CALIBRATING THE BALANCE OF FREE EXERCISE, RELIGIOUS ESTABLISHMENT, AND LAND USE REGULATION: IS RLUIPA AN UNCONSTITUTIONAL RESPONSE TO AN OVERSTATED PROBLEM?

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The Religious Land Use and Institutionalized Persons Act (RLUIPA) reflects a continuing struggle between Congress and the Supreme Court to define the scope of religious liberties guaranteed by the Free Exercise Clause of the First Amendment. RLUIPA is Congress's second attempt to countermand the Supreme Court's decision in Employment Division, Department of Human Resources v. Smith, *which held that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability that impose a substantial burden on religious exercise. In promulgating RLUIPA, Congress sought to vitiate governmental discrimination against religious individuals and groups in the land use context by mandating strict scrutiny review of land use regulations that impose a substantial burden on religious exercise.*

In this Comment, the author argues that RLUIPA cannot be supported as a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment. RLUIPA cannot be characterized as remedial legislation pursuant to the enforcement provisions of the Fourteenth Amendment because Congress has failed to adduce meaningful evidence of pervasive, unconstitutional religious discrimination in the implementation of local land use regulations. Moreover, rather than codifying or enforcing existing jurisprudence, RLUIPA substantively alters legal doctrine in at least two ways. First, the Act includes an overbroad definition of what constitutes a substantial burden on religious exercise, and thereby modifies the scope of judicially recognized religious liberties. Second, by requiring strict scrutiny review in all cases where a local government is empowered to make an individualized assessment of a religious land use, RLUIPA expands the limited category of cases that trigger strict scrutiny review in the aftermath of Smith. *Although federal appellate court decisions generally have upheld the constitutionality of RLUIPA by harmonizing its provisions with existing free exercise jurisprudence, the author maintains that such narrow*

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constructions have not lessened RLUIPA's generally broad and unconstitutional reach. Finally, the author suggests that RLUIPA is a poorly calibrated and potentially counterproductive approach to furthering religious liberty protections in the land use context.

INTRODUCTION

The Religious Land Use and Institutionalized Persons Act (RLUIPA)[1] reflects a continuing struggle between Congress and the Supreme Court to define

1. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

the scope of religious liberties guaranteed by the Free Exercise Clause of the First Amendment. RLUIPA is Congress's second attempt to mitigate the impact of the Supreme Court's decision in *Employment Division v. Smith*,[2] which held that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability that impose a substantial burden on religious exercise.[3] Congress's first attempt, the Religious Freedom Restoration Act (RFRA),[4] which aimed to overturn this precedent by requiring strict scrutiny review of all laws that substantially burden religious conduct, was held unconstitutional in *City of Boerne v. Flores*[5] as exceeding the legitimate scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment.[6] RLUIPA is thus designed to avoid the constitutional shortcomings that led to RFRA's invalidation, by reserving strict scrutiny review for two areas of government regulation in which evidence suggests that religious groups may be particularly susceptible to discrimination: local land use regulations and religious accommodations for prisoners.[7]

This Comment focuses on the constitutionality of RLUIPA's land use provisions. Part I examines the legislative history and legal context that culminated in Congress's decision to enact RLUIPA. Part II considers the validity of RLUIPA as an exercise of Congress's Section 5 enforcement power and explores judicial constructions of RLUIPA in this context. While federal circuit courts have construed RLUIPA narrowly so as to align its provisions with existing religious liberty jurisprudence, Part II concludes that the Supreme Court likely will invalidate RLUIPA as exceeding the legitimate scope of congressional authority. Finally, Part III asks if RLUIPA is an effective means of furthering religious liberty protections and suggests that even if RLUIPA is constitutional, it is neither necessary nor beneficial.

I. LEGISLATIVE AND JURISPRUDENTIAL CONTEXT

A. Municipal Zoning Authority

The authority to enact zoning schemes regulating land use is rooted in the states' police power to legislate in furtherance of the public's general

2. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

3. *Id.* at 877.

4. 42 U.S.C. §§ 2000bb to 2000bb-4.

5. 521 U.S. 507, 511 (1997).

6. U.S. CONST. amend. XIV, § 5 (providing that Congress shall have the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment).

7. 42 U.S.C. §§ 2000cc(a)(1) to 2000cc-1(a).

welfare.[8] Although local municipalities and political subdivisions are not vested with an independent police power, states generally delegate their zoning authority to local governments in order to ensure that land use regulations accurately reflect local needs and concerns.[9] In 1922, the United States Department of Commerce promulgated the Standard State Zoning Enabling Act (SZEA) to guide the implementation of local land use controls.[10] The SZEA provided for the establishment of zoning districts in which municipalities could segregate between compatible and incompatible land uses.[11] It reflected an expansive understanding of legitimate zoning goals as including the need "to ensure safety from fire, panic, and other dangers; to promote health and the general welfare; to prevent the overcrowding of land; to avoid undue concentration of population; [and] to facilitate the provision" of public services.[12] Under the SZEA, responsibility for the design and implementation of zoning ordinances that are consistent with these purposes falls to independent, quasi-judicial "boards of adjustment."[13] Adjustment boards are also empowered to grant "special exceptions to the terms of the ordinance in harmony with its general purpose and intent,"[14] when an applicant can demonstrate that strict application of a zoning ordinance would entail "unnecessary hardship."[15] Although individual states have adopted various interpretations of what constitutes an unnecessary hardship sufficient to justify a zoning exemption, adjustment boards exercise considerable discretion in applying state standards to individual variance requests on a case-by-case basis.[16]

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8. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy.").

9. *See, e.g.*, Flower Hill Bldg. Corp. v. Flower Hill, 100 N.Y.S.2d 903 (Sup. Ct. 1950). The court explained that zoning law aims

> to throw around each community, an arm of protection in the form of a local zoning ordinance, which could insure its inhabitants against radical zoning changes (not necessitated by public demand and by changing conditions of the neighborhood) which would be detrimental to their established living conditions, their property values and the most desirable use of their lands.

Id. at 907–08.

10. *See* ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD ZONING ENABLING ACT (rev. ed. 1926), *available at* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf.

11. *See id.* at 6.

12. *Id.*

13. *Id.* at 9–12.

14. *Id.* at 9.

15. 3 E.C. YOKLEY, ZONING LAW AND PRACTICE § 20-6 (Douglas Scott MacGregor ed., Matthew Bender 2000) (1948).

16. For further analysis of individualized governmental discretion in land use regulation, see Austin v. Brunnemer, 147 S.E.2d 182, 185 (N.C. Sup. Ct. 1966) (holding that a "Board [of Adjustment]

In addition to the power to grant zoning variances that exempt individual land users from compliance with general zoning requirements, adjustment boards consider applications for "special use" permits where a zoning ordinance provides that a landowner must obtain prior approval before undertaking a specified land use.[17] Similarly, "conditional use" permits are required when a landowner must obtain prior approval from a local legislature rather than a local adjustment board.[18] Both conditional use and special use permits involve an inquiry into the nature and probable impact of a proposed land use. This inquiry is guided by an assessment of the extent to which a proposed use will further the general welfare of a surrounding community.[19]

In the context of land use regulation, courts have interpreted general welfare as embracing a broad range of considerations that often have an attenuated impact on public health or safety.[20] The Supreme Court endorsed the expansive nature of local zoning authority under this general welfare standard when it declared that "[i]t is within the [zoning] power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[21] Under this standard, zoning ordinances in some states provide for the establishment of architectural review boards to ensure that the proposed design of a new building is compatible with existing structures.[22] Similarly, historic preservation or historic landmark laws can prohibit a landowner from altering interior or exterior features of a designated historic building, or prohibit a proposed land use that would have a detrimental impact on the preservation of a designated landmark.[23] These restrictions are justified as promoting the general welfare to the extent that they stimulate tourism and

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should pass on the [zoning variance] application as a matter of discretion rather than of strict legal right."); 3 YOKLEY, *supra* note 15, § 20-5 (describing the broad, discretionary authority of adjustment boards to grant variances); Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1, 7–14 (2001); Frank T. Santoro, *Section Five of the Fourteenth Amendment and the* Religious Land Use and Institutionalized Persons Act, 24 WHITTIER L. REV. 493, 525–28 (2002).

17. 3 YOKLEY, *supra* note 15, § 21-1.

18. 2 *id.* § 14-2.

19. *See* 3 *id.* § 21-1; 12 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.03[2][c] (Michael Allan Wolf ed., Matthew Bender 2005) (1949).

20. *See* 13 POWELL, *supra* note 19, § 79D.02[1].

21. *See* Berman v. Parker, 348 U.S. 26, 33 (1954).

22. *See* 13 POWELL, *supra* note 19, § 79D.02[2].

23. *See id.* § 79D.02[3].

related economic growth, provide cultural and educational enrichment for local communities, increase local property values, or improve aesthetics.[24]

Religious land use, like other land uses, must comply with municipal zoning regulations. Conflicts between religious landowners and local zoning boards can arise when religious organizations wish to relocate, expand, or modify existing facilities, or when growing religious communities attempt to open new religious facilities within a zoning district. However, religious landowners' efforts to challenge exclusionary zoning ordinances on constitutional free exercise grounds are rarely successful. The failure of such legal challenges can be attributed in part to the judiciary's recognition of the expansive scope of states' police power to legislate in furtherance of the general welfare. Additionally, courts have been reluctant to accept the notion that land use restrictions can impose a constitutionally significant burden on religious exercise.

