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Shawn Jensvold

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> [L]egislatures cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind.[1] It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation.[2]
>
> --Thomas Jefferson

I. INTRODUCTION

In response to the substantial increase in litigation over conflicts between land use regulations and religious assembly,[3] Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[4] signed into law on September 22, 2000. RLUIPA is a targeted bill that prohibits the government from, *inter alia*, substantially burdening religious assembly.[5] RLUIPA protects religious assembly in

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 The author would like to thank Professor Alan Brownstein for his invaluable comments and suggestions. Thanks also to professor Debra Bassett for reviewing the citations. Of course, any analytical or other errors must be attributed solely to the author.

1. Thomas Jefferson to James Madison, Oct. 28, 1785, *reprinted in* 8THE PAPERS OF THOMAS JEFFERSON682 (Julian P. Boyd ed., 1953).

2. Thomas Jefferson, Minutes of the Board of Visitors of the University of Virginia (Oct. 7, 1822), *reprinted in* 19 THE WRITINGS OF THOMAS JEFFERSON 414 (Albert Ellery Bergh ed., 1907).

3. *See, e.g.*, Von G. Keetch and Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999). Mr. Keetch is a partner at the law firm of Kirton & McConkie in Salt Lake City. Professor Laycock serves as the Alice McKean Young Regents Chair in Law at the University of Texas at Austin.

4. Pub. L. No. 106-274, 1, 114 Stat. 803 (to be codified at 42 U.S.C. 2000cc) [RLUIPA].

5. *See* Religious Land Use and Institutionalized Persons Act § 2(a)(1). The First Amend-

two particular areas. First, it precludes the government from imposing substantial burdens upon the religious practices of individuals, assemblies, and institutions through land use regulations.[6] In a following section, RLUIPA protects the religious rights of prisoners.[7] Regarding land use regulations, RLUIPA applies only to the extent that Congress has power to regulate under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment.[8]

Under RLUIPA, if a government substantially burdens the exercise of religion through a land use regulation, it must demonstrate that the imposition of the burden serves a compelling state interest and is the least restrictive means for furthering that interest.[9] RLUIPA also prohibits governments from imposing or implementing land use regulations that discriminate against religious assemblies, treating religious assemblies on "less than equal terms" than secular groups, or totally excluding religious assemblies from particular jurisdictions.[10]

This article will focus on the constitutionality of RLUIPA as it pertains to land use regulation. More specifically, it will examine whether Congress exceeded its power under Section 5 of the Fourteenth Amendment by imposing RLUIPA's land use provisions upon the States.[11]

Recently, the Supreme Court restricted Congress's power under Section 5.[12] For a law to be a valid exercise of Congress's power under Section 5:

> There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.[13]

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ment's Free Exercise Clause protects religious assembly. The First Amendment states: "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I.

6. *See* Religious Land Use and Institutionalized Persons Act § 2(a)(1).

7. *See id.* § 3.

8. *See id.* §§ 2(a)(2)(a)-(c).

9. *See id.* § 2(a)(1). The compelling state interest and least restrictive means tests are collectively known as "strict scrutiny."

10. *Id.* §§ 2(b)(1)-(3).

11. Section 5 of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. This paper will not address questions regarding institutionalized persons, or Congress's power to regulate land use regulations under the Commerce and Spending Clauses. This is a legitimate analytical exercise, because RLUIPA contains a "severability" clause. *See* Religious Land Use and Institutionalized Persons Act § 5(i). Thus, if the Court strikes down one section of the act as unconstitutional, the other sections remain in force.

12. *See* City of Boerne v. Flores, 521 U.S. 507, 520-21 (1997) (striking down the Religious Freedom and Restoration Act (RFRA) on grounds that Congress exceeded its Section 5 enforcement power). For further discussion of *Flores* and RFRA, see *infra* notes 37-46 and accompanying text.

13. *Flores*, 521 U.S. at 520.

Stated another way, any legislation enacted under Congress's Section 5 power must remedy or prevent[14] a violation of the substantive provisions of Section 1 of the Fourteenth Amendment as the Supreme Court has interpreted it.[15] If the legislation does not remedy or prevent such a violation, then it does not enforce the Fourteenth Amendment, but rather attempts to alter the meaning of the constitutional provision(s) at issue.[16] It is the responsibility of the courts, not Congress, to interpret the Constitution, and nothing in Section 5 suggests otherwise.[17]

In response to the Court's "congruence and proportionality" requirement, RLUIPA's legislative history is replete with examples where land use regulations have suppressed religious assembly.[18] Critics of RLUIPA, however, argue that these examples do not demonstrate a "pattern of 'widespread and persisting' constitutional violations by the states."[19] Instead of remedying or preventing religious discrimination, RLUIPA, its detractors maintain, is an unconstitutional intrusion upon the rights of local governments to control the use of land within their respective jurisdictions.[20]

Related to the issue of whether RLUIPA is remedial or preventive are general concerns over federalism. Because local governments retain almost exclusive control over land use, RLUIPA's critics argue that the law is inconsistent with the Constitution's general principles of federalism and the specific language of the Tenth Amendment.[21] As a federal regulation requiring judicial review of Free Exercise challenges to land use regulations, RLUIPA, critics fear, will preclude the people, acting

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14. "Remedial" implies relief for existing constitutional violations, while "preventive" indicates a prophylactic function.

15. Section 1 states that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

16. *See Flores*, 521 U.S. at 520.

17. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

18. *See, e.g.*, 146 CONG. REC. E1564 (daily ed. Sept. 22, 2000) (document submitted by Rep. Hyde).

19. Marci Hamilton, letter to U.S. Senate on behalf of the National League of Cities (July 24, 2000) [hereinafter Hamilton letter] (on file with author and available at author's personal web site: <http://www.marcihamilton.com/rlpa/rluipa_letter.htm>) (quoting *Flores*, 521 U.S. at 526). Professor Hamilton is a Professor of Law at Benjamin N. Cardozo School of Law and was the lead counsel for the City of Boerne in *Flores*.

20. *See, e.g., id.*

21. *See, e.g., id.* The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

through their local governments, from controlling land use within their communities.[22]

RLUIPA is a carefully crafted piece of legislation, despite the valid concerns over the Act's seemingly expansive control over land use regulations offered by local government officials, legal scholars, and others. Indeed, the language of RLUIPA clearly indicates that Congress attempted to address the Court's concerns in *Flores* concerning the scope of Congress's power under Section 5 of the Fourteenth Amendment.[23] The factors that will determine whether RLUIPA will survive judicial review and succeed in protecting religion against land use discrimination are the focus of this article.

II. RLUIPA AND THE SUPREME COURT'S FREE EXERCISE CLAUSE JURISPRUDENCE

A. Employment Division v. Smith[24] *and the Demise of Strict Scrutiny*

Before analyzing the constitutional merits of RLUIPA, it is useful to briefly examine the Supreme Court's recent treatment of the Free Exercise Clause. The compelling state interest test that RLUIPA requires for land use regulations when they substantially burden religious exercise has its roots in the Supreme Court's early Free Exercise Clause cases.[25]

In 1990, however, the Supreme Court, in perhaps its most unpopular decision of the latter half of the twentieth century, virtually abandoned the use of strict scrutiny in Free Exercise Clause cases.[26] Justice Scalia, writing for the Court in *Smith*, stated that the Court had "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."[27] The Court cited numerous cases to support its holding that strict scrutiny does not apply to cases where individuals request relief from obedience to neutral laws of general applicability.[28]

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22. *See, e.g.*, Hamilton Letter, *supra* note 19.

23. *See infra* notes 46-48 and accompanying text.

24. 494 U.S. 872 (1990).

25. The Court first applied the compelling state interest test to the Free Exercise Clause in *Sherbert v. Verner*, 374 U.S. 398 (1963). In theory, the compelling state interest test represents the appropriate standard of review for free exercise claims. The Court's commitment to strict scrutiny in the intervening years between *Sherbert* and *Smith*, however, was checkered at best. For instance, the Court rarely used strict scrutiny to grant religious believers exceptions to otherwise valid laws. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 446 (1994).

26. *See Smith*, 494 U.S. at 884.

27. *Id.* at 878-79.

28. *Id.* at 879-81. For instance, the Court noted that in *Braunfeld v. Brown*, 366 U.S. 599 (1961), a plurality upheld Sunday-closing laws against a claim that they burdened the religious prac-

The Court did, however, note two categories of cases where the Free Exercise Clause continued to require strict scrutiny review of neutral, generally applicable laws.[29] The first category is one that the Court termed "hybrid rights."[30] The second exceptional category pertains to laws that allow for individualized governmental assessment.[31]

The Court declared that "where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[32] The Court's primary example of a law requiring individualized governmental assessment was the unemployment compensation program in *Sherbert*.[33] The Court explained that the "without good cause" standard employed in South Carolina's unemployment compensation program "created a mechanism for individualized exemptions."[34]

B. The Religious Freedom Restoration Act: Congress's Failed Attempt to Restore Strict Scrutiny

Following *Smith*, many commentators expressed serious concern over the protection of religious freedom in America.[35] The concern of legal scholars soon spread to Congress, which enacted the Religious Freedom Restoration Act of 1993 ("RFRA").[36] RFRA's existence, however, was short-lived. In 1997, in *City of Boerne v. Flores*,[37] the Court declared

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tices of those whose faiths compelled them to refrain from work on other days. *See Smith*, 494 U.S. at 880. The Court also noted *United States v. Lee*, 455 U.S. 252 (1982), where it rejected an Amish employer's claim that it should be exempted from Social Security taxes because the Amish faith prohibited participation in government support programs. *See Smith*, 494 U.S. at 880.

29. *See Smith*, 494 U.S. at 881.

30. *Id.* Hybrid rights claims involve not only the Free Exercise Clause, but "other constitutional protections such as freedom of speech and of the press." *Id.*

31. *See id.* at 884.

32. *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1976)).

33. *See id.* at 884.

34. *Id.* (quoting *Bowen*, 476 U.S. at 708). In *Sherbert*, South Carolina's Unemployment Compensation Act denied eligibility for benefits to claimants who refused to accept available work "without good cause." *Sherbert*, 374 U.S. at 400. In *Smith*, however, the Court held that the individualized assessment exception did not apply to Oregon drug laws that prohibited the ingestion of peyote, a controlled substance. *See Smith*, 494 U.S. at 882, 884-85.

