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Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I would like to thank Father Charles Whelan for his guidance and encouragement throughout the writing of this Note. Many thanks also to John, Laurie, and Giorgio for all of their assistance.

NOTES

THE CONSTITUTIONAL VALIDITY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000: WILL RLUIPA'S STRICT SCRUTINY SURVIVE THE SUPREME COURT'S STRICT SCRUTINY?

*Caroline R. Adams**

INTRODUCTION

In the summer of 2001, the Praise Christian Center moved into an eighty-year-old warehouse in Huntington Beach, California.[1] After installing a carpet, wiring, lights, and furniture, the congregation began to hold Sunday morning services.[2] But, in December 2001, Huntington Beach officials ordered the church members out of the warehouse, alleging that the church had not obtained the proper permits.[3] Church Pastor Derek Anunciation claims that the cost of obtaining the necessary permits is twice as much as the church can afford.[4] City officials also notified the church that zoning laws had recently changed to allow only single-family homes in the area where the warehouse is located.[5]

In Sierra Madre, California, Marantha High School, a non-denominational Christian high school, purchased a sixty-three-acre site to which it planned to relocate before September 2002, when its current lease expires.[6] In light of community concerns, however, the school modified its original plans and ultimately proposed to build on

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1. Jim Hinch, *Church Could Lose Its New Sanctuary*, The Orange County Reg., Jan. 9, 2002, http://www.ocregister.com/sitearchives/2002/1/9/local/church00109cci4.shtml.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Stephanie Chavez, *New Campus for School Rejected*, L.A. Times, Jan. 9, 2002, at B5.

8.5 acres with the remaining 54.5 acres to be preserved as open space.[7] After two years of debate, on January 7, 2002, the Sierra Madre City Council voted 3-1 to reject a zoning change that would have allowed the school to be built.[8]

Meanwhile, in the town of Harrison, New York, a Mormon Church is facing similar problems.[9] The Church of Jesus Christ of Latter Day Saints has tried for more than five years to obtain a permit to build a new temple in that township.[10] According to its complaint filed in the U.S. District Court for the Southern District of New York, the town spent three-and-a-half years reviewing the Church's application, a period that is about eight times longer than usual.[11] When the planning board finally approved the building plans, severe restrictions on the Church's size accompanied the "approval," as did prohibitions on operating a genealogy or visitor's center and on holding festivals and pageants of any kind on the property.[12]

In recent years, debates of this kind have become common in the United States. Zoning boards are perceived as notoriously uncooperative.[13] But religious institutions feel especially discriminated against in landmark and zoning decisions.[14] Some zoning codes limit the construction of religious institutions to certain districts,[15] and statistical evidence suggests that religious institutions, and especially those of minority religions, are disproportionately represented in zoning and landmark disputes.[16]

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7. *Id.*

8. *Id.*

9. Kent Larsen, *LDS Church Files Civil Rights Lawsuit Against Harrison, New York*, Mormon News, Dec. 18, 2001, http://www.mormonstoday.com/011221/N1HarrisonLawsuit01.shtml; Karen Pasternack, *Mormon Church Sues for Civil Rights Violations*, The J. News, Dec. 19, 2001, *at* http://www.thejournalnews.com/newsroom/121901/19mormon.html; *see also* The Becket Fund for Religious Liberty, Case Summary, *at* http://www.rluipa.com/cases/LDS-Harrison.html (last visited Apr. 10, 2002).

10. Larsen, *supra* note 9.

11. *Id.* According to the complaint, the usual amount of time spent reviewing any one application is five months. *Id.*

12. *Id.*

13. *E.g.*, Tom Wolfe, The Bonfire of the Vanities 593 (1987) ("'Mort? You know that church, St. Timothy's? . . . Right . . . LANDMARK THE SON OF A BITCH!'").

14. *E.g.*, Jane Lampman, *Uneasy Neighbors: Religious Groups Find Cities Less Hospitable on Zoning Matters*, Christian Sci. Monitor, Sept. 21, 2000, at 14 ("While issues of building size and traffic are familiar local concerns, religious groups say the problems they confront today are diverse: from zoning codes that favor secular over religious uses, to discrimination against certain faiths, to exclusion of churches altogether from land-use plans.").

15. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 474 (8th Cir. 1991) (upholding zoning code that excluded religious institutions from business districts); Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 309 (6th Cir. 1983) (upholding zoning code that excluded religious institutions from residential districts).

16. For example, a Brigham Young University study purports to show that minority religions are vastly over-represented in zoning lawsuits. *See infra* note 145.

Until recently, plaintiffs in these matters have relied on the Free Exercise Clause, Equal Protection Clause, and Free Speech Clause in their battles against local government. Two years ago, however, Congress provided religious institutions with a new weapon with which to challenge zoning board decisions—the Religious Land Use and Institutionalized Persons Act of 2000[17] ("RLUIPA").[18]

Under RLUIPA, if a religious institution is able to show that the denial of a zoning permit or variance "substantial[ly] burden[ed]"[19] its free exercise of religion, the opposing city or town must demonstrate that denying the necessary permit served a "compelling governmental interest."[20] Each city would also have to show that the denial was the "least restrictive means" available to advance that interest.[21]

The extent of the religious institutions' initial burden is governed by RLUIPA's definition of "religious exercise," which "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[22] In fact, RLUIPA specifically provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[23] Thus, under RLUIPA, each of the zoning issues detailed above would likely qualify as an issue of "religious exercise."[24]

In fact, RLUIPA was designed to address debates of this very nature between zoning boards and religious institutions.[25] In response to lobbying by religious activists of various denominations, Congress determined that discrimination against religious institutions had to be

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According to Sidley Austin Brown & Wood, the Brigham Young study reveals "that a minority religious group is over *ten times* more likely to need to file suit to gain approval for erecting a religious building" than a large religious group. Sidley Austin Brown & Wood's Religious Institutions Group and the RLUIPA Litigation Task Force, Questions & Answers About the Federal Religious Land Use Law of 2000, at 3, http://www.sidley.com/db30/cgibin/pubs/Web%20version%20of%20RLUIPA%20booklet.pdf (last visited Mar. 21, 2002). This study informs the arguments of many RLUIPA advocates who testified before Congress. See *infra* notes 145-54 and accompanying text for more extensive discussion.

17. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2001).

18. RLUIPA is pronounced "ar-loo-pa." For more information on RLUIPA, see generally The Becket Fund for Religious Liberty's RLUIPA Home Page, which can be found at http://www.rluipa.com.

19. RLUIPA, § 2(a)(1).

20. *Id.* § 2(a)(1)(A).

21. *Id.* § 2(a)(1)(B).

22. *Id.* § 8(7)(A).

23. *Id* § 8(7)(B).

24. *Id.*

25. Sidley Austin, *supra* note 16, at 1 ("RLUIPA is a law designed to protect religious assemblies and institutions from zoning and historic landmark laws that substantially interfere with their religious free exercise.").

redressed, particularly in the zoning context.[26] Accordingly, both the Praise Christian Center and Marantha High School plan to rely in part on RLUIPA in challenging the action taken by the zoning boards.[27] The Mormon Church has already filed a complaint in the Southern District of New York, alleging that the zoning board violated its rights under RLUIPA by substantially burdening its exercise of religion.[28]

Enacted in 2000, RLUIPA represents a scaled-down version of two prior bills, the Religious Liberty Protection Acts of 1998[29] and 1999[30] ("RLPA"), which were never enacted.[31] It also shares several common elements with the Religious Freedom Restoration Act of 1993 ("RFRA"),[32] which the Supreme Court found to be unconstitutionally broad in *City of Boerne v. Flores*.[33] In response to criticism that the RLPA was also overly broad,[34] Congress narrowed considerably the proposed statute and passed RLUIPA in its stead.[35] RLUIPA seeks to combat infringement of the First Amendment's Free Exercise Clause[36] in two specific areas. First, it protects the right of individuals to gather and worship by treating the land use of

26. 146 Cong. Rec. H7191 (daily ed. July 27, 2000) (statement of Rep. Charles T. Canady) ("While this bill does not fill the gap in the legal protections available to people of faith in every circumstance, it will provide critical protection in two important areas where the right to religious exercise is frequently infringed.").

27. Chavez, *supra* note 6; Hinch, *supra* note 1.

28. Larsen, *supra* note 9.

29. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998).

30. Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

31. 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Charles T. Canady) (stating that RLIUPA "is patterned after an earlier, more expansive bill, H.R. 1691, which passed the House of Representatives with an overwhelming vote after several committee hearings, two markups, and the filing of a Committee Report").

32. 42 U.S.C. § 2000-bb (1994), *amended by* Religious Land Use and Institutionalized Persons Act, § 7, 42 U.S.C. § 2000cc-4 (2001).

33. 521 U.S. 507 (1997).

34. *E.g.*, *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 41 (1998) [hereinafter Hamilton Testimony, 1998] (testimony of Marci Hamilton, Professor, Benjamin N. Cardozo School of Law, Yeshiva University) ("When I first read The Religious Liberty Protection Act of 1998, I thought someone was playing a prank on me. If I had been commissioned to write a law post-*Boerne v. Flores* that contains multiple constitutional violations, I could not have done a better job."); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary*, 105th Cong. 33 (1998) [hereinafter Eisgruber Testimony, 1998] (testimony of Christopher L. Eisgruber, Professor, New York University School of Law) (finding that the RLPA of 1998 "repeats and exacerbates the mistakes that led eventually to the decision in *Boerne* that struck down RFRA").

35. 146 Cong. Rec. H7191 (daily ed. July 27, 2000) (statement of Rep. Jerrold Nadler) ("[RLUIPA] is different, more narrow, than the Religious Liberty Protection Act we considered on the floor last year [which] had some people concerned with some civil rights implications. Those concerns . . . are not present in this bill.").

36. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

religious institutions as "religious exercise."[37] Second, RLUIPA is designed to protect institutionalized persons (persons confined to prisons, hospitals, and so forth) from infringement of their right to free exercise of religion under the First Amendment.[38]

To accomplish the former goal, on which this Note will focus, Congress targeted zoning and landmark laws because it considered discrimination against religious institutions particularly insidious in that arena. This Note will explore the extent to which RLUIPA's land-use provisions are constitutional given the defects of Congress's prior religious liberty bills, and ultimately will argue that RLUIPA fails in two major respects. First, the record on which Congress relied in enacting RLUIPA fell short of demonstrating a "pattern or practice" of discrimination against religious institutions.[39] Second, RLUIPA excessively expands the Court's free exercise jurisprudence in its attempt to protect religious institutions. For both of these reasons, Congress exceeded the proper scope of its Section 5, Fourteenth Amendment power.

Part I sets forth the background to the enactment of RLUIPA and the constitutional hurdles that Congress sought to overcome in doing so. Specifically, Part I discusses RLUIPA's compelling interest standard and the history of that standard in the Supreme Court's jurisprudence. It lays out Congress's previous attempts at religious protection legislation and describes how RLUIPA can be distinguished from those efforts, both in its scope and constitutional foundation.

Part II examines the ongoing debate between scholars and politicians over the status of, and constitutional basis for, RLUIPA. Section A of Part II describes the arguments that support, as well as those that oppose, finding a sufficient record of discrimination in the land-use context for Congress to invoke its Section 5, Fourteenth Amendment power. Section B discusses the debate over whether RLUIPA is a codification of the Supreme Court's free exercise jurisprudence or a departure from it.

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37. RLUIPA, § 8(7) (defining "religious exercise"); *id.* § 8(5) (defining "land use regulation").

38. *Id.* § 3(a). Section 3 of RLUIPA, entitled "Protection of Religious Exercise of Institutionalized Persons," states that the "compelling governmental interest" test shall be imposed on any government that places "a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997)." *See* Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 U. Haw. L. Rev. 479 (2001) (discussing why RLUIPA as applied to institutionalized persons fails under the Spending Clause and the Commerce Clause).

39. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

Finally, Part III argues that RLUIPA was a premature enactment,[40] neither supported by a real need for such legislation nor consistent with the Supreme Court's jurisprudence. It shows that Congress has again failed to satisfy the requirement that a "pattern or practice" of discrimination exist before relying on the remedial power of Section 5 of the Fourteenth Amendment. Part III will also discuss the most likely interpretations of *Employment Div., Dep't of Human Resources of Oregon v. Smith*[41] as applied to zoning laws, and will argue that RLUIPA unconstitutionally expands the legal definition of free exercise provided by the Court's decision in *Smith*.