B. The Supreme Court's Evolving Free Exercise Jurisprudence

RLUIPA provides that when a state or local government applies a land use regulation in a manner imposing a "substantial burden on religious exercise," the government must demonstrate that the burden serves to advance a compelling governmental interest and uses the least restrictive means to achieve that interest.[25] By requiring a compelling interest and least restrictive means analysis, Congress aimed to restore the strict scrutiny standard of review that the Supreme Court first applied in *Sherbert v. Verner*,[26] in which a facially neutral law had the effect of burdening religious exercise.[27]

In *Sherbert*, the Court considered a free exercise challenge to South Carolina's denial of unemployment compensation benefits for a Seventh Day Adventist who refused to accept work on Saturdays.[28] In concluding

24. *See id.* § 79D.02[3][b]; *see also* Kelo v. City of New London, 125 S. Ct. 2655 (2005) (recognizing the taking of private, developed land for purposes of economic development as a "public use").

25. 42 U.S.C. § 2000cc(a)(1)(A)–(B) (2000).

26. 374 U.S. 398 (1963).

27. *Id.* at 399–403.

28. *Id.*; *see also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding that a state unconstitutionally infringed upon the free exercise of religion by denying unemployment compensation benefits to an employee who was discharged for refusing to work certain hours because of sincerely held religious beliefs adopted after beginning employment); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding that a state unconstitutionally infringed upon the free exercise of religion by denying unemployment compensation benefits to an employee who voluntarily terminated his job because his religious beliefs forbade his participation in the production of armaments).

that the denial unconstitutionally burdened the appellant's free exercise of religion, the Court reasoned that the statute forced her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[29] In the Court's view, South Carolina's asserted interests in preventing a deluge of potentially fraudulent unemployment compensation claims, and in not hindering employers from scheduling necessary Saturday work, were insufficient to justify a restriction implicating the free exercise of religion.[30] The Court rejected the assertion that its holding would violate the Establishment Clause, as "[t]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences," and thus did not represent an impermissible endorsement of religious exercise.[31]

Similarly, in *Wisconsin v. Yoder*,[32] the Supreme Court strictly scrutinized a free exercise challenge to Wisconsin's compulsory school attendance law.[33] Recognizing that the Amish respondents had a religious obligation to lead a life unencumbered by "worldly influences,"[34] the Court concluded that an exceptionless compulsory school attendance policy would threaten the continued survival of Amish communities.[35] As in *Sherbert*, the Court reasoned that the challenged regulation forced individuals to make an intolerable choice; faced with a law that conflicted with their religious faith, the Amish respondents either could "abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[36] As the Court explained, this choice reflects "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[37] The Court emphasized that when the interests of parenthood are combined with a free exercise claim, strict scrutiny review is required to prevent the infringement of constitutional rights.[38] Applying strict scrutiny, the Court concluded

29. *Sherbert*, 374 U.S. at 404.
30. *Id.* at 407.
31. *Id.* at 409.
32. 406 U.S. 205 (1972).
33. *Id.* at 207–14.
34. *Id.* at 218.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 233.

that Wisconsin did not have a compelling interest that justified the denial of an exemption for Amish children of public school age.[39]

However, in *Smith*, the Supreme Court broke with this approach and declined to scrutinize strictly the application of a state drug law to the sacramental ingestion of peyote, a hallucinogenic drug.[40] Declaring that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,"[41] the Court maintained that strict scrutiny is not required when a "valid and neutral law of general applicability" imposes an incidental burden on the free exercise of religion.[42] As Justice Scalia's majority opinion explained, the effect of subjecting neutral, generally applicable laws to strict scrutiny review "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."[43]

The Court asserted that this approach was consistent with a proper interpretation of its holdings in *Sherbert* and *Yoder*. Rather than requiring strict scrutiny review of all neutral, generally applicable laws that create a burden on religious exercise, the Court explained that *Sherbert* stands for the limited principle that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[44] Similarly, the Court distinguished and limited its holding in *Yoder* by observing that the compulsory school attendance law at issue in *Yoder* did not implicate "the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with another constitutional protection[ ], [namely] the right of parents . . . to direct the education of their children."[45] Thus, *Yoder*'s strict scrutiny requirement is limited to instances in which neutral, generally applicable laws implicate "hybrid" rights by burdening religious exercise in combination with another constitutional right.[46]

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39. *Id.*

40. *See* Employment Div. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488. The *Smith* respondents were fired from their jobs because they ingested peyote for sacramental purposes at a ceremony of the Native American Church. *Id.* at 874. When respondents subsequently applied for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." *Id.*

41. *Id.* at 878–79.

42. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

43. *Id.* at 886.

44. *Id.* at 884.

45. *Id.* at 881.

46. Judges and legal scholars have questioned the viability of this so-called "hybrid rights doctrine." *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993)

C. RFRA: Congress Responds to *Smith*

In the aftermath of *Smith*, Congress enacted RFRA in order to "restore the compelling interest test as set forth in Sherbert v. Verner . . . and Wisconsin v. Yoder . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[47] To achieve this goal, RFRA provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that the burden is imposed to further a compelling governmental interest.[48] RFRA aimed to protect religious liberty against threats emanating from "all Federal [and state] law, and the implementation of that law . . . whether adopted before or after" RFRA's enactment.[49] In enacting RFRA, Congress asserted that Section 5 of the Fourteenth Amendment provided the constitutional authority for it to legislate standards of judicial review in cases of religious discrimination, consistent with its constitutional duty to enforce the rights guaranteed by the Fourteenth Amendment.[50]

However, in *City of Boerne v. Flores*,[51] the Supreme Court invalidated RFRA as it applied to the states, finding that Congress had exceeded the legitimate scope of its Section 5 enforcement power.[52] Acknowledging that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states,'"[53] the Court nonetheless held that "as broad as the congressional enforcement

(Souter, J., concurring in part and concurring in the judgment) (arguing that *Smith*'s distinction between pure free exercise claims and hybrid rights claims is "ultimately untenable"); Kissinger v. Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (describing the hybrid rights doctrine as "completely illogical"); *cf.* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (recognizing that the Supreme Court "has been somewhat less than precise with regard to the nature of hybrid rights"); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) ("[I]t is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*."). *See generally* Steve H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573 (2003); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling With the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649 (2001).

47. 42 U.S.C. § 2000bb(b)(1) (2000).
48. *Id.* § 2000bb-1(a) to -1(b).
49. *Id.* § 2000bb-3(a).
50. *See id.* § 2000bb(a).
51. 521 U.S. 507, 511 (1997).
52. *Id.* at 526.
53. *Id.* at 518.

power is, it is not unlimited."[54] Congress has a remedial power to enforce the Fourteenth Amendment's restrictions on the states, but it does not have the power to modify substantive rights or "to determine what constitutes a constitutional violation."[55] The Court recognized that it can be difficult to differentiate between permissible laws that merely remedy or prevent constitutional violations, and unconstitutional laws that substantively change governing precedent.[56] Nevertheless, it found that RFRA mandated an impermissible substantive change to the Court's free exercise jurisprudence because "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise."[57] The Court went on to articulate a narrow interpretation of permissible Section 5 legislation: It explained that when Congress acts pursuant to Section 5 authority, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[58] In the absence of such congruence and proportionality, "legislation may become substantive in operation or effect."[59]

Applying this standard to RFRA, the Court concluded that "RFRA is so out of proportion to a supposed remedial preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[60] The Court, in reaching its holding, distinguished RFRA from the provisions of the Voting Rights Act (VRA) that it upheld pursuant to Congress's Section 5 authority in *South Carolina v. Katzenbach*.[61] Unlike RFRA, the VRA was justified by "evidence in the record reflecting the subsisting and pervasive discriminatory" disenfranchisement of minority voters.[62] Recognizing that "the constitutional propriety of legislation adopted under the Enforcement Clause must be judged with reference to the historical experience it reflects," the Court concluded that the VRA was "necessary to 'banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.'"[63] The Court noted that the VRA was limited to discrete "regions of the country where voting discrimination had been most flagrant," and stipulated

54. *Id.*
55. *Id.* at 519.
56. *Id.*
57. *Id.* at 534.
58. *Id.* at 520.
59. *Id.*
60. *Id.* at 532.
61. *Id.* at 525 (discussing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).
62. *Id.* (quoting *Katzenbach*, 383 U.S. at 333–34).
63. *Id.* (quoting *Katzenbach*, 383 U.S. at 308).

that it would terminate in regions where "the danger of substantial voting discrimination ha[d] not materialized during the preceding five years."[64]

In contrast to the VRA, the Court observed, the legislative record supporting RFRA "centered upon anecdotal evidence," and that "the emphasis of the [congressional] hearings was on laws of general applicability which place incidental burdens on religion," rather than a discriminatory object or purpose underlying the imposition of such incidental burdens.[65] The Court noted that RFRA's legislative record failed to identify modern instances of generally applicable laws passed because of religious bigotry.[66] It further emphasized that the imposition of incidental burdens on religious exercise is "a reality of the modern regulatory state," and should not be conflated with an impermissible discriminatory burden on religious exercise.[67] Significantly, the Court identified "zoning regulations and historic preservation laws" as examples of regulations that "as an incident of their normal operation have adverse effects on churches and synagogues" but nevertheless do not require strict scrutiny review.[68]

Given the dearth of evidence to suggest that states have manipulated facially neutral laws of general applicability to discriminate against religious exercise, the Court concluded that RFRA could not be characterized as remedial legislation.[69] It found that

> [t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.[70]

Absent "reason to believe that many of the laws affected by [RFRA] have a significant likelihood of being unconstitutional," the Court declared 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."[71] Instead, by requiring religious exemptions from generally applicable, neutral civil laws, RFRA "provided the Church with a legal weapon that no