35. *See, e.g.*, Stephen L. Carter, *The Resurrection of Religious Freedom*, 107 HARV. L. REV. 118, 121-23, 135-40 (1993) (defending strict scrutiny of governmental laws affecting religious conduct); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4 (lamenting the *Smith* Court's decision to defer to all facially neutral laws burdening religion); *but see, e.g.*, Herbert W. Titus, *The Free Exercise Clause: Past, Present, and Future*, REGENT U. L. REV. 7, 29-33 (1995) (contending that the *Smith* decision actually strengthened religious freedom by instituting a bright-line test).

36. 42 U.S.C.A. § 2000bb (1994). Congress enacted RFRA primarily to reverse the effect of *Smith* and restore the compelling state interest as the standard of review in cases where "religious exercise is substantially burdened by the government." *Id.* at §§ 2000bb(a)(5), (b)(1)-(2).

37. 521 U.S. 507 (1997).

RFRA to be unconstitutional. The Court held that in enacting RFRA, Congress exceeded its power under Section 5 of the Fourteenth Amendment.[38]

The Court's decision in *Flores* generated nearly as much scholarly commentary as *Smith*.[39] One commentator took the unique approach of examining what Congress could do to protect religious freedom in light of RFRA's demise.[40] In his article, Daniel O. Conkle[41] argued that Congress could draft legislation grounded on alternative sources of power such as the Commerce Clause and Spending Clause.[42] Professor Conkle also suggested that Congress could ground alternative legislation on its enforcement power under Section 5, but such a law would have to be much more narrowly tailored than RFRA in order to meet *Flores's* "congruence and proportionality" requirement.[43] According to Professor Conkle, one method by which Congress could achieve such narrow tailoring would be to target specific "governmental practices that are likely to reflect [religious] discrimination."[44] One such governmental practice is land use regulation.[45]

C. RLUIPA: Congress's Latest Attempt to Protect Religious Freedom

RLUIPA's land use provisions track some of Professor Conkle's suggestions remarkably well.[46] In section 2(a), for example, RLUIPA stipulates:

(a) Substantial Burdens

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38. *See id.* The Court stated that Congress's powers under Section 5—the Enforcement Clause—were remedial and preventive, not substantive, in nature. *Id.* at 520. Because RFRA was designed solely to overturn *Smith*, the Court concluded, it represented a substantive, rather than remedial or preventive, action. *See id.* at 512, 532.

39. *See, e.g.*, Marci A. Hamilton, City of Boerne v. Flores: *A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699 (1998) (analyzing the constitutional principles supporting the *Flores* decision); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743 (1998) (arguing that RFRA was indistinguishable from various other statutes Congress passed under its Section 5 power).

40. *See* Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores: *The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633 (1998).

41. Robert H. McKinney Professor of Law, Nelson Poynter Senior Scholar, and Adjunct Professor of Religious Studies, Indiana University at Bloomington.

42. *See* Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores: *The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 646 (1998).

43. *Flores*, 521 U.S. at 520; *see* Conkle, *supra* note 42 at 647.

44. *See* Conkle, *supra* note 42, at 650.

45. *See id.*

46. *Compare* Religious Land Use and Institutionalized Persons Act § 2(a), *with* Conkle, *supra* note 42, at 646-50.

(1) *General rule.* No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution

(a) is in the furtherance of a compelling state interest; and

(b) is the least restrictive means of furthering that compelling governmental interest

(2) *Scope of application.* This subsection applies in any case in which—

(a) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(b) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several states, or with Indian tribes, even if the burden results from a rule of general applicability; or

(c) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Section 2(a)(1) of RLUIPA is similar to RFRA in that it attempts to reinstate strict scrutiny as the standard of review for cases involving governmental imposition of substantial burdens upon religious expression. In section 2(a)(2), however, RLUIPA diverges significantly from RFRA.

In sections 2(a)(2)(a)-(b), Congress grounded RLUIPA on its regulatory powers under the Spending and Commerce Clauses, respectively.[47] Important to the present analysis, however, is section 2(a)(2)(c), which is grounded on Section 5 of the Fourteenth Amendment.[48] A premise underlying this section of RLUIPA is that many land use regulations, as applied by local officials, fall within the "individualized assessments" category of cases identified in *Smith*. If this premise is correct, then section 2(a)(2)(c) is likely constitutional.[49] This section of RLUIPA would

47. *See* Religious Land Use and Institutionalized Persons Act §§ 2(a)(2)(a)-(b); *see also* U.S. CONST. art. I, § 8.

48. Religious Land Use and Institutionalized Persons Act § 2(a)(2)(c) does not specifically mention Section 5 of the Fourteenth Amendment, but because it is not grounded upon any of Congress's powers enumerated in Article I, Section 5 is the only available source through which Congress may enact such a provision.

49. Even assuming the constitutionality of § 2(a)(2)(c), Congress still may have exceeded its power under the Enforcement Clause in § 2(b). *See infra* notes 174-184 and accompanying text.

be a valid exercise of Congress's Enforcement Clause power because it merely clarifies the Court's own holding that laws which provide governmental officials with the power to make individualized assessments are not generally applicable, and therefore, require strict scrutiny review.[50]

III. RLUIPA, LAND USE REGULATIONS, AND *SMITH'S* INDIVIDUALIZED ASSESSMENTS EXCEPTION

This section will analyze the validity of the assumption underlying section 2(a)(2)(c) of RLUIPA—that most land use regulations, as applied in free exercise cases, fall within *Smith*'s individualized assessments exception. First, it will examine American land use regulations and the level of discretionary decision-making power they provide government officials. Second, it will review the application of the *Smith* exception in existing case law, including its level of compatibility with land use regulations.

A. American Land Use Regulations and the Level of Individualized Discretion They Provide Government Officials

Of the various types of land use regulations, zoning laws are the target of the vast majority of free exercise challenges. Consequently, this analysis will focus on the level of discretionary decision-making that zoning laws in America generally provide to local governing bodies.[51]

In 1916, New York City passed the first zoning ordinance in the United States.[52] Ten years after the passage of the first zoning ordinance, the Supreme Court upheld the constitutionality of such regulations.[53] Around the same time, the Commerce Department drafted the Standard State Zoning Enabling Act (Standard Act). The Commerce Department designed the Standard Act as a zoning legislative model, through which state could, among other things, "lessen congestion in the streets;...secure safety from fire, panic, and other dangers; ...promote

50. *See Smith*, 494 U.S. at 884-85; *cf. Flores*, 521 U.S. at 536 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."). Section 2(a)(2)(c), unlike RFRA, would not negate the basic holding of *Smith*, and therefore would not undercut stare decisis.

51. Landmark preservation laws also frequently appear in free exercise claims. Landmark preservation laws, however, operate in similar fashions to zoning ordinances. *See infra* notes 127-135, 166-170 and accompanying text.

52. *See* 1 ANDERSON'S AMERICAN LAW OF ZONING § 1.02, at 6 (Kenneth H. Young ed., 4th ed. 1996) [hereinafter 1 ANDERSON'S].

53. *See* Vill. of Euclid v. Amber Realty Co., 272 U.S. 365, 388 (1926).

health and the general welfare;...[and] avoid undue concentration of the population."[54] Eventually, all states passed zoning enabling legislation, most of which reflect the intentions of the Standard Act.[55]

The Standard Act granted power to state legislatures to pass and amend zoning enabling legislation.[56] Municipalities, however, held the responsibilities of dividing their respective lands into districts of varying types to best carry out the purposes of the Standard Act.[57] The Standard Act authorized municipalities to create "boards of adjustment," which could "make special exceptions to the terms of the ordinance in harmony with its general purpose and intent."[58] The primary device the Standard Act provided to boards of adjustment for making exceptions to the terms of zoning ordinances was the hardship variance.[59]

Zoning boards of adjustment are independent administrative bodies that act in a quasi-judicial capacity to grant variances and other exceptions to zoning ordinances.[60] "A variance is an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance."[61] Adjustment boards grant variances primarily to parties who demonstrate that a literal application of a zoning ordinance will cause them "practical difficulties or unnecessary hardship."[62]

As municipalities throughout the nation were implementing zoning ordinances, some state courts described standards such as "practical difficulties" and "undue hardship" as vague and indefinite, which provided adjustment boards with nearly unlimited discretion.[63] Gradually, however, most state courts accepted these terms, even though many of them disagreed as to the level of discretion the terms gave adjustment boards.[64] State courts have differed considerably in their interpretations of the

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[54] Standard State Zoning Enabling Act § 3 (1926), *reprinted in* 5 ANDERSON'S AMERICAN LAW OF ZONING § 32.01 at 4 (Alan C. Weinstein ed., 4th ed., 1997) [hereinafter Standard Act].

55. *See* 1 ANDERSON'S § 2.21, *supra* note 52, at 67.

56. *See* Standard Act § 2.

57. *See id.*

58. *Id.* at 6-8.

59. *See* DANIEL R. MANDELKER, LAND USE LAW § 4.15, at 108 (4th ed. 1997).

60. *See* Rogoff v. Tufariello, 255 A.2d 781, 784 (N.J. Super. Ct. App. Div. 1969).

61. 3 ANDERSON'S AMERICAN LAW OF ZONING § 20.02, at 410 (Kenneth H. Young ed., 4th ed. 1996) [hereinafter 3 ANDERSON'S].

62. *Id.* at 412.

63. *See, e.g.*, Speroni v. Board of Appeals, 15 N.E.2d 302, 303 (Ill. 1938).

64. *See* 3 ANDERSON'S § 20.08, *supra* note 60, at 435 (noting that some state courts considered the meaning of such terms to be commonly understood and thus providing adjustment boards with reasonable discretion, while others simply accepted that the terms provided boards with broad general powers, because such discretion was necessary to maintain validity of zoning ordinances).

meaning of terms such as "unnecessary hardship" and "practical difficulties."

Universally, American courts have concluded that a financial hardship alone is not sufficient to demonstrate an unnecessary (or undue) hardship.[65] Beyond that, however, there is considerable disagreement among the various states. For instance, the New Hampshire Supreme Court held that a financial hardship becomes an unnecessary hardship requiring the granting of a variance when conditions unique to the particular property become unduly oppressive.[66] In contrast, a Pennsylvania court ruled that "unnecessary hardship is a condition which renders a property almost valueless without the grant of a variance."[67]

Although the majority of states follow the New Hampshire example of defining "unnecessary hardship" broadly, many others have restricted the definition of the term in a manner similar to the Pennsylvania court.[68] Even under the more restrictive definition, though, the authority that zoning adjustment boards possess to grant variances is administrative and quasi-judicial in nature.[69] Inherent in such authority is the ability to exercise considerable discretion.