I. RLUIPA'S MUDDIED HISTORY

This part focuses on the free exercise jurisprudence and Congressional action that culminated in RLUIPA's enactment. The Act's background sheds light on why RLUIPA is so controversial. An analysis of the elements that Congress juggled in crafting the bill is essential to evaluating whether RLUIPA, as enacted, is constitutional.

This part analyzes RLUIPA's imposition of a compelling governmental interest in certain land-use cases involving religious institutions. It examines this standard in light of the Supreme Court's free exercise jurisprudence in cases such as *Smith*, which held that strict scrutiny was appropriate only in limited instances. This part also explores Congress's previous attempts to protect religious liberty in the wake of *Smith*, such as RFRA and the RLPA, and discusses RLUIPA's relationship to this earlier legislation. Finally, Part I lays out the constitutional bases on which Congress enacted RLUIPA, and briefly addresses the limits of Section 5 enforcement power under the Fourteenth Amendment.

A. *RLUIPA's "Compelling Governmental Interest" Standard*

As discussed in the Introduction, RLUIPA imposes a "compelling governmental interest" standard on local governments in zoning cases in order to remedy alleged discrimination against religious institutions.[42] In the Supreme Court's own words, "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most

40. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. Ark. Little Rock L.J. 619, 631 (1998) (concluding that "it would be worthwhile to wait to see how the *Smith* doctrine actually plays itself out in the courts" before enacting religious protection legislation); Ira Lupu, *The Failure of RFRA*, 20 U. Ark. Little Rock L.J. 575, 602-03 (1998) (arguing that "the process of constitutional adjudication should be allowed to work itself out on questions of religious liberty after *Smith*").

41. 494 U.S. 872 (1990).

42. 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

demanding test known to constitutional law."[43] In fact, government policies almost never survive review under the compelling interest or "strict scrutiny" standard.[44] Therefore, RLUIPA has the potential to impose a significant burden on zoning boards faced with zoning issues involving religious institutions.

In implementing this standard, Congress was responding to the 1990 case, *Employment Div., Dep't of Human Resources of Oregon v. Smith*.[45] In *Smith*, the Court held that a state prohibition against the use of peyote, a hallucinatory drug, did not implicate the Free Exercise Clause despite impinging on the sacramental use of the drug by Native Americans.[46] The Court reasoned that the compelling interest standard was too stringent in cases where "neutral law[s] of general applicability" incidentally burdened the free exercise of religion.[47] Because the prohibition on peyote was not aimed at inhibiting religion but rather was "neutral" and of "general applicability,"[48] the Court did not analyze it under the Free Exercise Clause and instead upheld the decision.

Many observers considered *Smith* to be a major blow to religious freedom.[49] Moreover, the Court's decision was perceived as reversing

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43. *City of Boerne*, 521 U.S. at 534.

44. *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (referring to the Supreme Court's strict scrutiny test as "'strict' in theory and fatal in fact"). But see *Korematsu v. United States*, 323 U.S. 214, 216, 218 (1944), where the Supreme Court applied strict scrutiny for the first time to a case of racial classification, and found that the government's internment of Japanese-Americans was justified by a compelling governmental interest).

45. 494 U.S. 872 (1990).

46. *Id.* at 878-79.

47. *Id.* at 879 (citations omitted).

48. *Id.*

49. *See, e.g., Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary*, 105th Cong. 6-7 (1998) [hereinafter Oaks Testimony, 1998] (testimony of Elder Dallin H. Oaks, Member, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-Day Saints, Salt Lake City, UT) ("With the abandonment of the compelling governmental interest test in the case of *Employment Division v. Smith*, the Supreme Court has permitted any level of government to enact laws that interfere with an individual's religious worship or practice .... This greatly increased latitude to restrict the free exercise of religion must be curtailed by restoring the compelling governmental interest test."); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary*, 105th Cong. 18 (1998) (testimony of Richard D. Land, President-Treasurer, Ethics and Religious Comm'n of the Southern Baptist Convention, Nashville, TN) ("The *Smith* decision was the worst religious liberty decision handed down by the Supreme Court in my lifetime."); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary*, 105th Cong. 22 (1998) [hereinafter Zwiebel Testimony, 1998] (testimony of David Zwiebel, Dir. Of Gov't Affairs and General Counsel, Agudath Israel of America, New York, NY) ("[W]hen the Supreme Court handed down its 1990 ruling in the *Smith* case, ... a chill went up and down the collective American Jewish spine."); *see also, e.g.*, Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. Rev. 259, 260 ("I believe that *Employment Division v. Smith* is substantively

its previous free exercise jurisprudence[50] in cases such as *Sherbert v. Verner*[51] and *Wisconsin v. Yoder*.[52]

Sherbert was the first case in which the Supreme Court applied the compelling interest test to a situation involving the Free Exercise Clause. The Court reversed the Supreme Court of South Carolina's holding that an applicant was ineligible for unemployment benefits under the South Carolina Unemployment Compensation Act[53] because she had refused to work on Saturday, the Sabbath of the Seventh-day Adventist Church, to which she belonged.[54] In reversing, the Supreme Court held that the South Carolina statute excessively burdened the applicant's free exercise of religion by "forc[ing] her to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion in order to accept work."[55] Because South Carolina had failed to demonstrate a compelling state interest which justified the substantial burden on her religious exercise, the Court found that denying the

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wrong and institutionally irresponsible."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990) (attacking the *Smith* decision); Elliot Mincberg, *A Look at Recent Supreme Court Decisions: Judicial Prior Restraint and the First Amendment*, 44 Hastings L.J. 871, 871 (1993) (asserting that *Smith* "severely damaged the right to free exercise of religion"). *But c.f.*, Ernest P. Fronzuto, III, Comment, *An Endorsement for the Test of General Applicability:* Smith II, *Justice Scalia, and the Conflict between Neutral Laws and the Free Exercise of Religion*, 6 Seton Hall Const. L.J. 713, 716 (1996) ("'[T]he test of general applicability' . . . has been throughout American history the prevailing standard of free exercise review."); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) (arguing that *Smith*'s interpretation of the Free Exercise Clause has historical support); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991) (defending *Smith* against McConnell's attack).

50. *E.g.*, *Smith*, 494 U.S. at 908 (Blackmun, J., dissenting) (expressing regret that the majority's position "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution"); *see also, e.g.*, David G. Savage & Richard Simon, *U.S. Restores Special Protections for Religious Groups*, L.A. Times, Sept. 23, 2000, at A18 (noting that "in 1990, the high court reversed itself in [the *Smith*] case"). *See* Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 Geo. L.J. 101, 109 (1997) (referring to "the implicit reversal of *Sherbert* in *Smith*"); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 Mich. J. Int'l L. 1179, 1221 (1994) ("In *Oregon v. Smith*, the Court reversed the precedent established in *Sherbert*. . . ."); James T. Hunt, Jr., Casenote, *Congress Exceeded Its Constitutional Authority Under the Enforcement Clause of the Fourteenth Amendment by Enacting the Religious Freedom Restoration Act* – City of Boerne v. Flores, *117 S. Ct. 2157 (1997)*, 9 Seton Hall Const. L.J. 609, 609 (1999) (noting that the Court's holding in *Smith* effectively "revers[ed] decades of Free Exercise Clause precedent").

51. 374 U.S. 398 (1963).

52. 406 U.S. 205 (1972).

53. *Sherbert*, 374 U.S. at 400-01 (citing S.C. Code Ann. tit. 68, §§ 68-1 to 68-404 (1952)).

54. *Id.* at 399-402.

55. *Id.* at 404.

religious exemption violated the First Amendment's Free Exercise Clause.[56]

Similarly in *Yoder*, the Supreme Court held that Wisconsin's compulsory school attendance law substantially burdened Amish respondents' right to free exercise of religious beliefs that require them to lead a life apart from "worldly influences."[57] Because the state could not demonstrate a compelling state interest justifying this burden, the Court upheld a religious exemption from the Wisconsin law on the respondents' behalf.[58]

In *Smith*, the Court distinguished both *Sherbert* and *Yoder*, limiting their scope more than many proponents of religious liberty had anticipated.[59] The Court held that *Sherbert*'s use of the compelling state interest balancing test was limited to the unemployment context,[60] finding that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[61] *Yoder* was also treated as an exception to the rule established in *Smith* because the circumstances involved not "the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with [an]other constitutional protection[], [namely] the right of parents . . . to direct the education of their children."[62] According to the Court's reasoning, therefore, *Sherbert* and *Yoder* are mere exceptions to the general rule that individuals must comply with every "generally applicable" law despite any incidental infringement of religious conduct that the law may involve.[63] To hold otherwise would permit the individual "'to become a law unto himself' [which] contradicts both constitutional tradition and common sense."[64]

B. *Protecting Religious Institutions' Land-Use Liberty in the Wake of* Smith

The wording and legislative history of RLUIPA strongly suggest that Congress intended RLUIPA section 2's prohibition against substantially burdening religious exercise in the land-use context to

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56. *Id.* at 407-10.
57. *Yoder*, 406 U.S. at 217-19.
58. *Id.* at 234-35.
59. *E.g.*, Samuel Rabinove, *The Supreme Court and Religious Freedom*, Christian Sci. Monitor, June 25, 1990, at 19 (noting that "what was so extraordinary about [*Smith*]—and what has sent shock waves through religious communities of every faith all over the country—was its totally unexpected, and unnecessary, scope"); *see also supra* notes 49-50.
60. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).
61. *Id.* at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).
62. *Id.* at 881 (citations omitted).
63. *Id.* at 879.
64. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

track the strict scrutiny exception laid out in *Smith*.[65] Indeed, section 2 limits the compelling interest test to cases where "a government makes . . . *individualized assessments* of the proposed uses for the property involved,"[66] thus circumventing *Smith*'s instruction not to apply strict scrutiny to laws of "general applicability."[67]

In distinguishing *Sherbert* from the facts of *Smith*, the Supreme Court noted that the compelling state interest test in *Sherbert* was "developed in a context that lent itself to *individualized governmental assessment* of the reasons for the relevant conduct," a context where a "system of individual exemptions" was in place.[68] Oregon's prohibition against the use of peyote did not involve any such "exemptions" or "assessments," but rather a "neutral" and "generally applicable" law, and therefore was not subject to the compelling interest standard.[69] Thus, in section 2 Congress used language identical to that used by the Court in *Smith* to ensure that RLUIPA's scope would fall within the *Sherbert* exception to the *Smith* rule.[70]

Congress was particularly careful to focus on this distinction because of the shortcomings of the Religious Freedom Restoration Act of 1993 ("RFRA").[71] Like RLUIPA, RFRA was designed to protect religious liberty and to combat discrimination against religious exercise.[72] However, RFRA was far broader than RLUIPA and imposed on state and federal governments alike the need to satisfy a compelling interest test whenever neutral and generally applicable laws "substantially burdened" an individual's free exercise of

65. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) (noting that "[e]ach subsection [of RLUIPA] closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability," and citing *Smith*'s rule as being consistent with RLUIPA's imposition of the compelling state interest test in cases of "individualized assessments").

66. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(2)(C), 42 U.S.C. § 2000cc(a)(2)(C) (2001) (emphasis added). This section limits the general rule of section 2(a)(1), in part, to cases where "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." *Id.*

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

68. *Id.* (emphasis added).

69. *Id.* at 879-80.

70. *See, e.g., Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 109 (1999) [hereinafter Laycock Testimony, May 1999] (testimony of Douglas Laycock, Assoc. Dean for Research, Univ. of Texas Law School) (discussing the comparable provision of the RLPA section 3(b)(1)(A), as "enforc[ing] the free exercise clause as interpreted in *Smith*").

71. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000-bb (1994), *amended by* RLUIPA, § 7.

72. RFRA, § 2(b)(2) (stating that the purpose of RFRA was "to provide a claim or defense to persons whose religious exercise is substantially burdened by the government").

religion.[73] In so doing, Congress attempted to circumvent the Supreme Court's holding in *Smith*. Indeed, Congress's stated purpose in enacting RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in *all* cases where free exercise of religion is substantially burdened."[74]

In *City of Boerne v. Flores*,[75] which itself involved a zoning dispute between a church that was seeking to expand and the zoning board of Boerne, a city in Texas, the Supreme Court found that RFRA was unconstitutional as applied to the States.[76] Specifically, the Court found that RFRA had exceeded Congress's power under Section 5 of the Fourteenth Amendment.[77] Holding that the remedy of RFRA was way out of proportion to any demonstrated ill, the Court criticized the "substantive alteration of [the *Smith*] holding [that was] attempted by RFRA" in imposing a compelling state interest test on generally applicable laws.[78] Thus, RLUIPA's "individualized assessment" language, which is taken verbatim from *Smith*, is clearly Congress's attempt to avoid the ill-fated history of RFRA in *City of Boerne*.