64. *Id.* at 532 (quoting *Katzenbach*, 383 U.S. at 331).
65. *Id.* at 530–31.
66. *Id.* at 530.
67. *Id.* at 535.
68. *Id.* at 531.
69. *Id.* at 534–35.
70. *Id.* at 534.
71. *Id.* at 532.

atheist or agnostic can obtain," and thereby expressed a governmental preference for religion over irreligion in violation of the Establishment Clause.[72]

D. RLUIPA: Congress Responds to *Boerne*

RLUIPA represents Congress's efforts to legislate religious liberty protections that will survive judicial review in the aftermath of *Boerne*.[73] First, whereas RFRA was enacted pursuant to Congress's Fourteenth Amendment enforcement power alone, RLUIPA is grounded not only in Section 5, but also in the Commerce and Spending Clauses[74] of Article I.[75] Furthermore, although RFRA applied to all federal and state laws, RLUIPA is designed to provide a congruent response to religious discrimination by limiting its strict scrutiny requirement to governmentally imposed religious burdens on land use and institutionalized persons, the two contexts in which Congress was able to compile evidence suggesting the existence of a widespread pattern of unconstitutional religious discrimination by local governments.[76] Finally, Congress attempted to shape RLUIPA as a proportional response to religious discrimination by limiting its land use provisions to cases where the government has the ability to make an "individualized assessment of the proposed uses for a subject property." Congress claimed that this caveat serves to codify the *Sherbert* exception that the Court recognized in *Smith*.[77] To the extent that RLUIPA accurately codifies recognized precedent, it is clearly a proportional response to identified constitutional violations.

Despite these efforts to remedy the shortcomings of RFRA, Congress likely exceeded the legitimate scope of the Fourteenth Amendment's enforcement provisions by enacting RLUIPA. Although RLUIPA's strict scrutiny requirement is limited to land use and institutionalized persons, the legislative record purporting to demonstrate a widespread pattern of discrimination in these contexts fails to demonstrate that "many of the laws affected by the congressional enactment have a significant likelihood of

72. *Id.* at 537 (Stevens, J., concurring).

73. *See, e.g.*, 146 CONG. REC. 16,622 (2000) (stating that RLUIPA "is the third in a series of bills we have considered on the floor in the last 7 years to deal with some Supreme Court decisions from the early nineties").

74. U.S. CONST. art. I, § 8.

75. 42 U.S.C. §2000cc(a)(2) (2000). *See generally* Evan M. Shapiro, Comment, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255 (2001) (arguing that Congress exceeded its commerce authority by enacting RLUIPA).

76. *See* 146 CONG. REC. 16,698–700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

77. *Id.*

being unconstitutional."[78] Absent a showing of pervasive religious discrimination by local governments, the Supreme Court is likely to find that RLUIPA "is broader than is appropriate if the goal is to prevent and remedy constitutional violations."[79] Moreover, because RLUIPA fails accurately to codify *Sherbert*'s individualized assessment exception to *Smith*, RLUIPA "alters the meaning of the Free Exercise Clause," and fails to achieve "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[80] Thus, if RLUIPA were interpreted in accordance with congressional intent, it likely would be declared unconstitutional by the Supreme Court.

However, recent federal appellate court decisions may have mitigated these constitutional concerns in two ways. First, by requiring plaintiffs to prove that challenged land use regulations are not merely burdensome, but rather driven by religious discrimination, these courts have avoided the danger that the limited legislative record of religious discrimination in land use regulations will result in an unconstitutionally overbroad law. Second, courts have reinterpreted RLUIPA's individualized assessment provision in order to align it with the Supreme Court's holding in *Smith* and subsequent cases. As a result, these courts have ensured that RLUIPA faithfully reflects existing jurisprudence without "alter[ing] the meaning of the Free Exercise Clause."[81]

Even if the Supreme Court does not accept congressional findings of a widespread pattern of governmental discrimination against religious land uses, it might conclude that RLUIPA, as interpreted by lower courts, is a congruent and proportional response to the limited instances of religious discrimination identified by the congressional record. However, the Supreme Court might find that lower courts' narrow constructions of RLUIPA have not lessened its generally broad reach. In that case, the Court would be less likely to accept RLUIPA as a valid exercise of Congress's Section 5 power absent clear evidence of the need for remedial legislation to counter pervasive religious land use discrimination by local governments.

78. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997).
79. *See id.* at 535–37.
80. *See id.* at 519–20.
81. *See id.*

II. IS RLUIPA A VALID EXERCISE OF CONGRESS'S FOURTEENTH AMENDMENT ENFORCEMENT POWER?

A. Evidence of Religious Discrimination in Land Use Regulations

In *Boerne*, the Court emphasized that the Fourteenth Amendment's Section 5 enforcement provision "did not authorize Congress to pass 'general legislation upon the rights of the citizen,'" and that Congress's power is limited to "corrective legislation" that is "necessary and proper for counteracting such laws as the States may adopt or enforce" in violation of judicially recognized constitutional rights.[82] Legislation that exceeds Congress's "'power to provide modes of redress' against offensive state action" is beyond the scope of the enforcement power, and is "repugnant to the Constitution."[83] Thus, if religious liberty legislation based on Section 5 enforcement power is to survive judicial scrutiny, Congress must demonstrate the pervasive existence of governmental religious discrimination.

In direct response to the Court's criticism in *Boerne*, Congress held a series of hearings over three years to identify the scope of religious discrimination in land use regulation.[84] Based on an accumulation of anecdotal and statistical data, supporters of RLUIPA determined that the evidence is "cumulative and mutually reinforcing"—it is greater than the sum of its parts, and demonstrates that land use regulation is a substantial burden on religious liberty. Notably, the evidence suggested that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against" in the application of land use regulations.[85]

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82. *Id.* at 525.

83. *Id.*

84. *See* 146 CONG. REC. 16,699 (2000); *see also* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003). Following the Court's invalidation of RFRA in *Boerne*, Congress introduced the Religious Liberty Protection Acts of 1998 and 1999 (RLPA). *Id.* at 333. However, RLPA was withdrawn in response to criticism from civil rights organizations, which were concerned that the Act would exempt religious landowners from fair housing laws. *Id.* at 334. Instead of holding new hearings to consider RLUIPA, Congress relied on the evidence of religious land use discrimination that was presented during hearings of RLPA. *Id.* Thus, RLUIPA is not supported by an independent, recorded legislative history.

85. 146 CONG. REC. 16,698 (2000) (summarizing the testimony of Prof. Douglas Laycock, Univ. of Texas Law School, *Religious Liberty Protection Act of 1999, Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 196–201 (1999) [hereinafter 1999 *RLPA Hearings*]).

RLUIPA supporters based their conclusions on anecdotal reporting of religious discrimination in particular land use decisions,[86] as well as on a number of statistical studies pointing to a pattern of widespread discrimination against religious land use in general. In rare cases, witnesses testified that "zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in the cases of black churches and Jewish shuls and synagogues."[87] However, proponents of religious liberty legislation testified that zoning boards are generally more subtle, choosing to "lurk behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan,'" rather than reveal an explicit anti-religious bias.[88] Thus, zoning regulations reflect "a pattern of abuse that exists among land use authorities who deny many religious groups their right to free exercise, often using mere pretexts (such as traffic, safety, or behavioral concerns) to mask the actual goal of prohibiting constitutionally protected religious activity."[89] Land use laws are particularly susceptible to such manipulation, as discretionary, individualized assessments of applications for zoning exemptions "readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case."[90] Unfortunately, "[n]o land use official, no city or municipal official, no organization representing states, cities, local governments, or counties, and no

86. Congress heard testimony regarding:

> (1) two instances of unconstitutional state action; (2) two allegations of facts purporting to show unconstitutional government action; (3) two references to cases where the courts did not find constitutional violations and the religious entity criticized the result; (4) multiple references to garden variety zoning laws applied to churches; and (5) private, rather than governmental, expression that does not implicate constitutional violations.

Hamilton, *supra* note 84, at 345. *But cf.* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 729–34 (1999) ("[T]hese cases, drawn from across the country and displaying a variety of land use issues, show anecdotally the need for further protection of free exercise.").

87. *See* 146 CONG. REC. 16,698 (2000).

88. *Id.*; *see also Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 91 (1998) [hereinafter *Hearings on RLPA*] (testimony of John Mauck, Attorney, Mauck, Bellande & Cheely) (quoting a City Mayor who said, "We don't want Spics in this town."); *id.* at 201 (testimony of Bruce D. Shoulson, Attorney, Lowenstein Sandler, P.C.) (describing how "during a hearing on [a zoning] application for an Orthodox Jewish institution, an objector stood and turned to the people in the audience wearing skull caps and said, 'Hitler should have killed more of you.'").

89. H.R. REP. NO. 106-219, at 20 (1999); *see also Hearings on RLPA*, *supra* note 88, at 159 (arguing that RLPA is necessary to safeguard religious land uses "because some municipalities think that everything they do is reasonable and all of their special use standards are reasonable").

90. *Id.*

historical preservation organization was permitted to testify" or rebut these conclusions at the congressional hearings.[91]

Many of the witnesses who did testify before Congress cited a study conducted by Professor W. Cole Durham of Brigham Young University in conjunction with the law firm of Mayer, Brown & Platt.[92] The study examined all 196 cases from 1921 to 1997 in which plaintiffs challenged land use regulations on free exercise grounds, and it revealed that "[m]inority religions representing less than 9% of the population were involved in over 49% of the cases regarding the right to locate religious buildings at a particular site, and in over 33% of the cases seeking approval of accessory uses."[93] Supporters of RLUIPA argued that this evidence indicates that minority religions have a much harder time obtaining zoning approval than do majority religions; moreover, Durham's study further concluded that, once in court, minority religious communities "win their claims at the same rates as larger churches."[94] For supporters of RLUIPA, the common rate of successful litigation outcomes indicated that local zoning authorities were disproportionately discriminating against minority churches that advanced legally meritorious claims.