Besides variances, the other major category of exceptions to zoning ordinances is the special permit.[70] There are two major differences between variances and special permits. First, variances allow for uses of land or construction of structures that are prohibited by the particular zoning ordinance.[71] In contrast, special permits are granted to uses or structures that are permitted by the zoning ordinance, but require prior approval.[72] The second difference is that variances run with the land, while special permits die with the owner.[73]

As with variances, the power of adjustment boards to grant special permits is also a quasi-judicial, rather than a legislative function.[74] Indeed, because of the different standards governing the exceptions, the degree of discretionary decision-making power boards of adjustment employ in granting special permits is arguably greater than with vari-

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65. *See id.* § 20.16, at 454.

66. *See* Carter v. City of Nashua, 308 A.2d 847, 855 (N.H. 1973).

67. Schaefer v. Zoning Bd. of Adjustment, 435 A.2d 289, 292 (Pa. Commw. Ct. 1981).

68. *See* 3 ANDERSON'S § 20.16, *supra* note 60, at 460.

69. *See id.* § 20.04, at 419. The power to grant variances in cases of "practical difficulties" is identical to those involving "unnecessary hardship." Only about half of the state enabling statutes authorize variances to relieve "practical difficulties." *See id.* § 20.10, at 440.

70. *See id.* § 20.03, at 414.

71. *See id.* at 415.

72. *See id.*

73. *See id.*

74. *See* 3 ANDERSON'S § 21.17, at 769.

ances. The standards governing the issuance of special permits are both broader and more numerous than those associated with variances.[75] For example, the New York Court of Appeals approved a zoning ordinance that delegated to the Board of Adjustment the power to grant or deny a special permit based on the proposed use's effect upon "the public health, safety and general welfare."[76]

The Maryland Court of Appeals also approved an ordinance with similarly vague language.[77] The court upheld a zoning board's denial of a discount department store's petition for a special exemption to operate a gasoline station. The board concluded that the department store failed to meet the zoning ordinance's requirement that the applicant demonstrate the existence of a "*need*" for the proposed gasoline station among the population in the "*general neighborhood.*"[78] The Court of Appeals held that the words "need" and "general neighborhood" were not so indeterminate as to allow the zoning board to engage in "arbitrary or unreasonable exercise[s] of power."[79]

There are numerous other similar standards governing the issuance of special permits, but the previous examples illustrate sufficiently the level of discretion zoning ordinances provide adjustment boards and other governing bodies. Although state courts have struck down ordinances that provide zoning boards with "unlimited discretion to condition the issuance of . . . permit[s] on the basis of such norms or standards as [they] may from time to time arbitrarily determine," the level of discretionary decision-making most ordinances provide adjustment boards is substantial.[80]

One final type of zoning exemption is the conditional use. Conditional uses are similar to special uses in that they are permitted within the zone but typically require prior approval.[81] Conditional uses differ from special uses, however, because legislative bodies, rather than boards of adjustment, typically possess the authority to grant conditional use permits.[82] For example, the typical application for a conditional use permit will be sent to the city council for approval instead of a zoning board. Moreover, conditional use permits, like variances, run with the land.[83]

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75. *See id.* § 21.09, at 713-14.
76. Aloe v. Dassler, 105 N.E.2d 104 (N.Y. 1952).
77. *See* Lucky Stores, Inc. v. Bd. of Appeals, 312 A.2d 758, 767 (Md. 1973).
78. *Id.*
79. *Id.*(quoting Heath v. Mayor & City Council of Baltimore, 49 A.2d 299, 803 (Md. 1946).
80. Warwick v. Del Bonis Sand & Gravel Co., 209 A.2d 227, 232 (R.I. 1965).
81. *See* 3 ANDERSON'S § 20.05, *supra* note 60, at 421.
82. *See id.*
83. *See*, County of Imperial v. McDougal, 564 P.2d 14, 17 (Cal. 1977).

Despite these differences, the level of discretion provided to municipalities in granting conditional use permits is remarkably similar to that given to adjustment boards for granting special use permits.[84] The reason for this is that the standards governing special uses are typically the same as those for conditional uses. For instance, parties applying for both conditional and special use permits are usually required to demonstrate that their proposed uses are not "detrimental to public health, safety, or general welfare."[85] Variance standards such as unnecessary hardship and practical difficulties do not usually apply to conditional uses.[86]

As the previous analysis has shown, zoning ordinances allow boards of adjustment and municipalities to make individualized assessments when evaluating petitions for variances, special uses, and conditional uses. The critical issue concerning the validity of Section 2(a)(2)(c) of RLUIPA, however, is whether the level of discretionary decision-making provided to governmental officials in zoning ordinances is compatible with the individualized assessment exception defined by the Supreme Court in *Smith*.[87] An appropriate point of comparison, then, is the level of governmental discretion inherent in unemployment compensations laws such as the one in *Sherbert*.[88]

In *Smith*, the Court held that the South Carolina unemployment compensation program at issue in *Sherbert* "created a mechanism for individualized exemptions" through its "without good cause" standard.[89] The Court noted that "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment."[90] A comparable situation exists with zoning ordinances.

In evaluating variance requests, for example, zoning boards necessarily examine the "particular circumstances" of the applicant's proposed use. The previously cited New Hampshire Supreme Court case of *Carter v. City of Nashua*[91] provides an excellent illustration. In *Carter*, the court upheld a zoning board's granting of a variance permitting the operation of a dog racing track on the New Hampshire portion of a particular tract of land that was situated partially in Massachusetts.[92]

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84. *See* 3 ANDERSON'S § 20.05, *supra* note 60, at 421.

85. Warren v. Collier Township Bd. of Comm'rs, 437 A.2d 86, 88 (Pa. Commw. Ct. 1981).

86. *But see* 3 ANDERSON'S § 20.05, *supra* note 60, at 423 (noting that "unnecessary hardship" and "practical difficulties" are used as standards for granting conditional use variances).

87. *See Smith*, 494 U.S. at 884-85.

88. *See Sherbert*, 374 U.S. at 400-01.

89. *Smith*, 494 U.S. at 884.

90. *Id.* (citing *Bowen*, 476 U.S. at 708).

91. 308 A.2d 847 (N.H. 1973).

92. *See id.* at 856.

In its opinion, the New Hampshire Supreme Court summarized the trial court's evaluation of the rationale behind the zoning board's decision to grant the variance.[93] First, the trial court determined that the dog racing track would benefit the business, commercial, and light industrial areas located within several miles of the tract at issue.[94] Furthermore, the trial court noted that all of the surrounding property owners had consented to the variance, that there were few residential neighborhoods near the tract, and that residents approved a referendum on whether a dog track should be located within the city.[95]

Based on *Carter,* it appears clear that to determine the existence of an "unnecessary hardship," zoning boards must consider the "particular circumstances" of the applicant's proposed land use.[96] Therefore, at least in relation to variances, zoning ordinances create "a mechanism for individualized exemptions."[97]

Because the standards governing special use and conditional use permits are even more indefinite than those associated with variances, the same conclusion applies. For instance, it is difficult to imagine how a board of adjustment could determine whether a proposed use promotes "the public health, safety and general welfare" without examining the specific circumstances of the landowner's claim.[98]

In summary, the application of zoning ordinances, through the issuance of variances, special use permits, and conditional use permits, fall within the *Smith* court's individualized assessment exception.[99] Consequently under *Smith*, strict scrutiny is the appropriate standard of review for the majority of claims involving Free Exercise Clause challenges of zoning ordinances or decisions by zoning boards.[100]

A smaller percentage of zoning laws, however, provide minimal or no discretion to local governmental officials. Some of these ordinances even contain provisions for variances or special use permits.[101] Other zoning ordinances apply only to particular tracts of land and allow only a limited number of uses with no exceptions. These laws provide minimal

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93. *See id.* at 855.

94. *See id.*

95. *See id.* The trial court examined these various factors as part of its analysis on whether overturning the variance would constitute an "unnecessary hardship" on the owner.

96. *Smith*, 494 U.S. at 884.

97. *Id.* (quoting *Bowen* 476 U.S. at 708).

98. Aloe v. Dassler, 105 N.E.2d 104, 104 (N.Y 1952).

99. *See Smith*, 494 U.S. at 884-85.

100. *See id.* at 883.

101. For example, some zoning ordinances allow for variances or special use permits, but limit such exceptions to specific uses. The level of discretion provided to government officials is much less than those that allow exceptions for "unnecessary hardships" or those that promote "public health, safety, safety and general welfare."

or no discretion to local government officials. Under the *Smith* standard, therefore, such laws would likely be considered generally applicable and strict scrutiny would not apply.

In the free exercise context, *Cornerstone Bible Church v. City of Hastings*[102] presents an example of a zoning ordinance that provides little discretion to government officials. *Cornerstone* concerned a church's challenge of a Hastings, Minnesota zoning ordinance that allowed only "commercial establishments, public and semi-public buildings, private clubs, second-floor apartments, parking lots," and other accessory uses within its central business district.[103] The ordinance also listed other particular uses that could be allowed upon the grant of a special use permit. Such uses included gas stations, creameries, and hotels, but not churches.[104]

The Hastings ordinance, by granting special use permits only for specified uses, provided significantly less discretion to government officials than most zoning laws. As noted earlier, most zoning ordinances that allow boards of adjustment to grant special use permits, do so according to broad standards such as promoting public health and safety. The Hastings ordinance, however, did not establish indeterminate standards as the means by which special use permits were awarded. Therefore under *Smith*, strict scrutiny would likely not apply.[105]

B. Smith's Individualized Assessments Exception and its Current Use in Free Exercise Clause Case Law

Despite the existence of some zoning laws that provide little discretion to government officials, the majority of land use regulations provide government with significant discretionary decision-making power. Consequently, most zoning laws likely fall within *Smith's* individualized assessments exception. Considering that *Smith* was decided over ten years ago, there is very little case law analyzing the *Smith* exception. Cases that have interpreted the *Smith* exception, however, reflect favorably on its incorporation into the Court's Free Exercise Clause jurisprudence.

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102. 948 F.2d 464 (8th Cir. 1991).

103. *Id.* at 466.

104. It can be reasonably argued that the Hastings ordinance discriminates against religious institutions by allowing semi-public buildings and second-floor apartments but not churches and other worship centers. Worship centers, however, may be more inconsistent with the general plan for a commercial district than other non-business uses. For example, when "residential or inconsistent commercial uses intrude [into an area comprised of primarily retail establishments] they create blank spaces or even hazards to pedestrian traffic." 2 ANDERSON'S AMERICAN LAW OF ZONING § 9.42, at 249 (Kenneth H. Young ed., 4th ed. 1996).