C. *RLUIPA's Constitutional Basis: Section 5, Fourteenth Amendment*

In its effort to tailor RLUIPA narrowly enough to track the Supreme Court's jurisprudence, Congress also sought to avoid RFRA's more significant defect, namely that the Act had exceeded Congress's Section 5, Fourteenth Amendment power to enforce that Amendment's substantive provisions.[79] In *City of Boerne*, the Court reaffirmed the "remedial" nature of the Section 5 power[80] and held that there was a dearth of evidence establishing a "pattern or

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73. *Id.* § 3(b).

74. *Id.* § 2(b)(1). In crafting RFRA, Congress also noted that "the Supreme Court [in *Smith*] virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *Id.* § 2(a)(4).

75. 521 U.S. 507 (1997).

76. The Supreme Court expressly invalidated RFRA only as applied to the States. *Id.* at 519.

77. *Id.* at 532-33; *see infra* Part I.C.

78. *City of Boerne*, 521 U.S. at 534; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (giving the Supreme Court the exclusive power to interpret the Constitution and to declare invalid any law contradicting it).

79. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see generally* William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 Iowa L. Rev. 391 (1998) (discussing generally Congress's remedial power under the Fourteenth Amendment, Section 5, and, in particular, that power as applied in enacting RFRA).

80. *City of Boerne*, 521 U.S. at 520. See also *University of Alabama v. Garrett*, where the Supreme Court most recently reiterated that "Congress'[s] § 5 [Fourteenth Amendment] authority is appropriately exercised only *in response to* state transgressions." 531 U.S. 356, 368 (2001) (emphasis added).

practice" of discrimination against religious groups.[81] According to the Court, RFRA could not "be understood as responsive to, or designed to prevent, unconstitutional behavior" and thus did not qualify as remedial legislation.[82] Moreover, the compelling interest standard imposed by RFRA "lack[ed] proportionality or congruence between the means adopted and the legitimate end to be achieved."[83]

Congress again attempted to employ its Section 5 enforcement power in enacting RLUIPA but limited the Act's scope to land use and institutionalized persons because a more substantial record of discrimination had been established in those areas than in any other.[84] Congress built up an evidentiary record throughout the course of several hearings held after the 1997 *City of Boerne* decision.[85] The record amassed consisted primarily of anecdotal and statistical evidence of discrimination in the zoning context. Instances of conflicts between religious institutions and zoning boards abound, and the statistical evidence appears to corroborate such anecdotes. However, this evidence is not clearly sufficient to justify Congress's use of its Section 5 remedial power, because the Supreme Court's cases have established a very stringent standard by which to assess the use of such power. Indeed, Congress has rarely succeeded in overcoming this hurdle.

Most recently, in *University of Alabama v. Garrett*, the Supreme Court struck down Title I of the Americans with Disabilities Act ("ADA")[86] as an abrogation of the States' immunity under the

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81. *City of Boerne*, 521 U.S. at 534.

82. *Id.* at 532.

83. *Id.* at 533.

84. Senators Hatch and Kennedy view the record as reflecting "forms of discrimination [that] are very widespread," and found that "[t]his discrimination against religious [land] uses is a nationwide problem." 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

85. *See* The Becket Fund for Religious Liberty, RLUIPA Home Page, *at* http://www.rluipa.com/generaldocs/background/html (last visited Mar. 10, 2002). The web page sets forth a summary of the pertinent hearings:

> The Subcommittee on the Constitution of the House Judiciary Committee held hearings on May 12, 1999, on HR 1691 ("Religious Liberty Protection Act of 1999"); on June 16 and July 14, 1998 on HR 4019 ("Religious Liberty Protection Act of 1998"); and a series of hearings on July 14, 1997, February 26, 1998, and March 26, 1998 ("Protecting Religious Freedom After *City of Boerne v. Flores*")....
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> Senate Judiciary Committee hearings [were held on] June 23 and September 9, 1999 on "Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure."
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> On June 23, 1998, the Senate Judiciary Committee held a hearing on S.2148, the "Religious Liberty Protection Act of 1998," [and on] October 1, 1997, the Senate Judiciary Committee also held oversight hearings on "Congress' constitutional role in protecting religious liberty in the wake of the Supreme Court's decision in the case of *City of Boerne v. Flores*."

Id.

86. Americans with Disabilities Act, 42 U.S.C. §§ 12111-17 (2000).

Eleventh Amendment[87] because Congress had exceeded its Section 5 power to enforce Fourteenth Amendment protections.[88] As in *City of Boerne*, "[t]he legislative record of the ADA . . . simply fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[89] Although Congress conducted hearings, gathered anecdotal evidence of instances of discrimination, and concluded generally that "society has tended to isolate and segregate individuals with disabilities,"[90] its record was still held insufficient to satisfy the stringent requirement of "a pattern of discrimination by the States which violates the Fourteenth Amendment."[91]

In both *City of Boerne* and *Garrett*, the Supreme Court contrasted the legislative histories of RFRA and the ADA, respectively, with that of the Voting Rights Act of 1965. In *South Carolina v. Katzenbach*, the Court had upheld the Voting Rights Act as "appropriate" legislation to enforce the Fifteenth Amendment's mandate against racial discrimination in the context of voting.[92] In that case, Congress "documented a marked pattern of unconstitutional action by the States" in that "officials . . . routinely applied voting tests in order to exclude African-American citizens from registering to vote, . . . litigation had proved ineffective and . . . there persisted an otherwise inexplicable 50-percentage-point gap in the registration of white and African-American voters in some States."[93]

Recognizing the strictness of the Supreme Court's standard in the arena of Section 5 enforcement power, Congress further attempted to ensure the validity of RLUIPA by relying on the Commerce Clause and Spending Clause[94] as constitutional bases for the Act.[95] The goals

87. U.S. Const. amend. XI.

88. Univ. of Alabama v. Garrett, 531 U.S. 356, 368 (2001).

89. *Id.*

90. 42 U.S.C. § 12101(a)(2).

91. *Garrett*, 531 U.S. at 374.

92. South Carolina v. Katenbach, 383 U.S. 301, 308 (1966); *see also Garrett*, 531 U.S. at 373 n.8 (noting that "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment").

93. *Garrett*, 531 U.S. at 373 (citing *Katzenbach*, 383 U.S. at 312-13).

94. In addition to cases where the government makes "individualized assessments" in land-use regulations, the "compelling interest" test applies in two other circumstances. First, the standard applies in cases where "the substantial burden is imposed in a program or activity that receives Federal financial assistance." Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(2)(A), 42 U.S.C. § 2000cc(a)(2)(A) (2001) (basing this enactment on the Spending Clause). Second, it applies where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." *Id.* § 2(a)(2)(B) (basing this enactment on the Commerce Clause).

95. *See* Evan M. Shapiro, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 Wash. L. Rev. 1255 (2001) (discussing why RLUIPA fails under Congress's Commerce Clause power).

of RLUIPA, however, fall squarely within the purpose of the Fourteenth Amendment, which guarantees that "[n]o State shall make or enforce any law which . . . [shall] deprive any person of life, liberty, or property, without due process of law."[96] The Court held in 1940 that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment."[97] Therefore, it is likely that the Court will focus primarily on Congress's Fourteenth Amendment Section 5 power in assessing the constitutional validity of RLUIPA.[98]

Given the Supreme Court's demanding standard and the complicated background of religious liberty legislation since *Smith*, RLUIPA's validity must be closely analyzed. Having evolved throughout the course of discussions on RFRA and the RLPA, the debates over RLUIPA's constitutionality are laid out in Part II and serve to contextualize the analysis of Part III.

II. DEBATES OVER THE CONSTITUTIONALITY OF RLUIPA

Because RLUIPA is such a recent enactment, the Supreme Court has not yet had the opportunity to address the question of its constitutionality, nor has this issue made its way into the federal circuit courts. While several federal district courts have confronted claims by religious institutions of RLUIPA violations in the land-use context, none have addressed the question of its constitutionality.[99] However, the Supreme Court's jurisprudence in *City of Boerne*, *Smith*, and beyond, sheds light on two major aspects of the Act's constitutionality. Part II.A addresses the constitutional basis of RLUIPA, while Part II.B examines the issue of RLUIPA's scope given the legal restrictions set forth in *Smith*.

This part lays out the conflicting arguments concerning RLUIPA's constitutionality on these two central issues. First, Section A details

96. U.S. Const. amend. XIV, § 1.

97. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

98. Eisgruber Testimony, 1998, *supra* note 34, at 33 (discussing the constitutional bases for the RLPA of 1998 and noting that "concerns about religious liberty . . . are concerns most appropriately articulated through the goals of the Fourteenth Amendment").

99. *See* C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903 (N.D. Ill. 2001) (assuming that RLUIPA was constitutional, and holding that zoning laws which restricted church locations did not discriminate against religion within the meaning of RLUIPA); Omnipoint Communications, Inc. v. City of White Plains, 202 F.R.D. 402 (S.D.N.Y., 2001) (finding that a religious corporation could not intervene in a suit under the Telecommunications Act of 1996 over building monopole on adjacent property which would ruin the view from the corporation's property because there was no protectable interest); Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173 (D. Conn. 2001) (presuming the constitutionality of RLUIPA in finding in favor of plaintiff's RLUIPA claims because the cease-and-desist order was not the least restrictive means of fulfilling the government's interest in protecting neighbors' health and safety against problems caused by plaintiffs' prayer services).

the record of discrimination on which Congress based its use of Section 5 power under the Fourteenth Amendment and examines the arguments for and against finding a "pattern or practice"[100] of discrimination in the context of religious land-use controversies. Proponents of RLUIPA argue that the record is replete with anecdotal and statistical evidence of discrimination, or at least prejudice, against religious institutions in land-use cases. In response, opponents challenge the sufficiency of such evidence, claiming that the record does not establish a pattern or practice of discrimination that rises to the level necessary for Congress to rely on its Section 5 power.

Second, even if there were a sufficient record of discrimination to justify remedial or preventive legislation, Section B lays out the arguments for, and against, RLUIPA's validity in light of the Supreme Court's interpretation of the Free Exercise Clause in *Smith*. While RLUIPA's proponents assert that the Act's "individualized assessment" language tracks the Supreme Court's reasoning in *Smith*, its opponents contend that RLUIPA is a departure from the Court's jurisprudence. Opponents further argue that RLUIPA is not an "appropriate" departure because the factual record lacks sufficient evidence of widespread discrimination against religious institutions in the United States,[101] and thus the enactment lacks proportionality to the ills sought to be remedied. This debate is important in shedding light on RLUIPA's scope and validity.

A. *Congress's Record of Land-Use Discrimination*

1. Proponents: A Pattern of Discrimination

In response to *City of Boerne*, in which the Supreme Court struck down RFRA, Congress debated, but never passed, the Religious Liberty Protection Acts of 1998 and 1999. Critics cited several shortcomings in the RLPA for which RFRA had also been faulted, such as over-breadth and infringement of other substantive rights.[102]

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100. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

101. *See* City of Rome v. United States, 446 U.S. 156, 213 (1980) (Rehnquist, J., dissenting) ("[C]ongressional prohibition of some conduct which may not itself violate the Constitution is 'appropriate' legislation 'to enforce' the . . . Amendments if that prohibition is necessary to remedy prior constitutional violations . . . or if necessary to effectively prevent purposeful discrimination . . . .").

102. Hamilton Testimony, 1998, *supra* note 34, at 40 (arguing that the RLPA of 1998 is unconstitutional because it "attempt[s] to amend the Constitution without Article V procedures"); *see also* American Civil Liberties Union, Freedom Network, Effect of the Religious Liberty Protection Act of 1998 on State and Local Civil Rights Laws (Jan. 25, 1999), *at* http://www.aclu.org/congress/l012599a.html ((stating that "passage of an unamended RLPA would have undermined many state and local civil rights laws by creating a new defense against civil rights claims brought under those laws").