The Durham study, however, does not support the claim that minority religions are overrepresented in land use litigation because of widespread religious discrimination by local zoning authorities.[95] Durham defined religious groups comprising less than 1.5 percent of the total population as minority religions, and concluded that these minority religions represent 9 percent of the population and 49 percent of zoning disputes regarding the

91. *See* Brief of Amicus Curiae Alabama Preservation Alliance, National League of Cities, et al. at 17–18, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (No. 01-4030). The congressional record also excluded a letter by Mayor Rudolph Giuliani of New York, who urged that Congress allow cities to participate in evaluating the need for RLUIPA. *See* Hamilton, *supra* note 84, at 352–53.

92. *See Hearings on RLPA*, *supra* note 88, at 131, 136–42 (testimony of Prof. W. Cole Durham, Jr., Brigham Young Univ. Law School, and written statement following testimony with appendix to written statement) (discussing a study prepared by the law firm of Mayer, Brown & Platt in January 1997). Durham acknowledged that his work was "not a scientific study in the strict sense," but explained that he did not "know how one would assemble a scientific universe of such cases." *See id.* at 131. The firm of Mayer, Brown & Platt is now the firm of Mayer, Brown, Rowe & Maw.

93. *Id.* at 136.

94. H.R. REP. NO. 106-219, at 24 (1999); *see also 1999 RLPA Hearings*, *supra* note 85, at 72 tbl.3 (statement of Von Keetch, Partner, Kirton & McConkie) (discussing a study of reported cases).

95. Professor Durham did acknowledge that "a study of this type can at best give a rough picture of what is happening." *Hearings on RLPA*, *supra* note 88, at 136. However, despite this caveat, Professor Durham maintained that his conclusion regarding the prevalence of religious discrimination in the land use context "seems inescapable." *Id.*

construction of new religious buildings. Nevertheless, litigation involving only two minority religions, Judaism and Jehovah's Witnesses, accounts for 35.2 percent of such cases.[96] The remaining minority religions represent 5.8 percent of the population and are involved in only 14.4 percent of challenged location denials.[97] Furthermore, while minority religions represent 5.8 percent of the adult population, they account for 6.8 percent of the total adult religious population, further mitigating the discrepancy between minority and mainstream religious land use litigants.[98] Therefore, while these figures suggest that minority religions are somewhat overrepresented in zoning disputes, Durham's study does not support the existence of a prevalent, nationwide pattern of discrimination against minority religions in the land use context.

Moreover, these statistics do not demonstrate even the existence of a widespread, persistent pattern of anti-Jewish or anti–Jehovah's Witnesses discrimination. First, an overwhelming majority of the cases involving Jehovah's Witnesses occurred at least forty years prior to the congressional hearings; none of the cases involving Jehovah's Witnesses were litigated after 1990.[99] This evidence does not support the existence of persistent, ongoing religious land use discrimination, let alone the need to remedy such abuse by permanently constraining the discretion of local zoning authorities throughout the nation.[100]

Second, the evidence of persistent land use discrimination against Judaism is similarly misleading. Durham departed from his own methodology by including Judaism as a minority religion, as Jews constitute 2.2 percent of the population and exceed Durham's threshold standard of 1.5 percent.[101] Moreover, twenty-three of the thirty-eight cases involving Jewish congregations occurred in states with disproportionately high Jewish populations, including California, Florida, New Jersey, and New York, where Jews

96. *See* Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2398 (2002) (citing *Hearings on RLPA*, *supra* note 88, at 143).

97. *Id.* at 2399 (citing *Hearings on RLPA*, *supra* note 88, at 143).

98. *Id.* at 2399–400 (citing *Hearings on RLPA*, *supra* note 88, at 136).

99. *Id.* at 2398 (citing *Hearings on RLPA*, *supra* note 88, at 142–53).

100. *See* City of Boerne v. Flores, 521 U.S. 507, 530–31 (1997) (explaining that RFRA is not a "remedial" Act, in part because "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry").

101. Adams, *supra* note 96, at 2398 (citing *Hearings on RLPA*, *supra* note 88, at 143). If Durham's study had classified Judaism as a majority religion, the proportion of location cases involving "minority religions" would have decreased from 49 percent to 29 percent. *Id.* at 2399.

represent far more than 2.2 percent of the adult population.[102] If Judaism is classified as a mainline majority religion in these states, the evidence that zoning authorities target minority religions for land use discrimination is further weakened. While this analysis does not preclude the abiding influence of anti-Semitism as a significant factor in individual land use decisions, it undermines the assertion that such bigotry is a normative feature of local zoning policy.

A more accurate impression of the extent of religious discrimination in land use regulations can be gleaned from the 1998 National Congregations Study, which assessed the extent to which religious congregations of all denominations are constrained by local zoning regulations.[103] The study revealed that 17 percent of religious congregations, representing over one third of the U.S. population, had applied for a zoning permit or license during the preceding year.[104] However, only 1 percent of these congregations reported that their zoning request was denied;[105] furthermore, five out of six congregations within this 1 percent were affiliated with mainstream religious groups.[106] These results suggest that, contrary to the assumptions that led Congress to enact RLUIPA, religious discrimination in the land use context is an uncommon experience for minority and mainstream religions alike.[107]

Given the absence of persuasive statistical evidence that might demonstrate prevalent religious land use discrimination, anecdotal evidence of such discrimination should not be interpreted as evidence of a widespread problem. Moreover, anecdotal claims of religious land use discrimination are not always persuasive, particularly when zoning officials offer plausible, nondiscriminatory justification for denying requested religious exemptions. The distinction between discriminatory and merely inconvenient zoning regulations is explored in the following sections.

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102. *Id.* In 1999, Jewish individuals constituted 2.9 percent of the general population in California; 4.3 percent in Florida; 5.8 percent in New Jersey; and 9.1 percent in New York. *See* Jim Schwartz & Jeffrey Scheckner, *Jewish Population in the United States, 1999*, *in* 100 AMERICAN JEWISH YEAR BOOK 242 (David Singer & Lawrence Grossman eds., 2000).

103. Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results From the National Congregations Study*, 42 J. CHURCH & ST. 335, 337 (2000).

104. *Id.* at 339.

105. *Id.* at 341.

106. *Id.* at 342.

107. *But cf.* Jensvold, *supra* note 16, at 35 (concluding that "[w]hether the congressional record for RLUIPA illustrates a widespread pattern of First Amendment violations is debatable but is not an outlandish assertion"); Keetch & Richards, *supra* note 86, at 733 (concluding that "[t]hese cases, drawn from across the country and displaying a variety of land use issues, show anecdotally the need for further protection of free exercise").

As the preceding discussion makes plain, RLUIPA cannot be justified as remedial Section 5 legislation, for Congress has failed to provide convincing evidence of pervasive religious discrimination in the application of land use regulations. As the Supreme Court explained in *Boerne*, when Congress legislates on the basis of its Section 5 enforcement power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. . . . The appropriateness of remedial measures must be considered in light of the evil presented."[108] As one commentator has observed: "[I]n response to the Court's Section 5 cases, Congress has not altered its fundamental approach by engaging in sound fact finding, but rather resorted to proof by adjective, sparse anecdotes, and sweeping generalizations parading as facts."[109] Given the dearth of evidence relating to the prevalence of religious land use discrimination, RLUIPA cannot be considered a congruent or proportional response to what is, at most, a limited evil.

B. Does RLUIPA Substantively Alter Judicially Defined Free Exercise Rights?

RLUIPA's constitutional infirmities extend beyond Congress's failure to demonstrate the need for Section 5 legislation to remedy pervasive governmental discrimination against religious land uses. By enacting RLUIPA, Congress has provided religious groups with a level of protection that far exceeds the scope of religious liberty protections adopted by the Supreme Court. This broadened scope of protected religious liberties again suggests that RLUIPA exceeds a congruent and proportional response to identified instances of discrimination. As the Court explained in *Boerne*, Section 5 does not authorize Congress to redefine the nature of constitutional rights because "Congress does not enforce a constitutional right by changing what the right is."[110]

Rather than codifying existing jurisprudence, RLUIPA substantively alters legal doctrine in at least two ways. First, RLUIPA includes an overbroad definition of what constitutes a substantial burden on religious exercise, and thereby substantively changes the scope of judicially recognized religious liberties. Second, by requiring strict scrutiny review in all cases in which a local government is empowered to make an individualized assessment of a religious land use, RLUIPA expands the limited category of cases that trigger strict scrutiny after *Smith*.

108. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).
109. *See* Hamilton, *supra* note 84, at 328.
110. *Flores*, 521 U.S. at 519.

1. RLUIPA's Substantial Burden Provision

a. Existing Substantial Burden Jurisprudence

For many faith communities, including Christians, Jews, Muslims, Buddhists, and Hindus, group worship is a central element of religious life.[111] However, prior to the enactment of RLUIPA, courts held consistently that regulations restricting the location and development of churches and other religious facilities did not impose a substantial burden on religious exercise. Thus, in *Grosz v. City of Miami Beach*,[112] *Christian Gospel Church, Inc. v. City and County of San Francisco*,[113] and *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,[114] the Eleventh, Ninth, and Sixth Circuit Courts of Appeal held that zoning regulations prohibiting religious gatherings in residential neighborhoods did not impose an unconstitutional substantial burden on religious exercise.