105. *See Cornerstone*, 948 F.2d at 472. The Eighth Circuit cited *Smith* in denying the church's free exercise claim. The court held that the Hastings ordinance was a neutral law that applied to all land uses and therefore did not discriminate against religious conduct. *See id.*

First, the only Supreme Court case discussing the individualized assessments exception is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[106] In *Lukumi*, the Court struck down several city ordinances prohibiting the ritual slaughter of animals as violating the Free Exercise Clause.[107] In particular, the Court struck down an ordinance that provided for the punishment of "[w]hoever . . . unnecessarily . . . kills any animal."[108] The Court found that the ordinance violated the Free Exercise Clause because it specifically targeted appellant's religious practice of animal sacrifice.[109]

The Court held that the ordinance was not a neutral, generally applicable law, because while it prohibited killing animals for religious reasons, it allowed other methods of killing animals such as hunting and euthanasia.[110] The Court further noted that the ordinance's "necessity" requirement necessitated an evaluation of the particular justification for killing animals.[111] This, the Court concluded, represented "a system of 'individualized governmental assessment of the reasons for the relevant conduct.'"[112]

The Third Circuit Court of Appeals also decided a case based in part on its interpretation of the *Smith* exception.[113] In *Fraternal Order of Police v. City of Newark*, the Third Circuit struck down a Newark Police Department ordinance that prohibited the wearing of beards.[114] Several Sunni Muslim officers challenged the policy on free exercise grounds after being disciplined for violating the policy.[115] According to the court, it is a "major sin" under the Sunni Muslim faith for any male who can grow a beard to refuse to wear one.[116]

The Third Circuit, in striking down the no-beard policy, held that the police department created not merely a mechanism for individualized exemptions, but "a categorical exemption for individuals with a secular objection but not for individuals with a religious objection."[117] The department exempted other officers for medical reasons, while refusing to

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106. *508 U.S. 520 (1993).*

107. *See id.* at 547.

108. *Id.* at 537.

109. *See id.*

110. *See id.*

111. *See id.*

112. 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

113. *See* Fraternal Order of Police Newark v. City of Newark, 170 F.3d 359, 364-66 (3d Cir. 1999).

114. *See id.* at 367.

115. *See id.* at 361.

116. *Id.* at 360.

117. *Id.* at 365.

exempt the Sunni Muslim officers.[118] Thus, not only did the policy fall within the *Smith* individualized assessments exception, but it was also evidence of discriminatory intent.[119]

A Nebraska District Court also offered an interpretation of the *Smith* exception.[120] In *Rader v. Johnston*, the district court held unconstitutional a state university requirement that all incoming freshmen live on-campus.[121] The plaintiff, a devout Christian and incoming freshman to the University of Nebraska-Kearney (UNK), applied for an exemption from the school's on-campus housing policy so he could live in the Christian Student Fellowship (CSF) house, located off-campus.[122] UNK administrators declined plaintiff's request.[123]

The district court found the UNK on-campus housing policy to fall within the *Smith* exception because administrators had previously granted exemptions in a variety of different situations: to a student living outside of Kearny who wished to drive his pregnant sister to work; to a student who was depressed and experiencing headaches; to a student with learning disabilities; and to a student who was mourning the death of a parent.[124] Consequently, the district court held that the policy was not one of general applicability and applied the compelling state interest test.[125] The district court awarded plaintiff's request for injunctive relief.[126]

Although the three previously cited cases demonstrate the viability of the *Smith* exception in striking down government regulations on Free Exercise grounds, they do not reveal precisely how the exception applies to land use regulations. To date, there are no federal land use cases applying the *Smith* exception. The Washington State Supreme Court, however, has applied the exception to the City of Seattle's application of its landmark preservation ordinance to a church.

In *First Covenant Church v. City of Seattle*,[127] First Covenant Church objected to the City's designation of its worship facility as a landmark under the City's Landmark Preservation Ordinance. Seattle adopted this ordinance "to: 'designate, preserve, [and] protect, . . . improvements and objects which reflect significant elements of the City's cultural, aesthetic,

118. *See id.*
119. *See* 170 F.3d at 365.
120. *See* Rader v. Johnston, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996).
121. *See id.* at 1558.
122. *See id.* at 1544.
123. *See id.* at 1548.
124. *See id.* at 1547.
125. *See id.* at 1553.
126. *See id.* at 1558.
127. 840 P.2d 174 (Wash. 1992).

social, economic, political, architectural, engineering, historic, or other heritage . . .'"[128]

After designating the church as a landmark under the general ordinance, the City adopted a second ordinance specific to First Covenant.[129] This ordinance required the church to obtain a certificate of approval prior to making particular alterations to the church's exterior.[130]

The City, however, in the second ordinance, declared that nothing prevented First Covenant from altering the church's exterior "when such alterations are necessitated by changes in liturgy."[131] After an extensive procedural history, the Washington State Supreme Court held that Seattle's ordinance designating First Covenant's church a landmark violated the Free Exercise Clause.[132]

The court gave two reasons why the landmark ordinance was not generally applicable and therefore outside of the *Smith* ruling. First, the court held that because the ordinance referred to "liturgy," it specifically targeted religion.[133] Secondly, the court stated that the ordinance did not fall within the *Smith* ruling, because it "invite[d] individualized assessments of the subject property . . . and contain[ed] mechanisms for individualized exceptions."[134] The court did not elaborate on this conclusion, but the language of the designation ordinance strongly suggests that the Landmarks Prevention Board had significant discretionary decision-making authority.[135]

First Covenant demonstrates that land use regulations can fall within the *Smith* exception. Further, most zoning laws in the United States confer substantial discretionary decision-making power upon their governing boards. It is reasonable, therefore, to conclude that a significant portion of free exercise claims brought under RLUIPA section 2(a)(2)(c) will fall

128. *Id.* at 177 (quoting Seattle Municipal Code 25.12.020(B) (1977)).

129. *See id.* at 178.

130. *See id.*

131. *Id.*

132. See *id.* at 178, 193. The Washington State Supreme Court first held that the designation ordinance violated the Free Exercise Clause under the *Sherbert* compelling state interest test. *See id.* at 178; First Covenant Church v. City of Seattle, 787 P.2d 1352, 1355-56 (Wash. 1990), *vacated by* 499 U.S. 901, (1991). The United States Supreme Court, however, granted Seattle's petition for certiorari and vacated and remanded the case for further consideration under Smith. See *First Covenant*, 840 P.2d at 178; City of Seattle v. First Covenant Church, 499 U.S. 901 (1991).

133. *See First Covenant*, 840 P.2d at 181.

134. *Id.*

135. The ordinance provided: "When alterations necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall jointly explore such possible alternative design solutions *as may be appropriate or necessary to preserve the designated features of the landmark*." *Id.* at 178 (emphasis added).

within *Smith's* individualized assessments exception and require strict scrutiny review.

Congress, therefore, at least with section 2(a)(2)(c), does not appear to have exceeded its enforcement power under Section 5 of the Fourteenth Amendment. By merely requiring strict scrutiny review for claims involving land use regulations that provide government officials the authority to make individualized assessments, RLUIPA does not intrude upon the Supreme Court's power to interpret the Free Exercise Clause. Unlike RFRA, which essentially attempted to reverse *Smith*, RLUIPA works within the Court's opinion.

IV. POTENTIAL DIFFICULTIES WITH RLUIPA UNDER THE SUPREME COURT'S ENFORCEMENT CLAUSE ANALYSIS

A. In the Context of Land Use Regulations, the Constitutional Definitions of Substantial Burden and Religious Exercise Are Unclear

Although most zoning laws appear to fall within *Smith's* individualized assessments exception, RLUIPA raises additional constitutional questions. RLUIPA requires courts to apply strict scrutiny review in cases where governments impose or implement "land use regulation[s] in a manner that imposes a *substantial burden on the religious exercise*" of a person, assembly, or institution.[136] The problem with this language is that in land use contexts, the definitions of "substantial burden" and "religious exercise" are not entirely clear.

Because these terms are not well-defined in the Supreme Court's Free Exercise Clause jurisprudence, RLUIPA may face significant constitutional challenges. First, it may be that while land use regulations often create conflicts with religious exercise, they rarely place "substantial" burdens upon religious institutions. Another possibility is that in many cases, the claims brought by religious plaintiffs do not involve religious exercise, as defined by the Court.

If, therefore, only a small percentage of religious land use cases involve substantial burdens of religious exercise, then courts will likely not view RLUIPA as remedial or preventive. Instead, courts will be inclined to strike RLUIPA down as a substantive change in Free Exercise law.

Determining the degree to which government burdens religious exercise is a well-established step in the Supreme Court's Free Exercise Clause jurisprudence.[137] The Court, however, has not specified what con-

136. Religious Land Use and Institutionalized Persons Act § 2(a)(1) (emphasis added).

137. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face

stitutes a substantial, or undue, burden upon free exercise in a land use context. Courts evaluating RLUIPA, therefore, will likely look to lower federal court decisions for guidance on what constitutes a substantial burden.

One circuit court decision that sheds some light on this issue is *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood.*[138] In *Lakewood*, the Congregation owned its existing worship facility, located in one of the City's commercial districts, but wanted to relocate to a larger facility in a residential district.[139] The City, however, refused to grant the Congregation a special use permit to construct a church building on the property it had purchased.[140] The Sixth Circuit held that the City's action made the Congregation's religious exercise more expensive but was not an unconstitutional burden.[141]

Another relevant circuit court decision is *Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York.*[142] In *St. Bartholomew's*, the Second Circuit ruled that New York City officials did not violate the First Amendment in refusing to allow a church to replace a building it owned with an office tower.[143] The Second Circuit held that the City's designation of the church's Community House building as a landmark did not substantially burden the church's free exercise rights.[144]

In addition to "substantial burden," both *Lakewood* and *St. Bartholomew's* address the issue of what constitutes a "religious exercise" in a land use context. In *Lakewood*, the Sixth Circuit held that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs."[145] The court's language

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may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.").

138. 699 F.2d 303 (6th Cir. 1983).

139. *See id.* at 304.

140. *See id.* at 305.

141. *See id.* at 308-09. The court noted specifically that although the Congregation could construct a church in only ten percent of the City (the non-residential areas), it was free to purchase any existing church in the remaining ninety percent. The court also stated that the zoning ordinance did not prohibit the Congregation from worshiping in any part of the city.

142. 914 F.2d 348 (2d Cir. 1990).

143. *See id.* at 355-56.

144. *See id.* ("Incidental effects of government programs, which make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification for its otherwise lawful actions."). The landmarks law at issue prevented any alteration or demolition of structures designated as landmarks without approval of the Landmarks Commission. The City designated St. Bartholomew's Church and Community House as having special character and aesthetic value to the heritage and culture of New York City. *See id.* at 351.