Therefore, Congress limited its previous attempts significantly in crafting RLUIPA.[103]

Recognizing that the record of adverse treatment of religious institutions was most conspicuous in the area of land use,[104] Congress tailored RLUIPA's scope to the record of discrimination before it.[105] In justifying the use of its Section 5 power, Congress relied on a record of anecdotal and statistical evidence that purported to show discrimination against religious institutions.[106] Both types of evidence can be further classified into two distinct categories. The first category consists of cases pertaining to restrictions on the initial construction of a religious building in a particular district.[107] The second category involves instances where religious institutions are prevented from expanding already-existing structures onto neighboring lots or within the boundaries of their own property.[108]

a. *Anecdotal Evidence Involving Land-Use Regulations That Restrict the Initial Construction of a Religious Building*

Within the former category fall complaints that churches "are being zoned out of cities because of their social service ministries to the destitute,"[109] their failure to bring economic value to commercial areas, and their incongruous presence in residential areas. One oft-cited example is the case of the Refuge, a missionary church in St. Petersburg, Florida.[110] The Refuge conducts social welfare programs such as feeding the homeless, counseling alcoholics and HIV-infected

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103. *See supra* note 35.

104. *See supra* note 84.

105. 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (statement of Sen. Orrin G. Hatch) ("It is no secret that I would have preferred a broader bill than the one before us today. Recognizing, however, the hurdles facing passage of such a bill, supporters have correctly... agreed to move forward on this more limited, albeit critical, effort.").

106. *Id.* at S7775 (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) ("Some of this evidence is statistical.... Some is anecdotal, with examples from all over the country.").

107. Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725, 736 (1999) (attached Appendix with the Brigham Young study which breaks down the religious land use cases into these same two categories, calling them "location cases" and "accessory use cases").

108. *See id.*

109. *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 4 (1999) [hereinafter McFarland Testimony, June 1999] (statement of Steven T. McFarland, Center for Law and Religious Freedom, Christian Legal Society, Annandale, VA).

110. *Id.* at 7-8 (citing The Refuge Pinellas, Inc. v. City of St. Petersburg, 755 So.2d 119 (Fla. Dist. Ct. App. 2000)); *see also* 146 Cong. Record E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Henry J. Hyde).

individuals, and working with juvenile offenders.[111] In so doing, the Refuge is "doing exactly what Christ calls His Church to do."[112] However, St. Petersburg ordered the Refuge to leave its current location, labeling it a "social service agency" rather than a "church" for zoning purposes.[113] Notably, the City's zoning law permits churches in the area where the Refuge is located, but forbids social service agencies.[114] In response to the Church's complaint, the City compared the Refuge to a "stink weed" that was likely to have "a negative impact on the rose garden and [that needed to] be weeded out."[115]

In Michigan, the Grand Haven zoning board denied the Haven Shores Community Church a building permit for altering the storefront property that it had rented.[116] The City of Grand Haven objected to the permit because the storefront was located in a business district zoned for private clubs and schools, fraternal organizations, concert halls, and funeral homes, but not for churches.[117] In December 2000, District Judge McKeague signed a consent order permitting the church to occupy the storefront.[118] This case involves one of the first settlements to be reached pursuant to RLUIPA.[119]

In *Cornerstone Bible Church v. City of Hastings*, the zoning code completely excluded churches from business districts while permitting them to build only in residential districts.[120] The prohibition was upheld.[121] Conversely, in *Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, the city of Lakewood, Ohio, designed its zoning code to exclude churches from residential areas because of the

111. McFarland Testimony, June 1999, *supra* 109, at 7.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 8 (citing City's Response to Petition for Writ of Certiorari, at 3, in *Refuge Pinellas*).
116. Alicia Benjamin-Samuels, *Michigan Church Wins Right to Worship in Storefront*, The Freedom Forum Online (Jan. 4, 2001), *at* http://www.freedomforum.org/templates/document.asp?documentID=1-2976; *see* 146 Cong. Rec. E1565 (daily ed. Sept. 22, 2000) (statement of Rep. Henry J. Hyde) (citing The Becket Fund for Religious Liberty's complaint on behalf of the Haven Shores Community Church as "alleging religious discrimination"); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 946 (2001) (citing Haven Shores Community Church v. City of Grand Haven, No. 00-175 (W.D. Mich. Dec. 20, 2000) (consent decree)).
117. *See* Benjamin-Samuels, *supra* note 116.
118. *See Haven Shores*, No. 00-175.
119. *See id.*
120. Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 663 (D. Minn. 1990) (upholding exclusion of churches from business districts because they could locate in residential districts), *rev'd in part, on other g'nds*, 948 F.2d 464 (8th Cir. 1991)); *see also* H.R. Rep. No. 106-219, at 19 (1999) [hereinafter House Report, 1999] (statement of Rep. Charles T. Canady) (citing *Cornerstone Bible*).
121. *Cornerstone Bible*, 740 F. Supp. at 663.

"traffic hazards, increase[d] noise levels, potentially decrease[d] property values, and . . . various other problems."[122] The Sixth Circuit found that relegating the building of new churches to ten percent of the city was not a free exercise violation because building a church was an "accessory of worship, not a fundamental tenet."[123]

In Long Island, a beach-side community wanted to exclude a synagogue, claiming that it would attract excessive traffic on Friday nights.[124] The town and trial judge agreed.[125] However, the court of appeals judge held for the synagogue, finding that the synagogue would be no more disruptive than the large secular parties typically held on Friday nights.[126]

Another frequently cited case involves the Etz Chaim congregation of elderly and disabled Orthodox Jews located in the Hancock Park area of Los Angeles.[127] Because the members were unable to walk long distances and Orthodox Jews are not allowed to use cars on the Sabbath, in 2000 they sought a conditional use permit to establish a synagogue in one of the houses in Hancock Park, an area zoned only for single-family dwellings.[128] The Hancock Park Homeowners Association complained that a synagogue would decrease property values.[129] The permit was denied despite the fact that other places of

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122. Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 305 (6th Cir. 1983); *see* Storzer & Picarello, *supra* note 116, at 956 (citing *Lakewood*).

123. *Lakewood*, 699 F.2d at 307. The Sixth Circuit's reasoning has been viewed as highly problematical. *See, e.g.*, Storzer & Picarello, *supra* note 116, at 956 (concluding that *Lakewood*'s "astonishing holding . . . clearly demonstrates the need for [RLUIPA]"). Note that RLUIPA's definition of "religious exercise" precludes such reasoning. *See* Religious Land Use and Institutionalized Persons Act of 2000, § 8(7), 42 U.S.C. § 2000cc-5(7) (2001). The Supreme Court's own analysis suggests that the Sixth Circuit's reasoning that church-building does not amount to a "fundamental tenet" is an improper inquiry. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886-87 (1990) (finding it "[in]appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field").

124. *The Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 11 (1998) [hereinafter Stern Testimony] (statement of Marc D. Stern, Director, Legal Department, American Jewish Congress).

125. *Id.*

126. *Id.*

127. *See* 146 Cong. Rec. E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Henry J. Hyde) (citing Congregation Etz Chaim v. City of Los Angeles, No. 97-5042 (C.D. Cal. June 1, 1998) (order and memorandum opinion)); *Protecting Religious Freedom After* Boerne v. Flores, *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 32-36 (1998) (statement of Rabbi Chaim Baruch Rubin, Congregation Etz Chaim, Los Angeles, CA) (discussing the Congregation Etz Chaim's difficulties with zoning laws); Lampman, *supra* note 14, at 14 ("The Hancock Park congregation in Los Angeles is a poignant case in point.").

128. 146 Cong. Rec. E1566 (statement of Rep. Henry J. Hyde) (citing *Congregation Etz Chaim*).

129. *Id.*

assembly, such as schools, were permitted there.[130] The California court of appeals affirmed the denial because alternative locations for prayer were available.[131]

b. *Anecdotal Evidence Involving Land-Use Regulations That Restrict Expansion of Religious Building Itself or of Uses Made of Building*

The second category consists of cases, such as *City of Boerne* and *St. Bartholomew's Church v. City of New York*,[132] where the needs of growing churches have conflicted with local desires to restrict such growth as well as with the interests served by landmark and zoning laws.

Concerns about parking and traffic congestion often cause zoning boards to deny accessory use permits to religious institutions. A conflict of this nature arose in a suburb of San Antonio, Texas, just last year.[133] The congregation of Castle Hills First Baptist Church had increased significantly since its establishment in the 1950s to its current size of 17,000.[134] In the late 1990s, the church acquired six residential lots across the street for parking.[135] San Antonio allowed it to demolish and remove the homes on the lots, but has, at the current time, yet to grant a special permit allowing construction of parking lots.[136] Instead, the City Council has repeatedly denied the special permit, forcing many church members to park on the far side of a major highway in order to attend the church services.[137]

In *City of Boerne*, the Archbishop of San Antonio, Texas, applied for a building permit to enlarge St. Peter Catholic Church because the building was no longer large enough to accommodate the growing congregation.[138] According to the applicable zoning ordinance, any construction in a landmark district, such as the one where St. Peter's was located, had to obtain the approval of Boerne's Historic

130. *Id.*

131. *Id. See generally* Zwiebel Testimony, 1998, *supra* note 49, at 23 ("Zoning laws that make it difficult, or virtually impossible, to build houses of worship within residential areas [often] have the practical impact of excluding Orthodox Jews from those areas.").

132. 914 F.2d 348, 355-56 (2d Cir. 1990) (upholding denial of Church's multiple applications to convert a seven-story community house into a significantly larger office tower).

133. The Becket Fund for Religious Liberty, Summary, *at* http://www.rluipa.com/cases/CastleHills.html (last visited Apr. 16, 2002) (citing Castle Hills First Baptist Church v. The City of Castle Hills, No. 99-14880 (Cal. Dist. filed Dec. 12, 2001)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. City of Boerne v. Flores, 521 U.S. 507, 511-12 (1997); *see also* Storzer & Picarello, *supra* note 116, at 959 & n.197 (citing *City of Boerne* as an accessory use case).

Landmark Commission.[139] The Commission denied the Church's application.[140]

Similarly in *St. Bartholomew's Church*, the Second Circuit affirmed the denial of a Church's application for permission to replace a seven-story Community House with a fifty-nine-story office tower.[141] The application was denied despite the Church's demonstrated need for extra space to accommodate religious and social programs and its invocation of the landmark ordinance's "hardship exception."[142]

c. *Statistical Evidence Documenting Land-Use Discrimination Against Religious Institutions*

In addition to the anecdotal evidence presented by witnesses during the congressional hearings on religious liberty protection, surveys of religious land-use litigation and of zoning-code policies were submitted. According to Senators Orrin Hatch and Edward Kennedy, Congress based its finding that land-use "discrimination [is] very widespread"[143] on the "hearing record [which] compiled massive evidence that [the right to religious land use] is frequently violated."[144]

Many of the witnesses who testified before Congress drew upon a study conducted by Professor W. Cole Durham of Brigham Young University in conjunction with lawyers at Mayer, Brown & Platt.[145] The study examined all 196 reported cases involving free exercise

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139. *City of Boerne*, 521 U.S. at 511-12.

140. *Id.*

141. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 351-52 (2d Cir. 1990); *see* Storzer & Picarello, *supra* note 116, at 959 & n.197 (citing *St. Barholomew's Church* as an accessory use case).

142. *St. Bartholomew's Church*, 914 F.2d at 351-52.

143. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

144. *Id.* at S7774.

145. *The Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 131-32, 141-46 (1998) [hereinafter Durham Testimony, 1998] (statement of Prof. W. Cole Durham, Jr., Brigham Young Univ. Law School) (discussing Brigham Young study); *see also, e.g., Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 106th Cong. 83-84 (1999) [hereinafter Laycock Testimony, June 1999] (statement of Douglas Laycock, Associate Dean for Research, Univ. of Texas Law School) (drawing on Professor Durham's study to support his advocacy); *Protecting Religious Freedom After* Boerne v. Flores, *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 56, 60-72 (1998) (statement of Von G. Keetch, Counsel to the Church of Jesus Christ of Latter-Day Saints) (discussing Professor Durham's 1997 study); Oaks Testimony, 1998, *supra* note 49, at 7 (pointing to Durham's study as "compelling evidence that the *Smith* test is burdening religious freedoms in many areas" and noting, in particular, the "huge disparity" found in the impact of land-use laws); Lampman, *supra* note 14 (citing Brigham Young study for proposition that "[i]t has become clear that small religious groups are vastly overrepresented in church-zoning cases").

challenges in the context of land-use regulation from 1921 to 1997.[146] In his own testimony to Congress in 1998 on the need for legislative action in the religious land-use context, Professor Durham summarized the results of the study as follows: "Minority religions representing less than 9% of the population were involved in over 49% of the cases regarding the right to locate religious buildings at a particular site, and in over 33% of the cases seeking approval of accessory uses."[147] These statistics, he argued, indicate that minority religions, such as Judaism and small Christian denominations, are vastly over-represented in zoning litigation and "frequently discriminated against."[148] While conceding that other factors could partially explain this phenomenon, Professor Durham concluded that "religious discrimination" must "play[] a significant role" and noted that the survey of reported cases represents "only the tip of the iceberg" because many similar disputes are not followed to the end or result in settlement.[149]

The Brigham Young study shows that the over-representation of minority faiths is particularly acute in location cases in which religious institutions seek to build new structures at a site or to move into an already-existing building.[150] According to Douglas Laycock, "[t]his difference in treatment can be understood as discrimination based on the scope of the religious mission, or simply as a governmental restriction on the scope of religious missions." [151] Whatever the reason, proponents found the study's "disparities [to be] conspicuous [and to] lead quickly to the conclusion that minority religions have a much harder time obtaining approval for construction of a house of worship . . . than do majority religions."[152]

Proponents of RLUIPA also rely on Durham's study for the proposition that, once in court, minority faiths "win their cases at about the same rate as larger churches."[153] This evidence, they assert, demonstrates that the claims brought by smaller churches are as

146. The study includes two cases from the 1920s: *Shaffer v. Temple Beth Emeth*, 190 N.Y.S. 841 (App. Div. 1921) and *Westminster Presbyterian Church v. Edgecomb*, 189 N.W. 617 (Neb. 1922).