In contrast, RLUIPA would dictate a contrary outcome in these cases by expanding the scope of protected religious exercise. RLUIPA provides that:

> 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 . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.[115]

Thus, RLUIPA prohibits a range of governmental activity that courts have refused to characterize as unconstitutional religious discrimination. To the extent that RLUIPA effects a substantive expansion of free exercise rights by proscribing otherwise permissible conduct, it cannot be characterized as a remedial or prophylactic response to governmental religious discrimination within the meaning of the Fourteenth Amendment's enforcement provisions.

Significantly, RLUIPA defines "religious exercise" as including "[t]he use, building, or conversion of real property for the purpose of religious exercise," regardless of whether the proposed property modification is "compelled by, or central to, a system of religious belief."[116] By requiring

111. *See generally* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999).

112. 721 F.2d 729 (11th Cir. 1983).

113. 896 F.2d 1221 (9th Cir. 1990).

114. 699 F.2d 303 (6th Cir. 1983).

115. 42 U.S.C. § 2000cc(a)(1)(A)–(B) (2000).

116. *Id.* § 2000cc-5(7)(B). However, "not every activity carried out by a religious entity or individual constitutes 'religious exercise.'" *See* 146 CONG. REC. 16,700 (2000). For instance, "a

strict scrutiny review of burdensome land use regulations that do not implicate religious exercise compelled by, or central to, a system of religious belief, this section of RLUIPA appears to alter profoundly the definition of substantial burden by conflating land use regulations that burden the core of religious exercise with regulations that burden any aspect of religious exercise whatsoever.[117]

For example, prior to RLUIPA's enactment, the Ninth Circuit in *Christian Gospel Church*[118] rejected a free exercise challenge to a city's denial of a zoning permit to establish a church in an area that was zoned for single-family residences. The church's expert witness testified that denying a permit would impose a substantial burden on religious exercise by conflicting with the "fundamental belief in house church," which maintains that "Jesus is soon coming again and nonresidential structures for worship [thus] are unnecessary and contrary to [church doctrine]."[119] However, the court observed that because the government action in this case did not prohibit home worship in all locations, the burdens imposed on the church were limited to "convenience and expense." In effect, they required the church to "find another home or another forum for worship."[120]

Similarly, in *Congregation of Jehovah's Witnesses*,[121] the Sixth Circuit rejected a free exercise challenge to a municipal zoning ordinance that prohibited the construction of church facilities "in virtually all residential districts in the city."[122] Like the Ninth Circuit in *Christian Gospel Church*, the Sixth Circuit emphasized that the ordinance did not prevent the congregation from purchasing an existing church building, or constructing its own church facility in another part of the city.[123] The court acknowledged that its ruling likely would limit the congregation to property lots that "may

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burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'" *Id.*

117. In enacting RLUIPA, Congress may not have intended to introduce a new definition of what constitutes a substantial burden on religious exercise. As Senators Hatch and Kennedy explained, "it is not this intent of the Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence." *See* 146 CONG. REC. 16,700 (2000). Nevertheless, Supreme Court jurisprudence emphasizes that a burden is not substantial unless it encumbers a central tenet of religious belief or practice. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

118. *Christian Gospel Church*, 896 F.2d at 1221.

119. *Id.* at 1224.

120. *Id.*

121. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983).

122. *Id.*

123. *Id.* at 307.

not meet its budget or satisfy its tastes," but explained that the "First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches."[124]

A literal application of RLUIPA's substantial burden provision likely would reverse the outcome in cases such as *Christian Gospel Church* and *Congregation of Jehovah's Witnesses*, in which the Ninth and Sixth Circuits subjected the challenged zoning regulations to rational basis review, the lowest level of constitutional scrutiny. This potential reversal of judicial precedent suggests that RLUIPA, as enacted, impermissibly "alters the meaning of the Free Exercise Clause" and cannot be supported "as enforcing the Clause" pursuant to the Fourteenth Amendment.[125] Although the Ninth and Sixth Circuits emphasized that religious exercise is not unduly burdened by a zoning scheme allowing worshippers to use property in other parts of a city, RLUIPA provides that any restriction which substantially burdens a landowner's use of "real property for the purpose of religious exercise" must be strictly scrutinized.[126]

Indeed, in *Elsinore Christian Center v. City of Lake Elsinore*,[127] a federal district court in California concluded that RLUIPA exceeds the scope of Congress's Fourteenth Amendment power by instructing courts to apply a substantial burden analysis in a manner that substantively alters existing legal precedent. The district court noted that RLUIPA requires a degree of religious accommodation that exceeds even pre-*Smith* applications of *Sherbert*'s strict scrutiny doctrine. As the court explained, under *Sherbert* a substantial burden on religious exercise "accrues only where compliance with governmentally dictated or proscribed behavior would cause a religious adherent to trespass on a '*central* religious belief or practice.'"[128] However, in the court's view, "RLUIPA was intended to and does upset this test."[129] Zoning regulations seldom have the capacity to impose a substantial burden on religious exercise within the meaning of *Sherbert* because land use regulations rarely implicate a central tenet of religious belief or practice. "RLUIPA, in contrast, self-consciously defines religious exercise *far* more expansively" to include the use of land for religious purposes.[130] "By explicitly prescribing that the centrality of a religious belief is immaterial to whether . . . that

124. *Id.*
125. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).
126. 42 U.S.C. § 2000cc-5(7)(B) (2000).
127. 291 F. Supp. 2d 1083 (C.D. Cal. 2003).
128. *Id.* at 1090.
129. *Id.* at 1091.
130. *Id.* at 1098 (citing 42 U.S.C. § 2000cc-5(7)(A)).

belief constitutes 'religious exercise,' . . . RLUIPA establishes an entirely new and different standard than that employed in prior Free Exercise Clause jurisprudence."[131] In sum, "[b]ecause use of land *is* 'religious exercise' under RLUIPA, there can be no doubt" that the denial of a zoning permit to conduct worship services imposes a substantial burden on religious land use.[132]

The district court in *Elsinore* is the only court to endorse this interpretation of RLUIPA's substantial burden provision. Significantly, it is also the only court to hold RLUIPA unconstitutional. Other federal courts have avoided this analysis by advancing a narrow interpretation of RLUIPA that aligns its substantial burden provision with existing free exercise jurisprudence. In doing so, these courts have adhered to the standard principle of statutory construction that requires a court "first [to] ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided," before subjecting a federal law to constitutional scrutiny.[133] However, the *Elsinore* court determined that this principle was irrelevant to its analysis of RLUIPA.[134] First, the court held, RLUIPA's terms are so explicit as to allow for only one interpretation.[135] Second, the court noted that RLUIPA seems to prohibit creative judicial redefinition of its terms by instructing courts to interpret its provisions "in favor of a broad protection of religious exercise."[136] Thus, the *Elsinore* court was unwilling to search for an interpretation of RLUIPA that might square its provisions with existing free exercise doctrine. Nevertheless, rejecting this rigid adherence to RLUIPA's plain terms, a number of federal courts have attempted to harmonize RLUIPA's substantial burden provision with existing free exercise jurisprudence.

b. Narrowing RLUIPA's Terms to Reflect Existing Substantial Burden Jurisprudence

Although a strict application of RLUIPA's substantial burden provision would significantly broaden existing free exercise jurisprudence as reflected in cases such as *Christian Gospel Church* and *Congregation of Jehovah's*

131. *Id.* at 1091.
132. *Id.*
133. McConnell v. FEC, 540 U.S. 93, 180 (2003) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).
134. *See Elsinore*, 291 F. Supp. 2d at 1087.
135. *Id.* at 1091 ("When the Court finds the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)) (internal quotations omitted)).
136. *See id.* (citing 42 U.S.C. § 2000cc-3(g)).

Witnesses, courts have generally interpreted RLUIPA's terms more narrowly in order to avoid granting expansive benefits to religious groups. While RLUIPA explicitly provides that its terms "shall be construed in favor of a broad protection of religious exercise,"[137] it indicates that this rule of broad construction is limited "to the maximum extent permitted by . . . the Constitution."[138] Thus, narrow judicial interpretations of RLUIPA's substantial burden provision are justified generally by reference to established strands of free exercise doctrine. A judicial unwillingness to grant unique privileges to religious land users is a dominant theme for courts that narrowly construe RLUIPA's substantial burden provisions.

For example, in *Civil Liberties for Urban Believers v. City of Chicago*,[139] the Seventh Circuit held that "in the context of RLUIPA's broad definition of religious exercise, a land use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof— . . . effectively impracticable."[140] RLUIPA provides that a substantial burden on religious exercise is created where a land use regulation "limits or restricts a claimant's use or development of land" for purposes of "any exercise of religion."[141] But the Seventh Circuit explained that interpreting RLUIPA's substantial burden provision this broadly "would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations."[142] Not only would this sort of favoritism for religious land uses erode traditional norms of state autonomy, it also would violate the constitutional proscription against governmental establishment of religion. As the Second Circuit emphasized in *Westchester Day School v. Village of Mamaroneck*:[143]

> RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from [regulating

137. 42 U.S.C. § 2000cc-3(g).

138. *Id.*; *see also* 146 CONG. REC. 16,700 (2000) (claiming that the term "substantial burden" as used in RLUIPA "is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise").

139. 342 F.3d 752 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004).

140. *Id.* at 761.

141. 42 U.S.C. § 2000cc-5(5), (7)(A).

142. *Civil Liberties for Urban Believers*, 342 F.3d at 762.

143. 386 F.3d 183 (2d Cir. 2004).