145. *Lakewood*, 699 F.2d at 307.

implies that as long as a religious group has *some* location in which to gather and worship, then the government's prevention of the construction of a worship facility will not invoke the First Amendment.[146] This assertion, however, is widely disputed.[147]

St. Bartholomew's provides another perspective on the limits of "religious exercise" in a land use context. The Second Circuit understood "Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause."[148] It is uncertain, however, how this principle applies beyond the facts of the case.

In *St. Bartholomew's*, the Second Circuit held that the church failed to prove its claim that converting the Community House into an office tower was necessary for it to continue its existing religious activities.[149] But what if, instead of an office tower, the Church had planned to convert the Community House into a parochial school?[150] Further, assume that the church had proven that without the increased revenue generated by the school, it would not have been able to make the necessary repairs to the church building. Under these circumstances, the Church's "religious exercise" is much more apparent. Applying the Second Circuit's rationale, however, it is unclear whether such facts would render a different result.

The rulings in *Lakewood* and *St. Bartholomew's* are indicative of circuit court decisions involving religious land use issues. In virtually every case,[151] circuit courts have ruled against the religious plaintiffs, finding the burdens on free exercise to be insubstantial.[152]

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146. *See id.* ("The zoning ordinance does not prevent the Congregation from practicing its faith through worship whether the worship be in homes, schools, other churches, or meeting halls throughout the city."). The court, moreover, drew a line between the construction of a worship facility and the religious exercise in cases such as *Yoder* and *Sherbert*. The court concluded that the latter involved religious practices deserving of First Amendment protection, while the former did not. *See id.* at 306-07.

147. *See* Keetch and Richards, *supra* note 3, at 726 ("The right to erect buildings where communities of faith may gather or to make use of existing buildings to fulfill a religiously mandated mode of worship is . . . a fundamental and indispensable aspect of the right to worship."); Laycock, *supra* note 3, at 756 ("But the recognition of some limits does not change the essential point: assembly for worship and other religious activities, and the creation of spaces in which such assemblies may occur, is at the very core of religious liberty."); *cf.* Scott David Godshall, Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562, 1574 (1984) (arguing that cases such as *Lakewood*, where courts consider "the centrality of the practice to the religious group as a threshold matter," lead to "unnecessarily restrictive results").

148. *St. Bartholomew's*, 914 F.2d at 355 (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990); Hernandez v. Comm'r, 490 U.S. 680 (1989)).

149. *See id.* at 355-56.

150. Assume, *arguendo*, that converting the Community House into a school would require structural changes that would invoke the landmarks law.

151. *See, e.g.*, Christian Gospel Church, Inc. v. San Francisco, 896 F.2d 1221 (9th Cir. 1990) (upholding City/County denial of conditional use permit to operate church in residential district);

Circuit court decisions, however, do not reflect the vast majority of conflicts between religious exercise and land use regulations. First, only a small percentage of religious land use cases are litigated in federal court.[153] Second, the percentage of circuit court cases decided in favor of the religious claimants is significantly less than for other cases.[154]

Cases such as *Lakewood* and *St. Bartholomew's* are important in delineating the limits of what may constitute a substantial burden on free exercise. Because circuit court decisions do not represent the majority of religious land use cases, however, courts should not over-emphasize them in evaluating RLUIPA. State and federal district courts, as well as commentators, offer alternative approaches to defining "substantial burden" and "religious exercise" in religious land use cases.

One common scenario that raises questions of both substantial burden and free exercise arises when religious institutions run homeless shelters. In *Stuart Circle Parish v. Board of Zoning Appeals*,[155] for instance, a federal district court held that it was central to the Parish's "faith to invite the homeless into the church to establish a climate of worship."[156] Further, the court declared that the city's zoning ordinance substantially burdened the Parish's religious exercise.[157]

Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988) (upholding County's denial of special use permit to construct multi-purpose worship facility in agricultural district); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983) (upholding city's prohibition of Jewish couple from conducting worship services at their home, in violation of zoning ordinance).

152. *But see* Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 302 (5th Cir. 1988) (finding City's denial of special use permit "more than [an] incidental" burden on the Islamic Center's right to religious assembly, because it left "no practical alternatives for establishing a mosque in the city limits"); Vill. of Univ. Heights v. Cleveland Jewish Orphan's Home, 20 F.2d 743 (6th Cir. 1927) (reversing Villiage's denial of special use permit for the construction of orphanage). *Islamic Center* is also a good example of a pre-*Smith* case to which the individualized assessments exception would have applied. Starkville's zoning ordinance prohibited the use of buildings as worship centers in the area surrounding the Mississippi State University campus without a special use permit. Prior to the Islamic Center's application, however, the City's Board of Aldermen had granted special use permits to all nine Christian churches that applied. The Fifth Circuit, therefore, rejected the City's claim that its denial of the permit was based solely on concerns over "traffic control and public safety." *Islamic Ctr.*, 840 F.2d at 302.

153. *See* Keetch and Richards, *supra* note 3, at 736-53. In their article, Keetch and Richards reveal and evaluate the findings of a 1997 study of religious land use cases in the United States. The study examined a total of 196 cases decided between 1921 and 1996. Of the 196 cases, federal courts decided only twenty-six, or 13%. Circuit courts decided eleven of the twenty-six federal cases.

154. *See id.* Of the twenty-six federal cases, religious claimants received favorable rulings in twelve, or 46%. For circuit court decisions, the percentage of favorable rulings was 36% (four favorable rulings out of eleven total decisions). In contrast, the percentage of favorable rulings in state court decisions was 62% (106 favorable rulings out of 170 total decisions).

155. 946 F. Supp. 1225 (E.D. Va. 1996). In *Stuart Circle Parish*, the Parish sought a temporary restraining order against the City of Richmond's zoning board to preclude it from enforcing restrictions on its Meal Ministry program—a weekly service designed to feed and provide worship and pastoral care for Richmond's urban poor.

156. *Id.* at 1239.

157. *See id.* Richmond's zoning ordinance restricted feeding and housing programs for home-

In *Stuart Circle Parish*, the court, in determining the level of burden and nature of the religious exercise, adopted a flexible approach that was relatively deferential to the Parish.[158] First, the court stated that one of the factors to be considered "in determining the substantiality of the burden" was "whether a particular practice is mandated by religion or simply encouraged."[159] Moreover, the court held that "[a]nother factor that obviously must be taken into account . . . is the extent of the interference."[160] Finally, the court held that even though the Parish could, under the terms of the ordinance, continue to feed the poor in some capacity, it could not fulfill its religious mission.[161]

In addition to homeless shelters, courts in other land use contexts have applied standards for defining "substantial burden on free exercise" that are more deferential to religious claimants. In *Alpine Christian Fellowship v. County Commissioners,*[162] for instance, the court examined the question of whether the County "impermissibly burdened the religious activities of the Church" by refusing to allow the Church to operate a private school at its facility.[163] The court, in holding that the County violated the Free Exercise Clause, declared that "the conduct of a school within the church building is integrally related to the religious belief of

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less to no more than thirty individuals and for no more than seven days between October and April. With Meal Ministry, the Parish served approximately one hundred people each Sunday afternoon throughout the year. Under the terms of the ordinance, therefore, the Parish was prohibited from serving the poor for 45 out of 52 Sundays. And even on those rare Sundays when it would be allowed to operate Meal Ministry, it would have to turn away more than half of the people who typically attend. To the court, this forced the Parish to abstain from a religiously mandated action. *See id.*

158. *But see* First Assembly of God v. Collier County, 20 F.3d 419, 424 (11th Cir.) (upholding County's closure of church's homeless shelter on grounds that the burden on the church to "move the shelter to an appropriately zoned area, is less than the burden on the County were it to be forced to allow the zoning violation") (quoting *Grosz*, 721 F.2d at 741) *modified on denial of reh'g* 27 F.3d 526 (1994). In following *Grosz*, the *First Assembly* court's balance tipped in favor of the government's interests. *See infra* note 209.

159. *Stuart Circle Parish*, 946 F. Supp. at 1238 (quoting Turner-Bey v. Lee, 935 F. Supp. 702, 703 (D. Md. 1996)).

160. *Id.* at 1238. The court also cited Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), which held that a substantial burden under RFRA was "one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs."

161. *See Stuart Circle Parish*, 946 F. Supp. at 1236. In declaring the Meal Ministry a legitimate religious exercise, the court cited an expert witness in Christian theology who "testified that feeding the poor is central to the Christian teachings of all denominations comprising the Stuart Circle Parish." *Id.* The court's contemplative analysis of the Parish's situation differs significantly from the Sixth Circuit's approach in *Lakewood. See supra* notes 145-147 and accompanying text.

162. 870 F. Supp. 991 (D. Colo. 1994).

163. *Id.* at 992. The Church resided in an agricultural and forestry district (AF-1), where churches were permitted by right, but private schools were permitted only upon issuance of a special use permit. Such schools were considered "contingent uses" in the County's land use code.

the church membership."[164] The district court's evaluation of "religious exercise" differs significantly from the approaches taken by circuit courts in cases such as *Lakewood* and *St. Bartholomew's*.[165]

In similar fashion, the Washington Supreme Court demonstrated significant concern for the church plaintiff in *First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Board*.[166] In *First United Methodist*, the City's Landmarks Preservation Board designated the interior and exterior of First United Methodist's church building a landmark. Consequently, the Church was prohibited from making alterations to the building "without City approval unless such changes [were] necessitated by changes in the liturgy."[167]

The Church, however, disputed the landmark designation, arguing that the church structure had deteriorated to a point where it could no longer afford the necessary repairs.[168] The court accepted the Church's arguments and held that the landmark ordinance "severely" burdened First United Methodist's free exercise of religion.[169] The court held the Church should be free to "[sell] its property and [use] the proceeds to advance its religious mission."[170] As with *Stuart Circle Parish* and *Alpine Christian Fellowship*, the Washington Supreme Court's approach to

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164. *Id.* at 994. Interestingly, the court cited *Employment Div. v. Smith*, 494 U.S. 872 (1990), but only to establish that the burden on religious exercise must be "substantial" to constitute a constitutional violation. *See Alpine Christian Fellowship*, 870 F. Supp. at 994. The court did not discuss whether the County's land use code was a "neutral law of general applicability." Language in the opinion, however, suggests that the court considered the County's action to be targeted at the Church's religious mission: "The restriction on the educational use of the building is not different, in principle, from a government imposed restriction on the religious ceremonial practices in the church." *Id.* at 995.