147. Durham Testimony, 1998, *supra* note 145, at 136.

148. 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) (referring to the "hearing record").

149. Durham Testimony, 1998, *supra* note 145, at 136; *see also* Keetch & Richards, *supra* note 107, at 731 (noting that "churches probably bring far fewer actions in this area than they may be entitled to bring" which "only underscores [that] religions are significantly disadvantaged in seeking land use accommodations as they deal with 'generally applicable' and 'neutral' laws").

150. Durham Testimony, 1998, *supra* note 145, at 136 (citing Brigham Young study).

151. Laycock Testimony, June 1999, *supra* note 145, at 83 (discussing Brigham Young study).

152. Keetch & Richards, *supra* note 107, at 729.

153. Laycock Testimony, June 1999, *supra* note 145, at 83 (discussing Brigham Young study).

meritorious as those of larger ones, and that smaller churches are being subject to very real discrimination at the zoning-board level.[154]

In fact, there is evidence that religious institutions as a whole, as opposed to simply minority groups, face discrimination in land-use conflicts. John Mauck, a Chicago practitioner, estimates that "30% of the cases in the Chicago Board of Zoning Appeals involve churches."[155] While not dispositive, this tends to corroborate the assertion that religious groups as a whole, not just minority religions, are over-represented in land-use litigation.

A second survey, conducted by the Presbyterian Church USA in 1997, surveyed all Presbyterian congregations regarding land-use conflicts.[156] Twenty-three percent of the responding congregations[157] attested to having needed a land-use permit during the period since 1992.[158] Ten percent said that they had had a "significant conflict" with the government or their neighbors over such land-use permits.[159] Moreover, eight percent had faced a substantially increased (by more than ten percent) cost in their respective building projects as a result of conditions imposed by local governments.[160]

The Presbyterian survey further showed that one percent of the responding congregations had encountered "a clear rule," applying only to churches, that forbade what the church sought to do.[161] In contrast, ten percent had faced "a clear rule," applying only to churches, that permitted what the church sought to do.[162] According to Laycock, a vocal proponent of RLUIPA, these statistics "confirm what no one disputes—that some communities accommodate the needs of churches. Land use discrimination against churches is widespread but not universal."[163]

In further support of its findings that religious groups are unfairly targeted in zoning board decisions, Congress took into account evidence by John Mauck[164] whose study of Chicago zoning codes

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154. Keetch & Richards, *supra* note 107, at 729.

155. Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 773 (1999) (citing conversation with John Mauck in Washington, D.C., on June 16, 1998) [hereinafter Laycock, *State RFRAs*].

156. *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 204-07 (1998) [hereinafter Ivory Testimony] (statement of Rev. Elenora Giddings Ivory, Dir., Wash. Office, Presbyterian Church (USA)); *see also* Laycock Testimony, June 1999, *supra* note 145, at 84 (citing the Presbyterian survey and its results); Durham Testimony, 1998, *supra* note 145, at 136-37 (citing Presbyterian survey).

157. Roughly ninety percent of the Presbyterian congregations are estimated to have responded. Ivory Testimony, *supra* note 156, at 204.

158. Laycock Testimony, June 1999, *supra* note 145, at 84.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the*

revealed that ten out of twenty-nine Chicago suburbs permit churches to locate only in residential districts.[165] Laycock explains that the right to locate in residential districts is "illusory for all but the tiniest congregations," and therefore restricting churches to residential areas is a tacit form of discrimination.[166]

In sum, a substantial amount of evidence was presented to Congress on religious land use. Proponents argue that the anecdotal and statistical records are "mutually reinforcing" and amount to a pattern.[167] While some express hesitation in using the word "persecution" in the context of religious land use, proponents agree that the record presents clear evidence of discrimination against religious institutions.[168]

2. Opposing Argument: Not a Pattern of Discrimination

While recognizing that the anecdotal evidence reveals difficulties for religious institutions in the land-use context, opponents contend that the evidence does not point to a pattern or practice of discrimination.[169] They further argue that the imposition of a compelling interest standard is not rationally targeted at remedying the record of mistreatment.[170]

a. *Evidentiary Record Does Not Amount to a Pattern of Discrimination*

Opponents of RLUIPA (and its predecessors) consider the evidence of religious land-use discrimination to be far from conclusive, and believe that the anecdotal and statistical findings fail to amount to a pattern or practice of discrimination within the Supreme Court's strict definition.

During the 1998 Congressional hearings on the RLPA, Professor Marci Hamilton distinguished "[d]iscriminatory impact," which would not satisfy the Court's strict standard, from "discrimination."[171] She stated that demonstrating "a national practice of discrimination"

Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 91-130 (1998) (statement of John Mauck, Attorney, Mauck, Bellande & Cheely, Chicago, IL).

165. *Id.* at 100-01 (reproducing study entitled "Compilation of Zoning Provisions Affecting Churches in 29 Suburbs of Northern Cook County by John W. Mauck of 7-10-98 Based Upon 1995 Published Standards").

166. Laycock, *State RFRAs*, *supra* note 155, at 761. He explains that "[u]nless your congregation can meet in a single house, the only way to build a church in a residential area is to buy several adjacent lots and tear down the houses." *Id.*

167. Laycock Testimony, June 1999, *supra* note 145, at 83.

168. *E.g.*, Durham Testimony, 1998, *supra* note 145, at 131-32 (alleging that the factual evidence demonstrates "an overwhelming pattern of discrimination").

169. *E.g.*, Hamilton Testimony, 1998, *supra* note 34, at 71 (on land-use provisions of the RLPA of 1998); *see also infra* Part III.A.

170. *E.g.*, Eisgruber Testimony, 1998, *supra* note 34, at 38.

171. Hamilton Testimony, 1998, *supra* note 34, at 71.

requires "fairly persuasive evidence," which she did not believe had been demonstrated in 1998.[172] She acknowledged that while some evidence demonstrated that churches were disproportionately and adversely impacted by zoning decisions, there was no pattern of discrimination, no consistent "targeting of a specific religion."[173] Rather, there were only scattered instances of abuse.[174]

Likewise, in response to RLUIPA, Hamilton argued that the Congressional hearings were one-sided and lacked sufficient evidence of discrimination.[175] As a reason for the RLUIPA-friendly record, she cited the "[u]ndue [i]nfluence of [r]eligious [l]obbyists" as well as the fact that "no land use official or neighbor to a religious building was ever permitted to testify."[176] According to Hamilton, the "record relie[d] on anecdotal accounts of discrimination against religious buildings in land use," but she noted that "there are precious few cases."[177]

Hamilton contended that the cases of conflict between religious institutions and zoning boards were not generally instances of discrimination.[178] Nor did she think that such cases even "involve[d] the free exercise of religion [because] they [were] simply garden-variety land use cases where the landowner who claim[ed] a special use exemption happens to be religious."[179]

In a letter to the Senate, dated July 24, 2000, Hamilton expressed her concerns about RLUIPA's severe constitutional deficiencies.[180] There, she asserted that "the supporters of RLUIPA have cobbled together a short string of anecdotes that do not illustrate constitutional violations, and certainly do not illustrate 'widespread and persisting' constitutional violations by the states."[181] Although acknowledging that land-use regulations have an "effect" on churches, she concluded that the record lacked any "good evidence of widespread and persisting discrimination against churches."[182]

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172. *Id.*
173. *Id.*
174. *Id.*
175. Marci Hamilton, *Struggling with Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby* (Jan. 17, 2002), *at* http://writ.news.findlaw.com/hamilton/20020117.html [hereinafter Hamilton, *Churches as Neighbors*].
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. Letter from Marci A. Hamilton, Professor, Benjamin N. Cardozo School of Law, Yeshiva University, to United States Senate, (July 24, 2000), http://www.marcihamilton.com/rlpa/rluipa_letter.htm [hereinafter Hamilton Letter, 2000].
181. *Id.*
182. *Id.* In addition to Fourteenth Amendment flaws, Hamilton cites deficiencies in RLUIPA with respect to Congress's power under the Commerce Clause, Spending Clause, Tenth Amendment principles of federalism, and Establishment Clause. *Id.*

b. *RLUIPA Is Not Congruent to Record of Religious Land Use*

Opponents also disagree with the Congressional finding that RLUIPA is "proportionate to the widespread discrimination."[183] They contend just the opposite[184]—that imposing a compelling state interest on zoning boards in cases involving religious institutions fails the proportionality standard articulated in *City of Boerne*.[185] In *City of Boerne*, the Supreme Court found that RFRA could not "be considered remedial, preventive legislation [because] RFRA [was] so out of proportion to a supposed remedial or preventive object."[186] RFRA was sweeping in both "reach and scope."[187] Because the record was so sparse, the Act was not even a "[p]reventive measure[] [of the sort] appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[188]

In addressing land-use discrimination in the context of the RLPA section 3(b), the corollary of RLUIPA section 2, Professor Christopher Eisgruber argued that imposing the compelling state interest test on zoning boards lacked proportionality to the demonstrated evils.[189] In his testimony to Congress on the issue, he stated that he had "[n]o doubt" that: "zoning administrators sometimes abuse their authority to harm unpopular churches. But that problem is not reasonably attacked by extending *all* churches—no matter how rich, how powerful, or how favored in law—a blanket writ to challenge the zoning ordinances which every other citizen and institution must respect."[190]

In so doing, Eisgruber implicitly acknowledged the validity of the statistics showing that minority religions are over-represented in land-use disputes but insisted that the compelling interest test is inappropriate to remedying that problem.[191] Rather, he argued that RLPA lacked all proportionality to the problem at issue.[192] Because of the similarity between the RLPA and RLUIPA's land-use provisions, Eisgruber's arguments can be equally applied to RLUIPA.

Likewise, Professor Lawrence Sager argues that RLUIPA is much broader than the evils that it was designed to protect against.[193] He

183. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).
184. *See infra* notes 189-99.
185. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).
186. *Id.* at 532.
187. *Id.*
188. *Id.*
189. Eisgruber Testimony, 1998, *supra* note 34, at 32-34, 38.
190. *Id.* at 38 (emphasis added).
191. *Id.*
192. *Id.*
193. Lawrence G. Sager, *Free Exercise After* Smith *and* Boerne, 57 Ann. Surv. Am. L. 9, 14-15 (2000).

argues that "RLUIPA is not fairly characterized as a means of protecting churches against discrimination."[194] Rather, "it is a bald and rather extreme privileging of churches for which no justification is available."[195] He furnishes examples of "much more narrowly tailored or surgically designed legislation" that would have better "protected churches against municipal discrimination."[196] For instance, he suggests that Congress could have passed "legislation that did not permit houses of worship to violate height restrictions but did entitle them to locate in residential districts absent a compelling state interest to the contrary."[197] This approach would narrowly target what he perceives as a legitimate problem documented in the legislative record, without affecting those land-use restrictions that do not present problems.

In addition to believing that there is no pattern of discrimination, Professor Hamilton agrees that RLUIPA's compelling interest provisions lack proportionality to the evidentiary record.[198] She argues that RLUIPA's "blanket approach is clearly incongruent and disproportional to any problems churches are experiencing in the land use context."[199]

Based on their reasoning that the record lacks a clear pattern of discrimination and that RLUIPA is disproportionate to the record of religious land-use treatment that Congress compiled, opponents conclude that RLUIPA is an invalid use of Congress's Section 5, Fourteenth Amendment power.[200] Moreover, opponents contend that imposing a compelling interest test on zoning boards raises serious questions about Congress's regard for the Supreme Court's decision in *Smith*, because it is not automatically clear that RLUIPA's standard is consistent with that jurisprudence.