> religious exercise] in a manner that would express preference for one religion over another, or religion over irreligion.[144]

Consistent with the narrow interpretation of RLUIPA's substantial burden provision endorsed by the Second and Seventh Circuits, the Third Circuit, in *Lighthouse Institute for Evangelism Inc. v. City of Long Branch*,[145] held that the denial of a mission's application for a zoning variance did not impose a substantial burden on religious exercise. As in pre-RLUIPA cases such as *Christian Gospel Church* and *City of Lakewood*, the Third Circuit reasoned that because the mission would have been free to operate within other city zoning districts, the denial imposed only a minimal burden on religious exercise.[146] True, the concurring opinion observed that the mission's religious exercise could not be conducted in other districts because "the church's mission, to 'serve the poor and disadvantaged in downtown,' can only be accomplished downtown."[147] Yet, the majority maintained that so long as alternative locations remained available, the mission's "opportunity for religious exercise was not [unconstitutionally] curtailed by the Ordinance."[148]

Similarly, in *Midrash Sephardi Inc. v. Town of Surfside*,[149] the Eleventh Circuit held that a land use regulation excluding churches and synagogues from seven of eight zoning districts did not impose a substantial burden on religious exercise, even though the plaintiff synagogue asserted a religious need to relocate within the proscribed zones.[150] The court acknowledged that because Orthodox Jews do not drive cars or use public transportation during their weekly Sabbath and religious holidays, Orthodox Jewish synagogues must be located within walking distance of congregants' homes.[151] Although Surfside's zoning scheme permitted churches and synagogues to locate within the town's residential district,[152] Midrash Sephardi claimed that many of its elderly

144. *Id.* at 189.
145. 100 F. App'x 70 (3d Cir. 2004).
146. *Id.* at 77.
147. *Id.* at 78.
148. *Id.* at 77.
149. 366 F.3d 1214, 1219 (11th Cir. 2004).
150. *Id.* at 1228.
151. *Id.* at 1221; *see also Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. 22, 23 (1998) (statement of David Zwiebel, Director, Government Affairs and General Counsel, Agudath Israel of America) ("Zoning laws that make it difficult, or virtually impossible, to build houses of worship within residential areas thus have the practical impact of excluding Orthodox Jews from those areas.").
152. *Midrash Sephardi*, 366 F.3d at 1219. While religious assemblies were not prohibited from locating within this "RD-1 two family residential district," they were still required to obtain a conditional use permit in order to do so. *Id.* Conditional use permits were "also required for educational institutions and museums, offstreet parking lots and garages, public and governmental buildings, and public utilities." *Id.* Surfside

members lived closer to the town's business district, which was out of walking range from the residential district.[153] However, citing the Seventh Circuit's holding in *Civil Liberties for Urban Believers*, the Eleventh Circuit concluded that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[154] Applying this standard, the court determined that "the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of RLUIPA," notwithstanding the reality that elderly members of the congregation who had difficulty walking would not be able to attend services at a more distant location.[155] Ultimately, the court reasoned that "allow[ing] religious exemptions to alleviate even the small burden of walking a few extra blocks would run the risk of impermissibly favoring religion over other secular institutions," in violation of the Establishment Clause.[156]

Cases such as *Civil Liberties for Urban Believers*, *Lighthouse Institute*, and *Midrash Sephardi* illustrate that RLUIPA's enactment has left judicial interpretations of what constitutes a substantial burden on religious exercise largely intact. Still, the district court's decision in *Elsinore* marks a striking departure from the restrained interpretation of RLUIPA's substantial burden provision adopted by the Seventh, Second, Third, and Eleventh Circuits. Although courts in these circuits have successfully harmonized the substantial burden provision with prior case law concerning religious land use, they have achieved this consistency by contravening the plain meaning of the statute. Perhaps these courts understandably have doubted that Congress intended to broaden the substantial burden standard given its instruction to interpret RLUIPA in light of Supreme Court precedent.[157] However, RLUIPA obviates the Court's jurisprudence by proscribing the imposition of substantial burdens on religious land uses that may have little bearing on religious doctrine or observance. Thus, most lower courts appear to have disregarded Congress's intent to broaden the scope of protected

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claimed that this permitting requirement was justified as an "exercise of planning judgment," including the need to limit any "possible impact on neighboring properties" within the RD-1 zone. *Id.*

153. *Id.* at 1220–21.

154. *Id.* at 1227.

155. *Id.* at 1228.

156. *Id.* Although the court declined to recognize a substantial burden, it ultimately ruled in favor of Midrash Sephardi because the zoning ordinance impermissibly attempted to target religious assemblies. *See id.* at 1233; *infra* notes 204–209 and accompanying text.

157. *See* 146 CONG. REC. 16,700 (2000).

religious conduct.[158] Conversely, Judge Wilson's opinion in *Elsinore* emphasizes the expanded scope of protected religious exercise under RLUIPA, without responding to Congress's direction to interpret its provisions in light of existing Supreme Court precedent. Indeed, by invalidating RLUIPA in its entirety, Judge Wilson appears to have thwarted Congress's overarching purpose of making it easier for religious plaintiffs to obtain relief from burdensome zoning regulations. Nevertheless, Congress cannot legislate beyond the scope of its Fourteenth Amendment enforcement power by simply denying that it has done so. As Judge Wilson recognized, the substantial burden provision explicitly modifies existing Supreme Court precedent by extending protection to fundamental and attenuated religious doctrines alike. By nullifying the substantial burden provision through judicial fiat, the federal circuit courts have disregarded congressional intent in favor of judicial subjectivity, creating legal confusion and uncertainty for local zoning authorities.

2. RLUIPA's Individualized Assessment Provision

a. Zoning Assessments as Neutral Laws of General Applicability

The Supreme Court in *Smith* reasoned that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[159] Such an approach would permit an individual, "by virtue of his beliefs, 'to become a law unto himself,' . . . contradict[ing] both constitutional tradition and common sense."[160] Thus, the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[161] However, the Court provided that "where the State has in

158. Professor Ira Lupu suggests that "[e]ven those judges inclined to protect religion" are reluctant to impose "forceful and general principles which cannot be readily evaded in subsequent cases" because religious exemption claims are "inevitably . . . context dependent, fact sensitive, and highly nuanced." Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 579 (1999).

159. Employment Div. v. Smith, 494 U.S. 872, 885 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

160. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

161. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

place a system of individual exemptions" from compliance with a neutral law of general applicability, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[162] The Court reasoned that where exemptions are granted based on "individualized governmental assessment of the reasons for the relevant conduct," strict scrutiny review ensures "equality of treatment" for religiously motivated exemption requests.[163]

In *St. Bartholomew's Church v. City of New York*,[164] decided prior to the enactment of RLUIPA, the Second Circuit explained that *Smith* established a "critical distinction . . . between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented."[165] Based on this understanding of *Smith*'s individualized assessment exception, the Second Circuit held that the discretionary designation of a church as a historic landmark pursuant to New York's landmark law was a neutral regulation of general applicability.[166] The court acknowledged that land use regulation "is hardly a process in which the exercise of discretion is constrained by scientific principles or unaffected by selfish or political interests."[167] Yet it refused to apply strict scrutiny unless the church could demonstrate that its designation as a historic landmark was the product of intentional religious discrimination."[168]

This emphasis on intentional discrimination as the trigger for strict scrutiny review of land use regulations that burden religious exercise is also reflected in the Fifth Circuit's approach in *Islamic Center of Mississippi, Inc. v. City of Starkville*.[169] The zoning regulation at issue in that case required churches to apply for an exception from a general prohibition on the use of buildings within city limits as churches.[170] The plaintiff, Islamic Center, owned a building immediately adjacent to a church in a zoning district that included twenty-five other Christian churches.[171] While the city acknowledged that it had never before denied a zoning exception to a religious group, it

162. *Id.* at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).
163. *Id.* at 886.
164. 914 F.2d 348 (2d Cir. 1990).
165. *Id.* at 354.
166. *Id.*
167. *Id.* at 355.
168. *Id.* at 354; *see also* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 955–56 (2001) (concluding that the court's holding in *Congregation of Jehovah's Witnesses* "clearly demonstrates the need for guiding and reinforcing legislation" such as RLUIPA).
169. 840 F.2d 293 (5th Cir. 1988).
170. *Id.* at 294.
171. *Id.*

refused to grant one for the Islamic Center.[172] As the Fifth Circuit explained, this "record makes it clear that the City did not act in a religiously neutral manner when it rejected an exception for the Islamic Center."[173] The city's manipulation of an individualized assessment regime for the purpose of discriminating against a religious group constituted a free exercise violation.

Finally, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[174] the Supreme Court had an opportunity to clarify the individualized assessment exception to *Smith*'s general holding. In *Lukumi*, the Court held that a city ordinance regulating the ritual slaughter of animals was not a neutral law of general applicability.[175] The Court explained that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[176] Although the challenged regulation was facially neutral, the Court concluded that "suppression of the central element of the Santeria worship service was the object of the ordinances."[177] Furthermore, because the ordinance was directed "only against conduct motivated by religious belief," it reflects the "precise evil [that] the requirement of general applicability is designed to prevent."[178]

Taken together, *St. Bartholomew's*, *Islamic Center*, and *Lukumi* illustrate the scope of the individualized assessment doctrine that the Supreme Court preserved in *Smith*. These cases demonstrate a key prerequisite for strict scrutiny review of a neutral law of general applicability that imposes a burden on religious exercise: In each case, strict scrutiny was triggered when a government targeted religious conduct for distinctive treatment or sought to advance legitimate governmental interests only against conduct with religious motivations. In contrast, when a local government makes an individualized assessment based on neutral criteria that it applies consistently to religious and secular exemption requests alike, courts will not apply *Sherbert*'s strict scrutiny standard of review.