165. *See supra* notes 145-150 and accompanying text. The district court in *Alpine Christian Fellowship* also deviated from the traditional approach taken by the Supreme Court and Courts of Appeals in Free Exercise Clause cases. Historically, these courts have rejected claims against government regulation of religious conduct. *See* Marci Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993) (demonstrating that the Supreme Court's approach to Free Exercise Clause cases, with very few exceptions, has been to declare restrictions upon religious belief as unconstitutional, but to allow government regulation of religious conduct).

166. 916 P.2d 374 (Wash. 1996).

167. *Id.* at 376.

168. The Church also claimed that changes in the neighborhood surrounding the church had dramatically reduced its membership. It argued that the present size of the sanctuary was "too large to foster as dynamic and meaningful worship services as desired." *Id.* Moreover, the church maintained that it should be allowed to sell any portion of its property to "fund religious and social service programs." *Id.*

169. *Id.* at 381.

170. *Id.* The court also speculated on the constitutional impact of alternative religious uses of land. For instance, the court asked "If the congregation decided that the building should be operated exclusively as a soup kitchen, would that be a cessation of religious purpose?" *Id.* at 380. (quoting Brief of Amici Curiae Christian Legal Society at 11-12).

evaluating the level of burden on religious exercise differs significantly from that taken by most circuit courts.

As the foregoing analysis has shown, the meanings of "substantial burden" and "religious exercise" in land use cases are not clearly established.[171] While some actions certainly reside outside constitutional boundaries,[172] others are more problematic.[173] Some of RLUIPA's other land use provisions, however, raise even more difficult definitional issues.

B. The Judicial Definition of "Less than Equal Terms" Is Also Indeterminate

Section 2(b) of RLUIPA, entitled "Discrimination and Exclusion," contains the statute's remaining land use provisions. This section contains terms that are even more ambiguous than "substantial burden" and "religious exercise." For example, section 2(b)(1) states: "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[174] The key phrase in this section is "less than equal terms."

Unlike "substantial burden," which has long been part of the Court's vernacular, "less than equal terms" or similar phrases do not typically appear in free exercise cases. Even Congress, in the legislative record for RLUIPA, did not make it abundantly clear what constitutes unequal

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171. Notably, in one of the first federal cases involving RLUIPA's land use provisions, a district court denied the plaintiffs' free exercise claims on grounds that the zoning ordinance, on its face and as applied, did not substantially burden the free exercise of religion. *See* C.L.U.B. v. City of Chicago, No. 94CV6151, 2001 U.S. Dist. LEXIS 3791 (N.D. Ill. Mar. 30, 2001). In *C.L.U.B.*, the district court set a high bar for the plaintiffs to establish a substantial burden. The court declared: "A substantial burden exists when the government pressures a plaintiff to modify her behavior and violate her beliefs, by, for example, discriminating against her because of her religious belief, inhibiting her dissemination of particular religious views or pressuring her to forgo a religious practice." *Id.* at *33.

172. *See, e.g.*, Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 826 (1988) (declaring that a church does not "have a constitutional right to build its house of worship where it pleases") (citing Lemon v. Kurtzman, 403 U.S 602 (1971)); Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 302-03 (5th Cir. 1988) (holding that the city violated the First Amendment by denying a special use permit to Islamic Center, when it had previously awarded similar permits to nine different Christian Churches); Grosz v. City of Miami Beach, 721 F.2d 729, 736 (1983) (holding that laws interfering only with religious claimants' "secular, philosophical, or personal choices" do not violate the Free Exercise Clause)(citing Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972); EEOC v. Miss. Coll., 626 F.2d 477, 488 (1980)).

173. *See, e.g., First United Methodist*, 916 P.2d at 380 (noting, without drawing constitutional conclusions, that religious property uses include "education, day care, the provision of food and shelter, counseling, and retreats") (citing Brief of amici curiae Christian Legal Society at 11-12).

174. Religious Land Use and Institutionalized Persons Act, § 2(b)(1).

treatment.[175] Some of the anecdotal evidence in the legislative record, however, provides guidance as to what types of situations Congress may have been referring.

Illinois Congressman Henry J. Hyde, for instance, presented the case of a church in Grand Haven, Michigan that signed a lease for a storefront property and then applied for a building permit to modify the space.[176] City officials, however, informed the church that zoning regulations prohibited religious meetings and worship at that location.[177] City officials claimed the zoning ordinance for the business (B1) district in which the church's property resides did not allow houses of worship as of right.[178]

The ordinance did, however, specifically allow "private clubs and schools, fraternal organizations, concert halls, and funeral homes."[179] In response, the church argued that it was obviously a "place of public assembly," but city officials disagreed and denied the permit.[180] Ultimately, after a religious liberties defense organization filed suit against Grand Haven on behalf of the church, city attorneys agreed to terms of a consent judgment that granted a building permit to the church.[181]

The Grand Haven ordinance appears to demonstrate the unequal treatment Congress intended section 2(b)(1) to prevent. The impact of secular assemblies and institutions the ordinance allowed in the B1 district is similar to, if not greater than, churches or other houses of worship. For instance, the traffic generated by concert halls on the night of a performance is at least equivalent to that of a typical church service. Moreover, a private school located in the business district would engender more significant safety concerns than a house of worship.

Despite Grand Haven and other examples of land use regulations treating religious assemblies on "less than equal terms" than secular assemblies, it is unclear whether the problem is pervasive enough to save section 2(b)(1).[182] Based on *Flores* and the Court's subsequent Section 5

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175. Representative Charles T. Canady, the House's chief sponsor of RLUIPA, did state that "less than equal terms . . . more squarely addresses the case in which the unequal treatment of different land uses does not fall into any apparent pattern." 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement by Rep. Canady). This clarification, however, is of little use without context.

176. *See* 146 CONG. REC. E1564 (daily ed. Sept. 22, 2000) (document submitted by Rep. Hyde).

177. *See id.*

178. *See id.*

179. *Id.*

180. *Id.*

181. *See* Haven Shores Cmty. Church v. City of Grand Haven, File No. 1:00-cv-175 (W.D. Mich. Dec. 20, 2000) (consent judgment). In the consent judgment, District Court Judge David W. McKeague stated that Grand Haven's zoning ordinance would not survive review under RLUIPA because it "prohibited a church or other religious use in" the district. *Id.* From this language, it is not clear what specific section(s) of RLUIPA Judge McKeague believed the ordinance to have violated.

182. Another example of unequal treatment appears in the previously cited case of C.L.U.B. v.

cases, Congress must demonstrate that unequal treatment of religious assemblies results in substantial numbers of constitutional violations.[183] If not, then the Court will likely consider section 2(b)(1) to be neither remedial nor preventive.[184]

Does the Court, however, truly intend for Congress to demonstrate widespread patterns of constitutional violations for every law it passes under the Enforcement Clause? For instance, assume, for the sake of argument, that the Court recently declared homosexuals to be a suspect class.[185] Would a subsequent law prohibiting states from criminalizing homosexual sodomy be valid under Section 5?[186]

In this hypothetical situation, Congress would appear to be well within its Enforcement Clause power. The law would simply prevent

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City of Chicago, No. 94CV6151, 2001 U.S. Dist. LEXIS 3791 (N.D. Ill. Mar. 30, 2001). *See supra* note 171. In *C.L.U.B.*, the city's zoning ordinance required religious institutions to obtain special use permits for establishing worship centers in all business, commercial, and manufacturing districts, while allowing as of right "clubs and lodges," "meeting halls," and "recreation buildings and community centers." *Id.* at *6-7. The city, however, in response to litigation, amended the ordinance's language to require special use permits for the secular uses. *See id.* at *7.

183. *See, e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *Flores*, 521 U.S. at 530 (holding that the legislative record for RFRA, unlike the records in the Voting Rights Act cases, lacked "examples of modern instances of generally applicable laws passed because of religious bigotry").

184. Section 2(b) of RLUIPA contains two other main subsections: section 2(b)(2), titled "Nondiscrimination," and section 2(b)(3), titled "Exclusions and Limits." Each of these faces its own constitutional difficulties. First, although the meaning of 2(b)(2) is much less ambiguous than 2(b)(1)—the definition of religious discrimination is well-established in equal protection and employment discrimination law—the record of land use regulations discriminating against religious assemblies and institutions may be insufficient.

Similarly, there is little ambiguity in subsection 2(b)(3)(a), which states that "no government shall impose or implement a land use regulation that *totally excludes religious assemblies from a jurisdiction* . . ." Religious Land Use and Institutionalized Persons Act § 2(b)(3)(a). Despite the "not in my backyard" opposition to religious assemblies in many areas, however, it is far from certain that courts will find that such evidence meets the "congruence and proportionality" test. *See* Laycock, *supra* note 3, at 759-63 for discussion of land use regulations and the exclusion of houses of worship.

Finally, subsection 2(b)(3)(b) may have a definitional problem similar to the "less than equal terms" language in subsection 2(b)(1). Subsection 2(b)(3)(b) prohibits governments from imposing or implementing land use regulations that "unreasonably [limit] religious assemblies, institutions, or structures within a jurisdiction." Religious Land Use and Institutionalized Persons Act § 2(b)(3)(b). While "reasonableness" is certainly common in torts and other areas of law, courts reviewing RLUIPA may find it difficult to define precisely what constitutes an "unreasonable limit" on a religious assembly, institution, or structure.

185. Under the Court's current equal protection jurisprudence, homosexuals are not defined as either a suspect or quasi-suspect class. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) (applying rational basis test to strike down an amendment to the Colorado Constitution that prohibited legislative, executive, or judicial actions designed to offer special protection to homosexuals).

186. In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court upheld an equivalent Georgia statute on grounds that the Fourteenth Amendment did not create a fundamental right for homosexuals to engage in sodomy.

states from violating the Equal Protection Clause as defined by the Supreme Court. However, under the standard established by *Flores* and subsequent cases, Congress would be unable to compile a significant record of constitutional violations. Even for the states that have anti-sodomy statutes, they are almost never enforced.[187]

Similarly, Professor Laycock has argued that prior to *Flores*, Congress passed many statutes for which substantial legislative records of constitutional violations were not established.[188] For instance, Laycock noted that in 1978 when Congress passed the Pregnancy Discrimination Act, the Supreme Court had held that pregnancy discrimination violated neither the Equal Protection Clause nor Title VII.[189] Therefore if Congress were to pass the same legislation today, the Court would have significant difficulty in upholding it.[190]

C. Whether RLUIPA's Land Use Provisions Are Remedial or Preventive in Nature is an Open Question

Despite the glaring inconsistency between *Flores* and some earlier statutes passed under the Enforcement Clause, RLUIPA's land use provisions will likely have to meet *Flores's* congruence and proportionality standard to pass constitutional inspection. The congruence prong should not be a significant hurdle because RLUIPA's land use provisions only target land use regulations that substantially burden the free exercise of religion. The proportionality prong, however, will be more troublesome.