B. *RLUIPA's Individualized-Assessment Limitation: Does RLUIPA Exceed the Scope of the Free Exercise Clause?*

As laid out in Part I, Congress has limited RLUIPA's scope to instances of "individualized assessments" in order to avoid contradicting the Supreme Court's holding in *Smith*.[201] However, the Court's distinction in *Smith* between generally applicable laws to which a compelling state interest test is inapplicable and instances,

194. *Id.* at 15.
195. *Id.*
196. *Id.* at 14.
197. *Id.* at 15.
198. *See* Hamilton Letter, 2000, *supra* note 180.
199. *Id.*
200. *Id.* (stating that "it is highly unlikely that RLUIPA will withstand judicial scrutiny," and referring to RLUIPA as conferring "an unconstitutional benefit").
201. *See supra* Part I.B.

such as *Sherbert*,[202] where the stringent standard may be applied[203] is nebulous. Although *Smith* explains that *Sherbert* "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct"[204] and therefore constituted an exception to the rule affecting generally applicable laws, the Court did not clarify the breadth of the *Sherbert* exception.[205] Moreover, the Court did not specifically address land-use regulations, and cases since *Smith* have failed to elucidate this question.[206]

Proponents of RLUIPA and several lower courts have interpreted the *Sherbert* exception broadly enough to include zoning and landmark laws.[207] However, others have construed the Court's "individualized assessment" language more narrowly so as to exclude many land-use laws from the exception's scope.[208]

1. Proponents: RLUIPA Codifies *Smith*

Proponents argue that RLUIPA is constitutional because its provisions carefully track the Supreme Court's jurisprudence.[209] This is true because RLUIPA's Section 2 narrowly tailors the scope of the compelling governmental interest test, limiting its applicability to cases where zoning boards make "individualized assessments of the proposed uses for the property involved."[210] This terminology mirrors the individualized assessment language employed in *Smith*.[211]

Proponents contend that RLUIPA's limitation to individualized assessments is distinct from the cases of generally applicable laws that *Smith* addresses.[212] According to this reasoning, the Supreme Court's

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202. Sherbert v. Verner, 374 U.S. 398 (1963). In *Sherbert*, an unemployment benefits exemption case, the Court found that the government did have to pass the "compelling state interest" test before it could substantially burden the petitioner's free exercise of her religion. *Id.* at 408.

203. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882-90 (1989).

204. *Id.* at 884.

205. *Id.* at 882-90.

206. *See* Hamilton Testimony, 1998, *supra* note 34, at 71.

207. *See infra* Part II.B.1.

208. *See infra* Part II.B.2; *see also* Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045, 1065-67 (2000) (discussing the divergent approaches that lower courts have taken in construing the *Sherbert* exception in the land-use context).

209. *See supra* Part I.B.

210. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(2)(C), 42 U.S.C. § 2000cc(a)(2)(C) (2001).

211. 146 Cong. Rec. S7775-76 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

212. *See, e.g.*, Storzer & Picarello, *supra* note 116, at 949 (stating that "such individualized assessments are not 'neutral laws of general applicability'"); *see also* House Report, 1999, *supra* note 120, at 17 (stating that the RLPA's section 3(b)(1)(A), which is practically identical to RLUIPA's section 2(a)(2)(C), "tracks the *Smith* opinion's explanation that, where governmental bodies possess authority to

holding in *Smith* does not apply to applications for zoning permits because those applications require the state to make individualized assessments. Therefore, RLUIPA neither contradicts *Smith* nor "expand[s] the application of the Free Exercise Clause."[213] Rather, the compelling interest standard set forth in *Sherbert*[214] applies to such individualized assessments in the zoning context,[215] and RLUIPA successfully "tracks" the Supreme Court's own reasoning. According to Professor Laycock, for example, the RLPA's "individualized assessment" limitation (which is almost identical to RLUIPA's section 2) is a provision to "enforce the free exercise clause as interpreted in *Smith*."[216]

Moreover, attorney Roman Storzer argues that "[i]t is difficult to imagine a context that is more concerned with individualized governmental assessments than the granting or denying of conditional use permits, special use permits, or variances."[217] He maintains that RLUIPA "does little more than codify the strict scrutiny review that already applies under the Free Exercise Clause in situations involving 'individualized assessments'" and cites *Smith* to support his argument.[218]

In further support of their argument, proponents cite cases[219] such as *Alpine Christian Fellowship v. County Commissioners*[220] and *Keeler v. Mayor of Cumberland*.[221] In *Alpine Christian Fellowship*, the District Court of Colorado applied the compelling state interest test in the case of a county's rejection of an accessory use of a church as a private school, and ultimately held that the county lacked a compelling state interest to deny the permit.[222] With virtually no analysis under *Smith* at all, the court found that the code substantially

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make 'individualized assessments' of the reasons for certain conduct, those bodies may not substantially burden a person's free exercise activities without a compelling interest").

213. Storzer & Picarello, *supra* note 116, at 949.

214. Sherbert v. Verner, 374 U.S. 398 (1963).

215. *See* Durham Testimony, 1998, *supra* note 145, at 138 ("As was clear even before *Smith* made the fact relevant, '[z]oning laws are peculiar in that they are not really laws of general applicability but are, rather, linked to individual properties'" (quoting Kenneth Pearlman, *Zoning and the Location of Religious Establishments*, 31 Cath. Law. 314, 335 (1988))).

216. Laycock Testimony, May 1999, *supra* note 70, at 109.

217. Roman P. Storzer, *Struggling As Churches With Neighbors: A response to Marci Hamilton's January 17, 2002 column on FindLaw.com*, *at* http://www.rluipa.com/media/MarciReply.html (last visited Feb. 13, 2002).

218. *Id.*

219. Storzer & Picarello, *supra* note 116, at 950 & n.141 (citing *Keeler v. Mayor of Cumberland* and *Alpine Christian Fellowship v. County Comm'rs*, and stating that "[l]ower courts have recognized the inapplicability of *Smith* in land use and other free exercise contexts").

220. 870 F. Supp. 991 (D. Colo. 1994).

221. 940 F. Supp. 879 (D. Md. 1996).

222. *Alpine Christian Fellowship*, 870 F. Supp. at 994-95.

burdened the church's free exercise of religion and summarily concluded that "the appropriate analysis is that suggested by *Sherbert*."[223] The court's lack of analysis in applying the *Sherbert* exception suggests a view supporting proponents' argument that the *Smith*'s "generally applicable" law rule is inapplicable to the land-use context.

Similarly, in *Keeler* the District of Maryland held that a landmark preservation ordinance fell within the *Sherbert* exception because the law delineated three situations in which property owners could be permitted to circumvent historical-landmark status.[224] These objective, secular exceptions were found to constitute a system of individualized exemptions within the meaning of *Smith*, and accordingly the court applied the compelling interest test.[225] The court reasoned that "where the government enacts a system of exemptions, and thereby acknowledges that its interest in enforcement is not paramount, then the government 'may not refuse to extend that system [of exemptions] to cases of 'religious hardship' without compelling reason.'"[226] Thus, as in *Alpine Christian Fellowship*, the *Keeler* court read the *Sherbert* exception broadly enough to include the zoning ordinance at issue.

Relying on cases such as *Keeler* and *Alpine Christian Fellowship*, the endorsers of RLUIPA argue that a compelling state interest test is appropriate, under the Supreme Court's reasoning in *Smith*, whenever zoning codes involve any system of permits or variances.[227] They contend that the compelling interest test in the zoning context merely codifies the Court's free exercise analysis in *Smith*,[228] despite the fact that *Smith* nowhere addressed zoning laws—a point that plays a central role in the opposition's argument.

2. Opposing Argument: RLUIPA Is a Departure from *Smith*

For RLUIPA's opponents and several federal circuit courts, the meaning of the *Sherbert* exception as defined in *Smith* is far less broad

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223. *Id.* at 994.

224. *Keeler*, 940 F. Supp. at 886. Despite the obligation imposed by the general Historic Preservation Ordinance, the Commission may ignore those mandates where:

> (1) The structure is a deterrent to a major improvement program which will be of substantial benefit to the City of Cumberland; (2) Retention of the structure would cause undue financial hardship to the owner; or (3) The retention of the structure would not be to the best interest of a majority of persons in the community.

Id. (citation omitted).

225. *Id.*

226. *Id.* (quoting Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1989)).

227. *See supra* notes 212-26 and accompanying text.

228. *See supra* notes 212-26 and accompanying text.

than the interpretation which Congress and other proponents have given it.

In criticizing RLUIPA, Professor Hamilton asserts that "[u]nder traditional free exercise clause analysis, generally applicable laws *such as zoning laws* are subject to very low-level review even when they affect religious institutions."[229] Her reasoning highlights the view that the Supreme Court did not intend the individualized assessment context of the *Sherbert* exception to apply to zoning cases. Rather, the land-use restrictions are typically generally applicable laws that fall within the Court's rule in *Smith*.

Read narrowly, the *Sherbert* exception could legitimately be construed as applicable only to the unemployment context.[230] If that were the case, it could be concluded without further analysis that RLUIPA's imposition of a compelling interest standard in the zoning context would fly in the face of *Smith*.

Although declining to interpret the *Sherbert* exception quite so narrowly, the Second, Sixth, and Eighth Circuits have not extended the exception to discretionary decisions made in land-use cases. In *St. Bartholomew's Church v. City of New York*, the Second Circuit upheld the decision of the New York City Landmarks Preservation Commission to deny St. Bartholomew's Church permission to circumvent the landmark designation of its property.[231]

In seeking to replace its community house with an office tower, the Church first applied to the commission pursuant to New York City Administrative Code Section 25-307 for a "certificate of appropriateness."[232] However, the commission denied its application as well as a second, modified version that proposed a forty-seven-story tower.[233] A third application sought a certificate of appropriateness pursuant to the "hardship exception" based on the claim that the Community House was inadequate to meet the Church's present needs, but this too was denied.[234]

The Church sued, claiming that the rejection substantially burdened its exercise of religion by impairing its "ability to carry on and expand

229. Hamilton, *Churches as Neighbors*, *supra* note 175 (emphasis added).

230. Notably, Justice Scalia, writing for the majority, does state that the Court "ha[s] never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation . . . [and in] recent years [has] abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Smith*, 494 U.S. at 883. He also notes that "[e]ven *if* [the Court] *were* inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, [the Court] would not apply it to require exemptions from a generally applicable criminal law." *Id.* at 884 (emphasis added).

231. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990); *see supra* notes 141-42 and accompanying text.

232. *St. Bartholomew's Church*, 914 F.2d at 351.

233. *Id.*

234. *Id.* at 351-52. This application was pursuant to New York City Administrative Code, sections 207-4.0 and 207-8.0. *Id.*

the ministerial and charitable activities that are central to its religious mission."[235] Despite the clearly discretionary procedure and system of individualized assessments, however, the Second Circuit held that "[t]he Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions" and therefore declined to subject the City to strict scrutiny.[236] Instead, the court found that the City's application of the law had not discriminated, in fact or purpose, against the Church, and thus dismissed its claim.[237]

In *Mount Elliott Cemetery Ass'n v. City of Troy*, the Sixth Circuit affirmed the denial of a cemetery association's application to rezone property located in a single-family residential zone so that the land could be used as a cemetery.[238] Ignoring the city planning director's recommendation to grant the requested permission, both the planning commission and the city council denied the application for several reasons.[239] Although the permit was discretionary in nature, the Sixth Circuit found that "the City of Troy's ordinances governing residential and community facilities [were] neutral laws of general applicability" and therefore did not fall within the *Sherbert* exception.[240]

The Eighth Circuit's holding in *Cornerstone Bible Church v. City of Hastings* provides another example of a narrow interpretation of the *Sherbert* exception.[241] In *Cornerstone*, a church sought to relocate to an old theater located in Hastings's central business district, a C-3 zone from which churches were totally excluded.[242] The zoning ordinance provided for a system of "Uses by Special Permit," for

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235. *Id.* at 353.

