stood for exactly the opposite proposition, although the authors of RLUIPA used the terms from *Smith* in the legislation.

The irony of *Nanak* is that in the using the *Smith* decision to uphold RLUIPA, Smith was *defeated* in his claim that he was wrongly denied unemployment compensation when he was dismissed for using peyote for religious purposes. When the *Smith* Court discussed an "individualized governmental assessment," it was referring to

[1] No. 03-17343 (2006).
[2] 494 US 872 (1990).
[3] *Guru Nanak* at 8599.

"a system of individual exemptions"[4] as a *policy*, not an *effect*. When there was such a system, then strict scrutiny applied when it substantially burdened an exercise of religion. The Court did not mean that the operation of health and welfare regulations was inherently a "system of individual exemptions" and that all effects of the policy were to be subject to strict scrutiny with respect to an exercise of religion. In short, "assessments" are not synonymous with "exemptions." Indeed, there was no evidence in *Nanak* that Sutter had turned its zoning policy into an effect in order to bar the new church. Even the church did not contend this, but the Ninth Circuit blithely assumed it. "Individualized assessment" was conflated with "substantial burden."

In finding RLUIPA *un*constitutional, the District Court had claimed in *Elsinore* that the fault with the Christian Center's RLUIPA argument was that "[i]n determining whether to issue a zoning permit, municipal authorities do not decide whether to *exempt* a proposed user from an applicable law, but rather whether the general law *applies* to the facts before it."[5] That's not bad, but it misses the point. The point is that RLUIPA conflates "exempt" and "apply." This is what the Court missed, and it did so because it could not believe that anyone was challenging the scrutiny regime of *West Coast Hotel v. Parrish.* Indeed, the District Court found RLUIPA unconstitutional on the grounds that only the Court can say what, in fact, freedom of religion is—a *Marbury* argument which is quite beside the point unless the Court has *West Coast Hotel* clearly in view, which the Elsinore Court did not. The Court was unconsciously acknowledging that RLUIPA infringes on the scrutiny regime, which of course it does, but that is as far as the Court could bring itself to go. If *Nanak* goes up to the Supreme Court on appeal, the question should be, Does RLUIPA overrule *West Coast Hotel v. Parrish*? What would you care to bet that counsel will be too stupid to phrase the question in this way?

Regardless of how the question is phrased, RLUIPA should be seen in the context of yet another case. *West Coast Hotel v. Parrish*[6] established the scrutiny regime, one of the corollaries of which is that an exercise of religion does not enjoy a higher level of scrutiny than minimum scrutiny with respect to laws of general applicability. But are we still living in that era? *Lawrence v. Texas*, in which the Court held sodomy laws unconstitutional "furthers no legitimate state interest."[7] Obviously, this is not a test on the scrutiny regime. Minimum scrutiny says that laws are constitutional if they are rationally related to a legitimate state interest. Intermediate scrutiny says that laws are unconstitutional if they substantially further an important state interest. The *Lawrence* test takes one term from each test. It makes no sense as a scrutiny regime test, and it is not one.

What the Court is doing is drawing from its unofficial jurisprudence, in which it decides which facts it considers important and wishes to see the law maintain. Laws which maintain important facts are found constitutional, and this unofficial determination is made official through its expression in terms of scrutiny regime. That is how the Court operates. *Lawrence* simply makes it clear that that is how the Court has always operated. The Court now feels that liberty is more important than the scrutiny regime allows, so it

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[4] *Smith* at 884.
[5] *Christian Center v. Elsinore*, 291 F. Supp. 2d 1083, 1098-1099 (2003). This case was also on appeal to the Ninth Circuit, and the Christian Center won its case based on *Guru Nanak*.
[6] 300 US 379 (1937).
[7] 539 US 558, 578 (2003).

breaks the scrutiny regime to give more individually enforceable rights with respect to liberty. In *Lawrence* it does so explicitly. Commentators wonder why the Court didn't simply hold that there was no rational basis for sodomy laws. Why didn't the Court do what it could easily have done—keep its reasoning within the scrutiny regime? Because the Court doesn't *like* the scrutiny regime.

The RLUIPA question is going to be addressed in the context of a simple dislike of the scrutiny regime and an informal analysis of facts of importance to the Court. Therefore it is important to argue the FACTS. The scrutiny regime very conveniently allowed us to avoid the question, what in fact is an exercise of religion? particulary with respect to the "laws of general applicability" test. But that is over now, and advocates of RLUIPA can easily analogize freedom of religion to liberty. If health and welfare regulation has to maintain liberty, does it not also have to maintain freedom of religion? On the other hand, the Christian Center did not argue in *Elsinore* that *where* an exercise of religion is exercised, is an indicium *of* an exercise of religion. Nor did Guru Nanak argue that where individuals *want* to exercise religion, is an indicium of an exercise of religion. Is the "free" in "free exercise" of religion, the way the Founders say liberty is an indicium of the protected exercise of religion? Opponents of RLUIPA may wish to argue that that *desire* is not an indicium of the free exercise of religion, or if it is, that health and welfare regulation does not have a substantial impact on a desire. Or, if it wishes to use the informal maintenance jurisprudence of *Lawrence*, it may argue that government is not obliged to maintain freedom of religion to extent of accommodating desires.

Whatever the doctrines, we are now clearly in a Constitutional era in which lawyers have to argue what, in FACT, are such things as freedom of religion and liberty. Although Congress has clearly presumed discretion over what in FACT is freedom of religion in RLUIPA, we have left behind the era in which factual inquiries are left to the political system. Marci Hamilton, author of *God and the Gavel* and a strenuous opponent of RLUIPA and supporter of the scrutiny regime, fulminated against *Guru Nanak* in an email to me: "[R]eligious conduct is going to receive more protection than speech, which is perverse, to say the least. Speech does not receive 'strict scrutiny' in circumstances where there is individualized assessment unless there are no procedural safeguards. The land use schemes always have such safeguards built in." This is an historically significant comment because it reflects common reactions of defenders of the scrutiny regime: a denial that what is happening, is happening, and a total unwillingness to grapple with the change.