As previously shown, the application of most land use regulations in the United States likely falls under *Smith's* individualized assessments exception. Because the constitutional definitions of "substantial burden on free exercise" and "less than equal terms," are somewhat unclear, however, it is not certain whether RLUIPA's application of strict scrutiny is proportional to the frequency with which land use regulations violate the Free Exercise Clause.

The *Flores* Court, in addition to depicting Congress's enforcement power under Section 5 as remedial and preventive, declared that the power to enforce does not include the power to alter the meaning of constitutional provisions.[191] Stated differently, "Congress does not enforce a

187. *See Bowers*, 478 U.S. at 198 (Powell, J., concurring) (noting the historical lack of enforcement of the Georgia statute).

188. *See* Laycock, *supra* note 39, at 747 n.19.

189. *See id.* at 753.

190. *See id.* ("There is not the slightest reason to believe that the Pregnancy Discrimination Act is congruent with and proportionate to any constitutional violations as the Court defines them.").

191. *See Flores*, 521 U.S. at 519.

constitutional right by changing what the right is."[192]

Consequently, if the Court were to determine that land use regulations so infrequently place substantial burdens on religious exercise, then it would also likely conclude that with RLUIPA, Congress intended to change the meaning of the Free Exercise Clause. The rationale for such a conclusion would resemble the following: "Land use regulations only occasionally infringe upon the free exercise rights of individuals and religious institutions. Congress, therefore, by requiring strict scrutiny review of land use regulations that place substantial burdens on religious exercise, attempted to change the existing judicial interpretation of the Free Exercise Clause. In other words, Congress tried to create constitutional rights that did not exist."

In *Flores*, the Court held that the legislative record for RFRA did not reflect a widespread pattern of religious discrimination.[193] Indeed, the Court concluded that the legislative record for RFRA only revealed "incidental" burdens, which was inconsistent with the law's stated purpose.[194] Moreover, the Court concluded that RFRA's scope—"displacing laws and prohibiting official actions of almost every description and subject matter"—was severely "out of proportion to a supposed remedial or preventive object."[195]

In contrast to RFRA, the legislative history for RLUIPA demonstrates a significant record of land use regulations substantially interfering with religious assembly.[196] Furthermore, the record supporting RLUIPA documents many instances in which localities have used land use regulations in arbitrary, even discriminatory, manners to prevent the establishment of houses of worship.[197] Congress, keenly aware of the

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192. *Id.*

193. *See id.* at 532. Professor Laycock, who served as lead counsel for Archbishop Flores, subsequently explained the reason for RFRA's scant legislative record. First, he noted that no one foresaw that documenting large numbers of constitutional violations in the record would have any constitutional significance. *See* Laycock, *supra* note 39, at 774-75. A second reason Professor Laycock offered was that RFRA's proponents could not illustrate the most egregious examples of Free Exercise violations, "because, almost by definition, seriously persecuted religions are highly unpopular." *Id.* at 775. Specifically, he noted that when Representative Stephen Solarz, RFRA's chief sponsor in the House, sought to file a congressional amicus brief for *Lukumi*, not a single representative or senator would agree to sign it. *See id.* at 776. The peculiar "Santeria religion was too unpopular to touch." *Id.*

194. *Flores*, 521 U.S. at 530.

195. *Id.* at 532.

196. *See* H.R. REP. NO. 106-219, at 18-24 (1999); Laycock, *supra* note 3 at 769-83. Both H.R. REP. NO. 106-219, which was originally submitted as part of the record for the "Religious Liberty Protection Act of 1999," and the Laycock article are cited in 146 CONG. REC. S7774 (daily ed. July 27, 2000) (exhibit submitted by Sens. Hatch and Kennedy). *See also* Keetch and Richards, *supra* note 3. The study that Keetch and Richards summarize in their article is also cited in H.R. REP. NO. 106-219.

197. *See infra* notes 202-203 and accompanying text.

Court's skeptical view of its Enforcement Clause power, went to great lengths to demonstrate that RLUIPA was preventive and remedial legislation.

The Supreme Court's recent evaluation of the legislative record for the Age Discrimination in Employment Act (ADEA) provides another point of comparison for RLUIPA. In *Kimel v. Florida Board of Regents*,[198] the Court held that Congress failed to demonstrate "any pattern of age discrimination by the States."[199] As a result, the Court concluded that ADEA was not preventive, but substantive in nature. ADEA, the Court declared, prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional" under the Court's equal protection standard of review for age discrimination laws.[200]

In contrast to ADEA, Congress provided what it believed to be a substantial record of statistical and anecdotal evidence indicating unconstitutional religious discrimination in land use regulation.[201] The record for RLUIPA indicates that local government officials, exercising "virtually unlimited discretion," frequently deny permits to religious organizations in arbitrary and discriminatory fashions.[202] Moreover, the record indicates that minority religious groups are vastly over-represented in land use litigation, indicating discriminatory treatment.[203] Finally, the record provides some evidence that there is a substantial disparity between the number of reported religious land use cases and actual conflicts between religious organizations and land use regulators.[204]

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198. 528 U.S. 62 (2000).

199. *Id.* at 89.

200. *Id.* at 86. Specifically, the Court cited several of its own decisions where it held that age classifications are presumptively rational. The Court further noted that even when States rely on "broad generalizations," such laws do "not violate the Equal Protection Clause." *Id.* at 84-85.

201. *See* H.R. REP. NO. 106-219, at 18.

202. *Id.* at 18-22. For example, the report cites evidence where non-religious assemblies such as community centers, health clubs, lodges, and museums "are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded." *Id.* at 19-20.

203. *Id.* at 20-21. Specifically, the report states that "Jews, small Christian denominations, and nondenominational churches are vastly overrepresented in reported church zoning cases. . . . Religious groups accounting for only 9% of the population account for 50% of the reported litigation involving location of churches and 34% of the reported litigation involving accessory uses at existing churches." *Id.* This same evidence is also summarized in Keetch and Richards, *supra* note 3, at 736-42.

204. H.R. REP. NO. 106-219, at 21 (noting that over a five-year period while "roughly 325 to 400" Presbyterian congregations reported conflicts over land use permits, there were only five total reported cases involving Presbyterian churches); *cf.* Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why they are Wrong*, 21 CARDOZO L. REV. 415, 421 (1999). Professor Berg explains that free exercise "disputes are more likely to be settled when the government has a weak reason for its policy or it can easily accommodate the needs of the religious believer." *Id.* Berg further notes that religious freedom legislation gives religious believers and organizations "real lev-

Based on the foregoing, it is doubtful that courts reviewing RLUIPA will reach conclusions similar to the Supreme Court's concerning ADEA. In *Kimel*, the Court held that Congress failed to identify "any discrimination whatsoever that rose to the level of constitutional violation."[205] With RLUIPA, Congress appears to have met this minimum requirement. Whether the record establishes RLUIPA's land use provisions as valid exercises of Congress's Enforcement Clause power, however, is a much more difficult question.

First, reviewing courts' interpretations of "substantial burden" and "religious exercise" will be critical. If courts apply the most restrictive interpretations of these terms, then they will likely fail to regard all but the most egregious examples as unconstitutional.[206] Additionally, courts may conclude that there is insufficient evidence to establish that governments frequently "impose or implement land use regulations" in manners which treat religious assemblies on "less than equal terms" with secular assemblies.[207]

Finally, it is possible, though perhaps unlikely, that courts will strike down RLUIPA's land use provisions on grounds that strict scrutiny, historically, has failed to effectively protect religious conduct. As some commentators have noted, the Supreme Court has demonstrated only a "flickering commitment" to the compelling state interest test.[208] Moreover, circuit courts have tended to support governmental interests in religious land use cases.[209]

Considering this history, it is possible that courts reviewing RLUIPA will undervalue the religious interests in land use cases. The difficulty, as one commentator notes, is that zoning ordinances are typically linked to "at least one extremely significant public value" such as protecting the

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erage in negotiating with government officials—[forcing them] to give some consideration to religious claims when they otherwise would not." *Id.*

205. *Kimel*, 528 U.S. at 89.

206. For example, if reviewing courts look only at circuit court religious land use cases and their respective interpretations of what constitutes a "substantial burden on religious exercise," then perhaps *Islamic Center* will represent the model for Free Exercise violations; *see supra* note 151. If so, then the vast majority of evidence presented by Congress in support of RLUIPA will prove futile.

207. Religious Land Use and Institutionalized Persons Act § 2(b)(1). Recall, however, that RLUIPA contains a severability clause. *See id.* § 5(i). Therefore, the Court could, for instance, uphold section 2(a)(2)(c) and strike down 2(b)(1).

208. Eisgruber & Sager, *supra* note 25, at 450 (noting the rare occasions in which the Court, prior to *Smith*, upheld claims involving religious conduct exemptions to neutral laws).

209. *See, e.g.*, Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983) ("Together, the important objectives underlying zoning and the degree of infringement of those objectives caused by allowing the religious conduct to continue place a heavy weight on the government's side of the balancing scale.").

public health, safety, or welfare.[210] As a result, religious demands "often tend to shrink in comparison."[211]

Courts preconceived to view governmental interests in regulating land use as more important than the needs of religious communities to have appropriate facilities in which to worship will likely view strict scrutiny as excessive. Correspondingly, such courts will be less inclined to declare RLUIPA as either remedial or preventive. Conversely, courts could recognize that a legitimate balancing of religious and governmental interests would render RLUIPA's use of strict scrutiny as an effective method for protecting the right to religious assembly in many cases.[212]

D. RLUIPA Invokes Federalism Concerns Because Land Use Is an Area of Law Regulated by State and Local Governments

Closely related to the issue of whether Congress, by enacting RLUIPA's land use provisions, acted within the scope of its Enforcement Clause power are concerns over federalism. Issues regarding Congress's possible encroachment upon state and local authority are primarily structural in nature.[213] *Flores* and subsequent Supreme Court cases dealing with Section 5 hold that the Constitution places distinct limits on Congress's powers over the states.[214]

Numerous reasons exist for the constitutionally imposed restraints on Congress's powers over the States. Federalism protects "liberty by dispersing governmental power," brings "government closer to the people," permits "the law to be tailored to local circumstances and local political preferences" and allows local governments to experiment with legislative

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210. Godshall, *supra* note 146, at 1576.