172. *Id.*
173. *Id.* at 302.
174. 508 U.S. 520 (1993).
175. *Id.* at 547.
176. *Id.* at 532.
177. *Id.* at 534.
178. *Id.* at 545–46.

b. As Enacted, RLUIPA Redefines Zoning Regulations as Individualized Assessments

RLUIPA represents a substantial departure from the individualized assessment doctrine as defined by the Supreme Court in *Smith*, and as applied by federal circuit courts in cases such as *St. Bartholomew's* and *Lukumi*. In *Smith*, the Supreme Court provided that strict scrutiny is appropriate when the government makes an individualized assessment of an applicant's motive in seeking a requested exemption from a neutral law of general applicability.[179] To trigger strict scrutiny, a local government must deny an exemption because of the religiously motivated nature of an applicant's request. Alternatively, when a denial is predicated on legitimate, nondiscriminatory considerations, *Smith* instructs courts to defer to local governmental authority and to uphold challenged burdens on religious exercise that are imposed pursuant to some rational basis. As the Second Circuit explained in *St. Bartholomew's*, there is no need for courts to impose strict scrutiny on all zoning decisions that adversely impact religious exercise. After all, there are often legitimate, nondiscriminatory reasons for a government to deny a religiously motivated variance request. For example, churches are often designated as historic landmarks pursuant to facially neutral landmark laws "[b]ecause of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive . . . having 'special character or special historical or aesthetic interest or value.'"[180] This sort of burden on religious exercise does not demonstrate that landmark laws suffer from "a lack of neutrality or general applicability" unless there is evidence of a governmental intent to discriminate against religion in the designation of landmark sites.[181]

In contrast to this established individualized assessment doctrine, RLUIPA requires strict scrutiny of land use determinations that substantially burden religious exercise when a government makes, or is permitted to make, "individualized assessments of the proposed uses for the property involved."[182] This provision broadens the scope of existing doctrine by focusing on the *proposed uses* for a subject property, rather than an applicant's *religious motive* for requesting a zoning exemption. This distinction is critical given that a broad spectrum of land use regulations involve individualized

179. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

180. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990).

181. *Id.* at 354–55.

182. 42 U.S.C. § 2000cc(a)(2)(C) (2000).

assessments of the proposed uses for a subject property.[183] But under established free exercise doctrine, these individualized assessments alone would not trigger strict scrutiny review absent evidence of intentional religious discrimination by local land use authorities. A local government might, for example, determine that the proposed use of a property would create undesirable noise or road congestion, or that the proposed use would be inconsistent with the character of a neighborhood. Such a determination might have no bearing whatever on the religious nature of the proposed use so denied. However, RLUIPA obviates the need, in religious land use cases, to demonstrate that an adverse zoning decision is driven by intentional religious discrimination. Instead, RLUIPA triggers strict scrutiny whenever an individualized assessment results in the imposition of a substantial burden on religious exercise, regardless of whether the assessment relates to legitimate zoning interests or anti-religious animosity.

In *Elsinore*, the district court held that Congress exceeded its Fourteenth Amendment enforcement power by enacting RLUIPA, in part because the statute cannot be characterized as a codification of *Smith*'s individualized assessment doctrine.[184] Judge Wilson's opinion emphasized that under *Smith*, "in circumstances in which individualized *exemptions* from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'"[185] By contrast, "[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."[186] If all land uses are subject to a zoning regulation, it is specious to claim that religious land users suffer discrimination by being forced to comply with the same rules that govern all other land users.[187]

Moreover, even if a city's permit process involves a system of individualized exemptions from general zoning rules, existing free exercise doctrine would not impose strict scrutiny absent evidence that the city had refused to extend its exemption system to cases of religious hardship.[188] Hence, in order to trigger strict scrutiny, a religious landowner would need to

183. *See supra* Part I.A (discussing the role of governmental discretion in the evaluation of applications for conditional use and special use permits, and in the application of architectural review standards and historic landmark preservation laws).

184. Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1097 (C.D. Cal. 2003).

185. *Id.* at 1098 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993)).

186. *Id.*

187. *Id.*

188. *Id.* at 1099.

demonstrate that a city denied a requested variance because of his or her religion. In contrast, RLUIPA triggers strict scrutiny review merely because a local government makes an individualized assessment of an applicant's request, "not because it fails to take religious hardship into account."[189] Thus, RLUIPA is not a codification of the *Sherbert* exception to *Smith* because RLUIPA entitles religious institutions "to strict scrutiny review of any governmental action restricting its religious use of land, regardless of the degree to which that action fails to take account of religious hardship."[190]

c. Narrowing RLUIPA's Terms to Reflect Individualized Assessment Jurisprudence

Although the court's interpretation of RLUIPA in *Elsinore* is consistent with congressional intent, federal circuit courts have upheld RLUIPA as a codification of existing precedent by narrowly interpreting its individualized assessment provision to reflect established doctrine. For example, in *Civil Liberties for Urban Believers*, the Seventh Circuit determined that a challenged zoning regulation did not impermissibly target religious land use by referring to "'church' as just one among many and varied religious and nonreligious regulated uses."[191] The regulation authorized local zoning authorities to grant exemptions on an individualized basis; still, the court concluded that because "it is neither the policy nor the practice of Chicago to refuse to extend to churches its system of individualized exemptions," the zoning variance denial occurred within the context of "a generally applicable system of land-use regulation."[192]

Similarly, in *Lighthouse Institute*, the Third Circuit held that the denial of a church's request to operate within a zone that excluded religious land uses "is properly considered as a neutral law of general applicability."[193] Although the ordinance authorized the city to grant individualized exemptions from the zoning exclusion, the court determined that the denial was not based on the church's religious motivation for seeking the exemption. Instead, the court determined that the local government acted in accordance with a legitimate effort to "promot[e] the revitalization of the City's downtown

189. *Id.*
190. *Id.*
191. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 763 (7th Cir. 2003).
192. *Id.* at 764.
193. Lighthouse Inst. for Evangelism Inc. v. City of Long Branch, 100 F. App'x 70, 75 (3d Cir. 2004).

area," by creating a zoning system under which "churches are only one of numerous uses which are not specifically permitted uses."[194]

Finally, in *Midrash Sephardi*, the Eleventh Circuit held that the City of Surfside violated RLUIPA by denying the synagogue an exemption from a zoning ordinance that prohibited churches and synagogues in seven of eight zoning districts.[195] However, consistent with the Seventh Circuit's approach in *Civil Liberties for Urban Believers*, and the Third Circuit's approach in *Lighthouse Institute*, the Eleventh Circuit did not interpret RLUIPA as triggering strict scrutiny whenever a substantial burden is imposed pursuant to a system of individualized assessments. As the court observed, "[z]oning laws inherently distinguish between uses and necessarily involve selection and categorization, often restricting religious assemblies to designated districts and frequently requiring that religious assemblies" apply for exemptions to locate within a restricted zone.[196]

Rather than altering *Smith*'s individualized assessment exception, the Eleventh Circuit explained that

> RLUIPA allows courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability. A zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly.[197]

Although Surfside argued that it distinguished between churches and other land uses on the basis of legitimate zoning objectives, the court concluded that the challenged regulation was not neutral or generally applicable because it "pursues Surfside's interests only against conduct motivated by religious belief."[198] The court held that by refusing to consider churches' requested exemptions on the same basis as secular landowners' exemption requests, Surfside improperly discriminated against religious assemblies.[199] Thus, the Eleventh Circuit interpreted RLUIPA as embodying the Supreme Court's holding in *Smith*: Discriminatory treatment of religiously motivated zoning exemption requests "extinguishes an ordinance's neutrality" and triggers strict scrutiny judicial review.[200]

194. *Id.*
195. *See* Midrash Sephardi Inc. v. Town of Surfside, 366 F.3d 1214, 1214 (11th Cir. 2004).
196. *Id.* at 1234.
197. *Id.* at 1232.
198. *Id.* at 1235.
199. *Id.* at 1234.
200. *Id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

III. IS RLUIPA AN EFFECTIVE MEANS OF FURTHERING RELIGIOUS LIBERTY PROTECTIONS?

A. Does RLUIPA Effectively Protect Religious Liberty?

Federal circuit courts have construed RLUIPA's religious liberty provisions as reflecting existing strands of free exercise jurisprudence. As a consequence of this narrow judicial construction, RLUIPA does little to counteract the burdensome impact of zoning regulations on religious land uses. Indeed, RLUIPA may actually impair the ability of courts to protect free exercise in the land use context. At least one commentator has suggested that by providing a focal point for free exercise litigation, laws such as RLUIPA may promote the atrophy of traditional free exercise claims by undermining the "possibilities for new and creative approaches to free exercise adjudication" in future cases.[201] This danger is particularly acute in cases where federal religious liberty legislation encompasses the field of state constitutional law, an otherwise fertile source for creative legal analysis.[202] Although RLUIPA applies to the limited contexts of land use regulation and institutionalized persons, state courts may conclude "that exemption claims which fall outside the scope of that legislation are not presumptively deserving of special respect and concern."[203] Furthermore, the failure of RFRA to shift the legal landscape in favor of free exercise claimants suggests that the potential benefits to be derived from religious liberty legislation may be modest indeed. In the four years prior to RFRA's invalidation by the Supreme Court, lower courts' reluctance to "construe the statute in ways which would give it real bite" resulted in litigation outcomes that were consistent with traditional free exercise doctrine.[204]

Nevertheless, supporters of RLUIPA suggest that it may enhance religious liberty in one of two ways. First, RLUIPA may provide sympathetic courts "with the least controversial way of applying strict scrutiny to land

201. *See* Lupu, *supra* note 158, at 580. For a potential illustration of such atrophy, see Murphy v. Zoning Comm'n, 289 F. Supp. 2d 87 (D. Conn. 2003), *vacated by* Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005) (granting a request for a preliminary injunction on the merits of plaintiffs' RLUIPA claim, while declining to address plaintiffs' additional [state] constitutional challenges).