236. *Id.* at 354-55. In so holding, the Second Circuit also acknowledged the quoted statistic that over fifteen percent of New York City's landmarks are religious properties. *Id.* at 354. However, the court did "not understand those facts to demonstrate a lack of neutrality or general applicability." *Id.* Rather, it recognized the practical fact that religious buildings were simply very likely to fall within the Landmarks Law because of their historical and aesthetic significance. *Id.*

237. *Id.* at 355-56. Proponents of RLUIPA suggest that the Second Circuit's "reasoning [in *St. Bartholomew's*] was simply wrong." Storzer & Picarello, *supra* note 116, at 951 n.142.

238. Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 400 (6th Cir. 1999).

239. *Id.* at 402. The City Council gave "six reasons in support of denial:"

> (1) insufficient transition or buffer areas proposed . . . ; (2) reduction of potential tax base; (3) potential traffic congestion . . . ; (4) E-P zoning buffer was a clear circumvention of the intent; (5) it doesn't meet the spirit of the ordinance; and (6) abuts developed land and is not considered a quasi-public use.

Id. (internal quotations omitted).

240. *Id.* at 405; *cf.* John M. Smith, Note & Comment, *"Zoned for Residential Uses"—Like Prayer? Home Worship and Municipal Opposition in* LeBlanc-Sternberg v. Fletcher, 2000 BYU L. Rev. 1153, 1158 (suggesting that because *Smith* "only applies to neutral rules of *general* applicability, it may not even reach land use laws.").

241. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991).

242. *Id.* at 467.

which gas stations, drive-in establishments, creameries, and small animal clinics, but not churches, were eligible.[243] The city permitted churches only in residential districts, which comprised forty-five percent of Hastings.[244] Because the city did not intend to regulate against religious worship, the Eighth Circuit found that the "ordinance [was] properly viewed as a neutral law of general applicability" despite the system of secular "special use" exemptions that was in place.[245]

Interpretations of this nature place many land-use laws outside the scope of the *Sherbert* exception. Under this analysis, RLUIPA effectively expands the meaning of the Supreme Court's holding in *Smith*, exceeding the remedial power granted to Congress by Section 5 of the Fourteenth Amendment.[246]

The arguments over the factual record of discrimination and the extent to which *Smith* applies to land-use regulations set the stage for Part III's argument that analyzes RLUIPA's deficiencies and sides with RLUIPA's opponents.

III. RLUIPA'S DEFICIENCIES RENDER IT UNCONSTITUTIONAL

Drawing on the debates set forth in Part II, this part argues that RLUIPA fails in two major respects. First, Section A shows that Congress's use of its Section 5, Fourteenth Amendment power was not remedial, because Congress lacked a sufficient record to demonstrate a pattern of discrimination. Rather, Congress unconstitutionally employed its power to create substantive changes in the Fourteenth Amendment protections. Second, Section B argues that RLUIPA fails to track the Court's free exercise jurisprudence in *Smith* despite its mirror terminology, and therefore fails to observe the legal limitations on Congress's power to enforce the Fourteenth Amendment.

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243. *Id.* at 466 n.1.

244. *Id.* at 467.

245. *Id.* at 472.

246. Relevant to this discussion is the Court's constitutional explanation in *City of Boerne v. Flores* that:

> [w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. 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.

521 U.S. 507, 536 (1997) (citations omitted).

A. *Factual Record Fails to Satisfy the Remedial Standard for Section 5 Power*

RLUIPA's most grave constitutional deficiency is its claim to remedial authority under Section 5 of the Fourteenth Amendment. Congress purports to have strong factual evidence of discrimination against religions in general, and minority religions in particular, in the land-use context.[247] However, none of the evidence rises to the level of a "pattern or practice" of discrimination. Nor is RLUIPA tailored narrowly to target the specific record of discrimination that does exist. Moreover, even if the evidence on which Congress relied did point to a pattern, the proffered statistics are themselves flawed.

1. Anecdotal Record Shows No Pattern of Discrimination

The Supreme Court has instructed that "[t]he appropriateness of [Section 5] remedial measures must be considered in light of the evil presented."[248] However, imposing a compelling state interest test on zoning boards does not serve to remedy any existing evil because no systematic discrimination has been shown. Rather, the legislative record depicts only sporadic conflicts between religious institutions and zoning boards. Moreover, rational, non-discriminatory reasons exist that explain why religious groups may be disproportionately represented in such conflicts.[249]

Anecdotes presented by RLUIPA's proponents, such as those detailing the abuse showered on the Refuge by St. Petersburg's zoning board,[250] often actually support the opposition's argument. The Refuge was a church, which was relabeled a "social services agency" for zoning purposes, and thus forced to relocate in accordance with the zoning laws.[251] While Steven McFarland cited the anecdote at a Congressional hearing as exemplifying discrimination against religious institutions, he admitted that this case is not part of a broader practice, stating that although "[o]ther churches in St. Petersburg offer counseling, concerts, Alcoholics Anonymous, and other forms of outreach . . . the zoning officials haven't ordered them to uproot."[252]

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247. *See* 146 Cong. Rec. at S7774 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) (relying on hearing record in concluding that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against").

248. *City of Boerne*, 521 U.S. at 530.

249. *See, e.g.*, *supra* note 236 (citing the Second Circuit's practical explanation for why churches may be heavily represented in landmark cases).

250. McFarland Testimony, June 1999, *supra* note 109, at 4, 7-8; *see supra* notes 110-15 and accompanying text.

251. McFarland Testimony, June 1999, *supra* note 109, at 7.

252. *Id.* at 8.

Rather, "[i]t appears as though the economic poverty of those served by the Refuge makes all the difference in the world."[253]

In so admitting, McFarland refuted what he set out affirmatively to prove. He showed that even the St. Petersburg zoning board, as insensitive as it may be, was not engaging in a pattern of religious discrimination. The board did not seek to uproot the Refuge because of its religion. Rather, the board seemed to target the Refuge because the poverty of its clients was interfering with a general effort to "clean up" the neighborhood.[254] Adverse treatment of churches was apparently an anomaly even in St. Petersburg where, as McFarland admitted, the City's many other churches have been left alone.[255]

This anecdote suggests that there is no routine discrimination against religious institutions. Rather, a continual struggle exists between zoning boards and churches to reach compromises that account for the interests of all concerned. Under these circumstances, it is unavoidable that, on some occasions, the interests of religious organizations will be impossible to accommodate.

The Second Circuit's reasoning in *St. Bartholomew's Church* sheds light on why religious institutions may be over-represented in landmark disputes, which comprise a good portion of the zoning disputes in which religious institutions are involved.[256] In claiming that New York's Landmarks Law was neither neutral nor generally applicable, the Church argued that "of the six hundred landmarked sites, over fifteen percent are religious properties and over five percent are Episcopal churches."[257] Rejecting the Church's claim, the court held that these statistics were not evidence of discrimination at all.[258] On the contrary, such figures were most likely attributable to "the importance of religion, and of particular churches, in our social and cultural history, and [to the fact that] many churches are designed to be architecturally attractive."[259]

Evidence such as Mauck's estimate that thirty percent of the cases in Chicago's Zoning Appeals Board[260] can be countered by reasoning such as that of the Second Circuit, and the claim that religious institutions are discriminated against can be rebutted. The aesthetic characteristics of religious buildings make them inherently more likely to be landmarked than other kinds of buildings.[261] Moreover, it is

253. *Id.*
254. *Id.* at 7.
255. *Id.* at 8.
256. *See supra* note 236.
257. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990).
258. *Id.*
259. *Id.*
260. *See supra* note 155 and accompanying text.
261. *St. Bartholomew's Church*, 914 F.2d at 354.

generally true that churches and similar organizations have greater financial resources with which to seek legal remedies than individuals.

In fact, religious institutions are often treated preferentially by zoning boards and local legislators. For instance, the "New York rule"[262] is generally to accommodate religious land uses more than secular ones and to prevent the complete exclusion of religious institutions from residential districts.[263] Although not applied in every state, the approach of the New York courts is considered to be the majority rule in the United States.[264] This policy requires zoning boards to make "every effort to accommodate the religious use [and] to suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible."[265]

Moreover, a 1998 study analyzing accommodation of religion in areas other than just zoning corroborates this preferential treatment.[266] The National Congregations study surveyed 1236 congregations, achieving a "nationally representative sample."[267] Based on this study, conclusions have been reached that religious organizations are generously accommodated in most instances, including land-use situations, where they seek permission from government authorities to engage in certain activities.[268]

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262. *See, e.g.*, Bright Horizon House, Inc. v. Zoning Bd. of Appeals, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) (noting that "the general policy, as applied in [New York], is that religious institutions are virtually immune from zoning restrictions").

263. *E.g.*, Grace Cmty. Church v. Planning & Zoning Comm'n, 615 A.2d 1092, 1102 (Conn. Super. Ct. 1992) (noting that "other states have held that it is illegal for a municipality to exclude churches in all zones, from all residential zones"); State v. Maxwell, 617 P.2d 816, 820 (Haw. 1980) ("The wide majority of courts hold that religious uses may not be excluded from residential districts."); Milharcic v. Metro. Bd. of Zoning Appeals, 489 N.E.2d 634, 636 n.2 (Ind. Ct. App. 1986) ("Indiana is in accord with the majority view that churches may not be lawfully excluded from residential districts."). Compare the minority, or "California," rule that permits religious institutions to be excluded from residential districts. *E.g.*, Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1534 (N.D. Ala. 1990).

264. *See supra* note 263.

265. Genesis Assembly of God v. Davies, 617 N.Y.S.2d 202, 203 (N.Y. App. Div. 1994) (citations omitted); *see also* Stern Testimony, *supra* note 124, at 10.

266. Dr. Mark Chaves, Hartford Instit. for Religion Research, The National Congregations Study, *at* http://hirr.hartsem.edu/org/faith_congregations_research_ncs.html (last visited Mar. 25, 2002).

267. *Id.*

268. American Atheists, Study Refutes RLPA Claims That Religious Practice Is "Burdened" by Government Regulations, *at* http://www.atheists.org/flash.line/rlpa26.htm (last modified July 31, 1999) (reporting that the National Congregations study found that "government licensing regulations do not seriously threaten the practices of faith-based groups seeking permits for church expansion, liquor licenses, gambling permits and other activities"); *see* Hamilton, *Churches as Neighbors*, *supra* note 175 (citing the National Congregations study as evidence that religious institutions are generally treated fairly).

Finally, a comparison of RLUIPA with its predecessor, RFRA, shows that the land-use laws cited by RLUIPA fail as evidence of intentional discrimination under the Court's reasoning in *City of Boerne*.[269] Just as RFRA's legislative history lacked evidence of discrimination, so RLUIPA's "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry"[270] in the zoning context. Nor does the record demonstrate that the land-use laws have the effect of discriminating against religious institutions in general.

In *City of Boerne*, the City's Historic Landmark Commission rejected an application for a building permit to enlarge St. Peter Catholic Church, which was no longer able to accommodate its growing congregation.[271] The Church was located in a landmarked area, where building was forbidden absent explicit permission.[272] Although the Supreme Court focused on RFRA's constitutional invalidity and did not rule on the merits of the case, its dicta are pertinent to the question of RLUIPA's validity in the land-use context.

The Court in *City of Boerne* reasoned that the "zoning regulations and historic preservation laws" at issue in the case could not be considered "examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices."[273] Nor did the Court believe that such land-use regulations "indicate[d] some widespread pattern of religious discrimination."[274]

The same zoning laws at issue in *City of Boerne* are the very "evils" that Congress sought to remedy by enacting RLUIPA. Although Congress spent a considerable amount of time during post-*Boerne* hearings in an attempt to amass a sufficient record of discrimination, it has again failed to show that zoning laws are vehicles of discrimination. There is neither evidence of discriminatory intent nor a sufficient showing of discriminatory impact.[275] In light of the minimal evidence of discrimination, it is ironic that Congress chose to respond to *Boerne* by challenging the very land-use laws that the Supreme Court specifically deemed free from "hostility" toward religious exercise.[276]

269. City of Boerne v. Flores, 521 U.S. 507, 532-33 (1997).
270. *Id.* at 530.
271. *Id.* at 511-12.
272. *Id.* at 512.
273. *Id.* at 531.
274. *Id.*
275. *See supra* notes 169-200 and accompanying text.
276. *City of Boerne*, 521 U.S. at 531.

2. Statistical Evidence of Discrimination Against Minority Religions Is Deficient

At least two senators found that the evidentiary record depicted "a widespread pattern of discrimination . . . against small and unfamiliar denominations as compared to larger and more familiar ones."[277] Even if the evidence, as presented, were sufficient to amount to a pattern of discrimination against minority religions, the flawed assumptions made in compiling the data would cast substantial doubt on the conclusions that RLUIPA's proponents drew. While it is difficult to refute whole studies without procuring new data, there are clear deficiencies in the statistics relied on by Congress.