211. *Id.*

212. *See* Colin L. Black, Comment; *The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis*, 72 TUL. L. REV. 1767, 1803 (1998) (arguing that a proper balancing of governmental and religious interests would produce more coherent and consistent results in religious land use cases).

213. *See* Hamilton, *supra* note 39, at 701 n.9 (stating that in *Flores*, the Court "engaged in structural analysis" when it asked "the categorical question whether" Congress, with RFRA, acted "within the boundaries of its constitutionally circumscribed powers"). Of course the Tenth Amendment specifically addresses the powers retained by the "States respectively, or to the people." U.S. CONST. amend. X. The primary purpose of the Tenth Amendment, however, like the Ninth, is to delineate the Constitution's structural protection of liberty.

214. *See Flores*, 521 U.S. at 516 ("Under our Constitution, the Federal Government is one of enumerated powers. . . . Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States.") (citations omitted); *see also* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.'") (quoting Marbury v. Madison, 5 U.S. 137, 176 (1803)).

and administrative actions.[215] These benefits of local control apply directly to land use regulation.

Local governments are generally better able to respond to their constituents' concerns over land use issues than Congress or federal executive agencies. Local officials have the ability to take quick (on a government responsiveness scale, anyway) administrative and legislative actions, to hear complaints from residents over proposed land uses and to grant variances or special use permits for non-conforming uses. And consequently Congress, by passing land use legislation, risks interfering with an area of law designed to be controlled at the state and local level.[216]

One of the principal reasons for RFRA's demise was its extensive interference with state law. Both the *Flores* Court and RFRA's critics expressed this concern. In *Flores*, the Court declared that RFRA, by "[requiring] searching judicial scrutiny of state law with the attendant likelihood of invalidation," intruded considerably "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[217] Similarly, Professors Eisgruber and Sager argued that "RFRA's displacement of state authority [was] unusually broad," potentially affecting nearly all state laws.[218]

With RLUIPA, Congress diffused the "unlimited scope" objections that befell RFRA by limiting the categories of state laws subject to strict scrutiny review. Nonetheless, because RLUIPA's land use provisions require judicial review of state laws and decisions, the same federalism issues apply. Professor Conkle, in his article anticipating RLUIPA-like legislation, discussed the federalism implications of such a law in detail.[219]

According to Conkle's analysis, even if a court were to declare RLUIPA a valid exercise of Congress's Enforcement Clause power, it is possible that it would hold it unconstitutional based solely on independent state sovereignty principles.[220] Conkle based his argument on the Court's noted federalism rulings in *New York v. United States*[221] and

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215. Daniel O. Conkle, *Free Exercise, Federalism, and the States as Laboratories*, 21 CARDOZO L. REV. 493, 494-95 (1999).

216. Recall that with the Standard Zoning Enabling Act, the Commerce Department did not impose its provisions upon the states. Instead, it designed the act only to serve as a model for states adopting their own zoning enabling laws. *See supra* notes 55-59 and accompanying text.

217. *Flores*, 521 U.S. at 534.

218. Eisgruber & Sager, *supra* note 25, at 464. The authors also characterized RFRA as "capricious," repeating their assertion that strict scrutiny was inconsistent with the Court's Free Exercise Clause jurisprudence. *Id.*

219. *See* Conkle, *supra* note 40, at 654-60.

220. *See id.* at 658-60.

221. 505 U.S. 144 (1992). In *New York*, the Court struck down a provision of the Radioactive

Printz v. United States.[222] He asserted that the Court could very well declare that a law such as RLUIPA, which regulates state and local governments' regulation of land use, is an unacceptable congressional intrusion.[223] After all, as the Court declared in *Gregory v. Ashcroft*,[224] "the Fourteenth Amendment does not override all principles of federalism."[225]

Despite the legitimate constitutional arguments for protecting state and local governments from federal interference, there is another important aspect of federalism ignored by the Court's recent decisions. Federalism is a structural threat to liberty.[226] As Professor Laycock explains, federalism probably protected constitutional liberties in an era of limited government.[227] In an era of big government, however, particularly "without vigorous enforcement of constitutional rights, federalism becomes a serious structural threat to liberty."[228]

Laycock argues that today, with so many different government entities possessing the power to restrict liberty, federalism, "in conjunction with the administrative state," increases the threat to religious freedom.[229] He declares that in this environment, the only real enforcement

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Waste Policy Amendments Act of 1985 (42 U.S.C.S. § 2021b) requiring states to take title of low-level radioactive waste produced in their state or assume liability for damages resulting from the its failure to take possession of such waste. *See id.* at 174-86. The Court declared that "[w]hether one views the take title provision as lying outside Congress's enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 177.

222. 521 U.S. 898 (1997). *Printz*, essentially a structural ruling, struck down provisions of the Brady Handgun Violence Prevention Act (18 U.S.C. § 922) requiring local law enforcement officials in some states to perform background checks on persons attempting to purchase handguns. *See id.* at 902-03. Justice Scalia, writing for the Court, stated that the Brady Act provisions, because they were not properly grounded on any of Congress's enumerated powers, and required officers "to administer or enforce a federal regulatory program," were therefore "fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* at 935.

223. *See* Conkle, *supra* note 40, at 660 (citing *New York*, 505 U.S. at 166). Conkle also noted, however, that the laws at issue in both *New York* and *Printz* were based on the Commerce Clause, and therefore the rulings do not apply directly to laws based on Section 5. *See* Conkle, *supra* note 40, at 659 n.131. As he stated in a previous article, "principles of state sovereignty that might limit congressional power under Article I do not apply when Congress properly invokes enforcement power under the Civil War Amendments." Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 71 n.162 (1995) (citing City of Rome v. United States, 446 U.S. 156, 178-80 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)). *New York* and *Printz* would, of course, apply to section 2(a)(2)(b) of RLUIPA, which is grounded on Congress's Commerce Clause powers.

224. 501 U.S. 452 (1991).

225. *See* Conkle, *supra* note 40, at 659 n.131 (quoting *Gregory*, 501 U.S. at 469).

226. *See* Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 68 (1998).

227. *See id.* at 80.

228. *Id.*

229. *Id.* at 81. Laycock notes that each of the following governmental actions may prohibit religious practices: "an act of Congress, a regulation of a federal agency, an act of a state legislature, a regulation of a state agency, an act of a county board or a county agency, an act of a city council or

of religious and other constitutional liberties occurs at the federal level. Specifically, Congress and the federal judiciary are the only viable sources of protection for liberty.[230]

Professor Laycock therefore contends that the Court, by pruning Congress's Enforcement Clause powers, has endangered religious and other constitutional liberties.[231] Moreover, recent efforts to restrict judicial scrutiny of individual rights exacerbate the problem. As another commentator explains, judicial enforcement of individual rights is necessary, because "the political process left to itself may not adequately protect the rights of minorities and dissenters."[232] This argument is especially germane to the current analysis if the statistics on the over-representation of minority religions in land use cases are accepted.[233]

The argument that a national government provides greater protection for the rights of minority groups than state and local governments is not of recent origin. In *Federalist No. 10*, James Madison explained that a "well-constructed Union" tends "to break and control the violence of faction."[234] Madison argued that a republic is superior to a pure democracy because the government encompasses a "greater number of citizens and extent of territory."[235] This factor, Madison declared, "renders factious combinations less to be dreaded."[236] Similarly, though factious leaders may exert tremendous influence at local, and even state levels, the "Union" will typically preclude them from exerting influence over other states.[237]

The federalism implications of RLUIPA's land use provisions engender persuasive arguments on both sides. Based on *Flores* and the Court's other recent Section 5 cases, however, it is doubtful that arguments such as Professor Laycock's will receive significant consideration.

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city agency, an act of a special purpose district, a state court exercising common law powers, or a federal court sitting in diversity and predicting common law developments." *Id.*

230. *See id.* at 81-82.

231. *See id.* at 82 ("Pulling Congress out of the balance fundamentally changes the structure of liberty in our country. It fundamentally changes the relation of federalism to liberty, because it leaves all these multiple sources of regulation with no central or unified source of power to protect liberty.").

232. William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 155 (1998).

233. *See supra* note 203.

234. THE FEDERALIST No. 10, at 129 (James Madison) (Howard Mumford Jones ed., 1961). Madison defined a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 130.

235. *Id.* at 135.

236. *Id.*

237. *Id.* at 135-36.

Yet, predicting the Court's future treatment of legislation is anything but an exact science.[238]

V. CONCLUSION

At a minimum level, RLUIPA's land use provisions are distinct from RFRA and the subsequent statutes the Court struck down as exceeding Congress's Enforcement Clause power. Unlike RFRA, RLUIPA's land use provisions do not implicate virtually every area of state law. Furthermore, most land use regulations in America, through the granting of variances and special use permits, do not operate as neutral, generally applicable laws. Consequently Congress, by requiring strict scrutiny review for the imposition and implementation of land use regulations that place substantial burdens on religious exercise, does not appear to have altered the Supreme Court's interpretation of the Free Exercise Clause.

Moreover, in contrast to the Age Discrimination in Employment Act ("ADEA") and the Patent Remedy Act, the legislative history for RLUIPA demonstrates at least a significant and growing problem with land use regulations infringing upon the right to religious assembly.[239] Whether the congressional record for RLUIPA illustrates a widespread pattern of First Amendment violations is debatable but is not an outlandish assertion.

Thus it appears that RLUIPA's land use provisions grounded on Congress's Enforcement Clause power meet many of the Court's core concerns in *Flores* and subsequent cases. As a result, despite other important constitutional concerns, it seems unlikely that the Supreme Court will strike down all of RLUIPA's land use provisions. If the Court were to make such a ruling, then the viability of Section 5 as a means for protecting constitutional liberties would certainly be in doubt.[240]

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238. Professor Laycock succinctly illustrates this point: "I confidently expected to win the *Flores* case." Laycock, *supra* note 39, at 743.

239. *See Kimel*, 528 U.S. at 88 (declaring that the ADEA prohibited "very little conduct likely to be held unconstitutional"); *Florida Prepaid*, 527 U.S. at 640 (holding that with the Patent Remedy Act, "Congress came up with little evidence of infringing conduct on part of the States").

240. Considering RLUIPA's formidable legislative history, a Supreme Court ruling striking down all of the land use provisions would essentially establish that only laws equivalent to the Voting Rights Act are valid exercises of Congress's Section 5 power. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301 (1966). And although racial discrimination by state actors certainly still exists in the United States, it seems improbable that the current Congress could enact a law designed to remedy equal protection violations that would engender a record of unconstitutional conduct surpassing that of RLUIPA.