202. *See* Lupu, *supra* note 158, at 580.

203. *Id.* at 581.

204. *See id.* at 570. Like RLUIPA, "RFRA was weakened primarily by very narrow judicial interpretations of its 'substantial burden' requirement." *Id.* at 578.

use laws alleged to burden religious freedom."[205] Second, by introducing the threat of federal litigation, RLUIPA may induce local governments to concede to the demands of religious land users. However, neither of these arguments is particularly compelling. As discussed above, federal circuit courts have appeared reluctant to construe RLUIPA beyond the scope of traditional free exercise doctrine. Moreover, because traditional free exercise and equal protection doctrines already prohibit intentional religious discrimination, RLUIPA might force local governments to abandon legitimate, nondiscriminatory motives for denying religious land use requests. Although, in certain instances, even a modest enhancement of religious liberty protection may be preferable to no enhancement at all, RLUIPA's negative effects arguably outweigh its purported benefits. Thus, even if RLUIPA is constitutional, it may be seen as unwise and unnecessary.

B. RLUIPA Undermines a Valuable Tradition of Local Land Use Authority

To the extent that RLUIPA is designed to intrude on a sphere of local governmental autonomy, it threatens to undermine a cherished constitutional norm. Local governments are vested with the authority to implement land use regulations for good reasons. Land use regulations inherently affect local communities, and local governments are in a better position than the federal government to reflect local land use priorities accurately.[206] As the Supreme Court has recognized, "regulation of land use is perhaps the quintessential state activity."[207]

A comprehensive zoning scheme is essential for the preservation of a community's unique character, and the responsibility of devising such a plan forces residents to mediate between conflicting values and arrive at a consensus that accurately captures local sentiments. Moreover, community members can express their dissatisfaction with a zoning regulation promulgated by local government more easily than they can protest a regulation imposed by the national legislature. At the core of this argument is the notion that diverse and geographically diffuse communities have different needs, traditions, and values, and that local land use controls should be allowed to reflect these unique local

205. *See* Sara Smolik, Note, *The Utility and Efficacy of the RLUIPA: Was It a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723, 759 (2004).

206. *See generally* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1815 (2004) (asserting that "local government—and more generally the decentralization of power—is a robust structural component of religious liberty").

207. FERC v. Mississippi, 456 U.S. 742, 768 n.30 (1982).

interests. For these reasons, federal courts have "emphasize[d] . . . reluctance to substitute [their] judgment for that of local decision-makers, particularly in matters of such local concern as land-use planning."[208]

Furthermore, modern religious land uses are often incompatible with the character of local communities. "Mega-churches" can be as large as shopping malls, bringing together thousands of worshippers from a diffuse region, while imposing attendant burdens such as noise and traffic problems on local residents.[209] As Marci Hamilton argues, "Land use law is the quintessential zero-sum game, where giving privileges to one landowner more often than not undermines the rights of neighbors and other members of the community."[210] Thus, RLUIPA creates a privilege for religious land uses at the expense of the community as a whole, and unjustifiably strips local governments' traditional power to design and implement zoning regulations.[211]

C. RLUIPA May Have the Effect of Promoting Religious Intolerance

Religious discrimination and intolerance likely will be amplified where local communities perceive that the power of municipal government to

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208. Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 596 (3d Cir. 1998); *see also* Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 211–14 (2001) (arguing that RLUIPA violates the Tenth Amendment because the federal government cannot commandeer state governments to implement federal land use regulations).

209. *See* Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Use After* Boerne, 68 GEO. WASH. L. REV. 861, 920 (2000); John Leland, *A Church That Packs Them in, 16,000 at a Time*, N.Y. TIMES, July 18, 2005, at A2 (describing a congregation of 30,000 members that plans to run weekly services for 40,000 to 50,000 people by the year's end); Patty Pensa, SUN-SENTINEL (Fort Lauderdale), June 27, 2005, at 1B ("The possibility of a church moving next door has residents clutching to the quietude they say added noise and traffic would disrupt."); *see also* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 927 (2000) (arguing that "the current cultural landscape prevents religious liberty from being plausibly defended by means of *religious* exemptions"); Santoro, *supra* note 16, at 531 (observing that the "changing nature of religious institutions, including the size of their houses of worship, their goals and values, the communities they serve, and the services they provide, has resulted in an increasingly less accommodating attitude among local communities to religious land use").

210. *See* Hamilton, *supra* note 84, at 355.

211. *See* Peter Applebome, *In the Character of a Village, It's Property vs. Religion*, N.Y. TIMES, June 26, 2005, § 1, at 25. John C. Layne, mayor of Airmont, New York, whose community has been sued under RLUIPA stated:

> I'm a practicing Roman Catholic. My children go to religious school. My wife teaches at a religious school. But I don't think it's the place of religion to change the character of a single-family neighborhood, and I don't think it's the place of the federal government to take local land use decisions from local governments.

Id.; Walsh, *supra* note 208, at 189 (arguing that RLUIPA violates the Establishment Clause because it "favors and protects those with a system of religious beliefs over those who do not hold an organized view of religion").

legislate in furtherance of the common good has been abrogated by special accommodation to religious land use.[212] Indeed, "the vast majority of Americans are religious believers, church attendance is higher in the United States than anywhere else in the world, higher than at any time in U.S. history, and religious viewpoints fill the public square."[213] Thus, RLUIPA empowers an already powerful political constituency at the expense of more vulnerable communities. Although the congressional hearings on RLUIPA emphasized the plight of "new, small, or unfamiliar churches,"[214] the "result of church expansion is too often that neighborhood streets where children once played roller hockey are now so busy that parents are uneasy letting the children play in the front yard."[215] For example, in one small California town, a congregation numbering 3700 adults and children has sought to expand its facility to accommodate its growing membership.[216] Although "the congregation amounts to half the city's population and has a budget that exceeds the city's," RLUIPA undermines the city's traditional ability to shield its citizens from the collateral affects of further expansion.[217] While local governments retain the power to zone out other intensive land uses that are incompatible with the character of a local community, RLUIPA is predicated upon the assumption that equivalent efforts to zone out religious land uses must be the product of religious bigotry.. Thus, RLUIPA forces homeowners to surrender control over regulating the character of their communities, while insinuating that homeowners who object to this sacrifice are guilty of religious discrimination.[218] Instead of promoting tolerance and religious freedom, the fundamental unfairness of RLUIPA's distinction between religious and secular land users is likely to engender religious hostility and

212. Religious liberty legislation might also threaten religious freedom by facilitating "further atrophy of the judicial capacity to protect religion"; when RLUIPA "claims fail, free exercise adjudication will theoretically remain necessary, but in fact will likely get short shrift." Lupu, *supra* note 158, at 580. *But see* Smolik, *supra* note 205, at 759 (concluding that RLUIPA provides "an atmosphere in which religious liberty is more easily protected by courts uncertain of how far to push the limits of *Smith*").

213. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 7 (2005).

214. 146 CONG. REC. 16,698 (2000).

215. HAMILTON, *supra* note 213, at 79.

216. *Id.*

217. *See id.*

218. In addition to fueling religious intolerance by allowing sectarian goals to overcome the collective good, RLUIPA might produce unanticipated conflicts beyond the zoning context. For example, under RLUIPA's expansive definition of substantial burden, churches could demand exemptions from municipal health and safety regulations. *See* Walsh, *supra* note 208, at 197. Although such laws are clearly rooted in the government's compelling interests in maintaining public health and welfare, they might still be overturned under strict scrutiny review if there are less restrictive means by which a city could achieve the same legitimate goals.

conflict. Recognizing the divisive impact of RLUIPA litigation, the district court in *Castle Hills First Baptist Church v. City of Castle Hills*[219] urged both parties to strive for a modicum of mutual respect and understanding:

> The Court . . . encourage[s] Castle Hills and all other similarly situated communities to engage in thorough and positive debate and negotiation on the issues of zoning of religious organizations and places of worship, recognizing that in the arena of religion, all parties need trod lightly, out of respect for the beliefs of the adherents and out of respect for the importance of religion to our larger American culture. Cities must govern the health, safety and welfare of their communities, but in so doing, should consider carefully the positive and supportive role that a place of worship will play in doing so.[220]

Unfortunately, by granting religious groups special powers to control this debate, RLUIPA renders the prospect for such productive discourse more remote than ever.

CONCLUSION

RLUIPA is an attempt by Congress to ensure that local land use regulations do not infringe on the free exercise guarantees of the First Amendment. Recognizing that the discretionary nature of land use regulations might allow local governments to discriminate against unpopular religious groups with impunity, RLUIPA requires that courts strictly scrutinize discretionary zoning decisions that create a substantial burden on religious exercise. However, by drafting RLUIPA so as to enhance religious liberty protections, Congress exceeded the legitimate scope of its Section 5 enforcement power. Furthermore, the requirements of RLUIPA curtail a longstanding tradition of local autonomy in the domain of land use regulation. The judicial decisions to which Congress responded with RLUIPA, and the cases subsequently decided, represent a significant chapter not only in land use regulation, but in the inherent tensions between the Free Exercise and Establishment Clauses. RLUIPA is by no means the concluding chapter in this continuing saga.

219. No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669 (W.D. Tex. Mar. 17, 2004).
220. *Id.* at *83–*84.