The Brigham Young University study conducted by Professor Durham[278] is the single most compelling piece of evidence offered during the congressional hearings on the topic of minority discrimination and, as such, is cited by many RLUIPA proponents.[279] However, closer examination of the study reveals flaws in its methodologies and demonstrates that RLUIPA, in fact, lacks a defensible justification.

The study includes 196 cases involving both zoning board and free exercise challenges that date back as far as 1921.[280] Professor Durham collected the cases from three different databases, and thus considers it "unlikely" that many—if any—relevant cases were missed.[281] His methodology in conducting the study was to assume that, in the absence of discrimination, land-use decisions should impact all religions in a consistent manner.[282]

As shown in Part II, RLUIPA's proponents cite the study as evidence that minority religions are vastly over-represented in land-use disputes and that a broad practice of discrimination therefore exists.[283] Professor Durham's study classifies a religious group comprising less than 1.5% of the total adult population as a "minority" religion, and a group representing more than 1.5% as a "mainline" or majority religion.[284] According to his analysis, the survey reveals that minority religions, which together comprise only nine percent of the total population, are involved in over forty-nine percent of the disputes involving the initial construction of religious

277. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

278. Durham Testimony, 1998, *supra* note 145, at 131-32, 136, 141-53 (discussing the Brigham Young study).

279. *See supra* note 145.

280. Durham Testimony, 1998, *supra* note 145, at 141-53 (attached study); *see also* Keetch & Richards, *supra* note 107, at 736.

281. Durham Testimony, 1998, *supra* note 145, at 141-53.

282. Keetch & Richards, *supra* note 107, at 729 (citing Brigham Young study).

283. *See supra* note 145.

284. Durham Testimony, 1998, *supra* note 145, at 142.

buildings ("Location Cases").[285] However, two minority religions, Jehovah's Witnesses and Judaism, together account for 35.2 percentage points of that figure—15.2% and 20.0%, respectively.[286] Closer examination reveals that the inclusion of these two groups in the minority category is misleading and substantially skews the data.

The Jehovah's Witness group comprises 0.8% of the general adult population and 15.2% of the Location Cases, which presents a striking disparity.[287] However, eleven of the nineteen Location Cases involving Jehovah's Witnesses occurred in the 1950s and three in the early 1960s.[288] Thus, almost three-quarters of the Jehovah's Witness cases used in the Brigham Young study took place forty or more years ago.[289] Of the remaining five cases, two occurred in the 1970s and three in the 1980s.[290] Zero land-use cases from the 1990s involve the Jehovah's Witnesses.[291] Scrutinized in this way, the figures suggest either a decade of discrimination in the 1950s or a sharp drop in discrimination after that period. Alternatively, they could indicate a significant rise in the number of Jehovah's Witnesses seeking to build churches between 1950 and 1964. Whatever the reason, these cases demonstrate little about the status of Jehovah's Witnesses in land-use disputes during the past thirty years and therefore cannot be used to prove that religious land-use discrimination is rampant today.[292]

A focused examination of the Judaism group is equally revealing. Also designated as a minority denomination by Professor Durham, the Judaism group represents 2.2% of the general population and a surprising 20.0% of the Location Cases.[293] However, the categorization of Judaism as a minority religion is problematic on several levels.

Durham's own scaling system places any religious group consisting of over 1.5% of the adult population in the majority religion category, with the notable exception of Judaism. According to his system, the Judaism group consists of 2.2% of the general population but is still classified as minority.[294] Professor Durham attempts to justify this anomaly by explaining that, if "Judaism were divided to reflect the major branches of that tradition, the various branches would come

285. *Id.* at 143 (Table 1 of study).
286. *Id.*
287. *Id.*
288. *Id.* at 147-53.
289. *Id.*
290. *Id.*
291. *Id.*
292. Significantly, the Supreme Court criticized Congress's enactment of RFRA for the fact that the "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne v. Flores, 521 U.S. 507, 530 (1997).
293. Durham Testimony, 1998, *supra* note 145, at 143.
294. *Id.*

under the 1.5[%] threshold."[295] While this calculation may be accurate, its effect is misleading. A more objective analysis would include Judaism in the study's majority religion category, which would have reduced by *twenty percentage points* the proportion of Location Cases in which minority religions were involved and rendered the conclusions about minority discrimination substantially less persuasive.

No less significant is the fact that twenty-three of the thirty-eight Location Cases involving Judaism occurred in California, Florida, New Jersey, and New York,[296] where the Jewish population is disproportionately represented, as compared with the rest of the United States.[297] Over sixty percent of the total U.S. Jewish population resides in these four states alone.[298] In California, Jewish persons comprise 2.9% of the total population (as of 1999); in Florida, 4.2%; in New Jersey, 5.7%; and in New York, 9.1%.[299] These percentages are substantially higher than Professor Durham's 2.2% of the total population,[300] and presumably are higher still in the urban areas where the Jewish population tends to cluster. Thus, Judaism falls squarely into Durham's majority religion category in California, Florida, New Jersey, and New York, the states where Jewish persons are most heavily concentrated in this country.[301]

Indeed, Professor Durham's whole system of categorization is called into question when one considers that many minority religious groups tend to cluster geographically. Because zoning decisions are made on a local level and take into account neighborhood concerns, it is misleading to allocate minority status based on the percentage of the total U.S. population. This is especially true in the case of Judaism, which does not fit within the minority category even under Professor Durham's own assumptions.

Without the classification of Judaism and Jehovah's Witnesses as minority denominations, the remaining eleven religions in that category account for 5.8% of the total adult population and only 14.4% of the Location Cases.[302] This discrepancy is far less severe than the 9-out-of-49 ratio proffered by the authors of the study and continually reiterated by RLUIPA's proponents.[303] Moreover, to

295. *Id.* at 142.

296. *Id.* at 147-53 (list of cases used in the study).

297. *See* Jewish Virtual Library, Jewish Population of the United States by States (2002), *at* http://www.us-israel.org/jsource/us-israel/usjewpop.html.

298. *See id.*

299. *Id.*

300. *See* Durham Testimony, 1998, *supra* note 145, at 143.

301. *See id.* at 142.

302. *See id.* at 143 (Table 1).

303. *See id.* at 136. Further note that excluding Judaism and Jehovah's Witnesses from the "minority" categorization also reduces the proportion of minority religions represented in Accessory Use cases (i.e., those cases where a religious institution seeks to expand an already-existing building or the activities occurring therein). *See*

normalize the ratio, one must consider that while minority religions account for 5.8% of the total population, they account for 6.8% of the total adult religious population, which reduces the ratio still further.[304] Non-discriminatory factors could easily explain a discrepancy of this size, such as the fact that small, new religions may well be growing at a more rapid rate than larger, more established ones.

This analysis reveals that the Brigham Young study is not as persuasive as the quoted statistics and summary conclusions claiming discrimination initially suggest. While minority religions are somewhat over-represented and may be subject to occasional discrimination in the land-use context, the study does not support the conclusion that there is a nationwide practice of discrimination against minority religious groups.

3. RLUIPA Lacks Congruence to the Factual Record

In addition to lacking an evidentiary record of discrimination, RLUIPA also fails the proportionality test established by the Supreme Court for enforcing the Fourteenth Amendment.[305]

In *City of Boerne*, the Supreme Court stated that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[306] Without such congruence, "legislation may become substantive in operation and effect" and fail to be remedial as the Fourteenth Amendment requires.[307] This is true whether the legislation is designed to remedy or to prevent constitutional violations.[308] Because Congress sought to create "preventive" legislation in enacting RLUIPA,[309] it is necessary to consider the impact of imposing a compelling governmental interest test on zoning boards in order to determine whether RLUIPA

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id. at 143 (Table 1). Instead of 34.0% of the Accessory Use cases, the remaining eleven minority religions account for only 15.5% of the cases. *See id.*

304. *See id.*

305. *See supra* notes 169-200 and accompanying text.

306. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

307. *Id.*

308. *See id.*

309. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy). In explaining the basis of its power to enact RLUIPA under the Fourteenth Amendment, Senators Hatch and Kennedy reasoned that, under *City of Boerne*, "Congress may act to enforce the Constitution when it has 'reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 532). Where there is such a "likelihood," the Court has stated that "preventive rules are sometimes appropriate remedial measures." *City of Boerne*, 521 U.S. at 530. In the opinion of Senators Hatch and Kennedy, Congress has satisfied this standard. 146 Cong. Rec. S7775. However, land-use laws are not likely to be unconstitutional because there is no persuasive evidence that such regulations are being used systematically to discriminate against religious institutions. *See supra* Part III.A.1-2.

constitutes a suitable and congruent "means."[310] The compelling interest test entails two extremely stringent requirements: first, the government's stated interest must be "compelling"; and second, the law must be the "least restrictive means" to achieve that interest.[311]

The Court in *City of Boerne* stated that the compelling state interest test is "the most demanding test known to constitutional law."[312] As Professor Laycock has acknowledged, only a narrow set of governmental interests in the land-use context actually qualifies as "compelling."[313] The Court in *Smith* also expressed concern that "if 'compelling interest' really means what it says (and watering it down... would subvert its rigor in the other fields where it is applied), many laws will not meet the test."[314] Whereas fire codes and safety regulations will usually satisfy the compelling standard, run-of-the-mill land-use concerns such as traffic, noise, decreased land-value, and plot-size will not.[315] Thus, if a compelling interest standard were imposed on zoning boards, the state would have very little, if any, room to maneuver in conflicts with religious institutions.[316] Indeed, because land-use interests, by their very nature, rarely rise to the level of compelling, the imposition of a compelling interest standard lacks proportion to a reasonable end.

Of course, the compelling interest standard is not imposed automatically on zoning boards under RLUIPA. A religious

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310. *City of Boerne*, 521 U.S. at 520.

311. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1)(A)-(B), 42 U.S.C. § 2000cc(a)(1)(A)-(B) (2001).

312. *City of Boerne*, 521 U.S. at 534.

313. *See* Laycock, *State RFRAs*, *supra* note 155, at 766.

314. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990).

315. Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Use After* Boerne, 68 Geo. Wash. L. Rev. 861, 919 (200) (citing Laycock, *State RFRAs*, *supra* note 155, at 766); *see also* Soc'y of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990) (noting that "[t]he government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion"); First Covenant Church v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992) (finding that the government's "interest in preservation of esthetic and historic structures is not compelling"); Thomas Pak, *Free Exercise, Free Expression and Landmarks Preservation*, 91 Colum. L. Rev. 1813, 1845 (1991) (stating that "[a]lthough the goals of landmarks preservation are valid state interests... they do not rise to the level of more traditional justifications for compelling state interests").

316. *See* Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173 (D. Conn. 2001). In this recent RLUIPA case, the District of Connecticut found that a Connecticut zoning board had a sufficiently compelling reason to impose a cease-and-desist order on a prayer group that was meeting in a single-family home because cars crowded into the end of a cul-de-sac could create safety problems for members of the group as well as for their neighbors. *Id.* at 178-79. The court found that health and safety concerns were "compelling," whereas "aesthetics and traffic safety" usually fail to rise to that level. *Id.* at 190 (citations omitted). However, in the end, the court struck down the zoning board's restriction for its failure to be the "'least restrictive means' of protecting the health and safety of their community." *Id.*

institution must first demonstrate that its exercise of religion has been substantially burdened.[317] However, RLUIPA defines "religious exercise" broadly to ensure that zoning and landmark disputes are encompassed—arguably more broadly than the Supreme Court's interpretation allows.[318] Under RLUIPA's expansive definition, "[r]eligious exercise" includes "[t]he use, building, or conversion of real property for the purpose of religious exercise."[319]

In contrast to religious exercise, "substantial burden" is not defined in the text of RLUIPA. Recently, the District of Connecticut addressed what Congress intended by this terminology in the context of RLUIPA. In *Murphy v. Zoning Comm'n*, the court held under RLUIPA that a cease-and-desist order substantially burdened the "religious exercise" of a prayer group that held meetings in a single-family house at the end of a cul-de-sac on Sunday afternoons and thus violated zoning requirements.[320] The town's cease-and-desist order required that plaintiffs' meetings not exceed twenty-five attendees.[321] However, the court found that the order was a "substantial burden" because "[t]o require plaintiffs to turn people away whom plaintiffs believe can and should be helped by the group's prayer forces them to modify their religious practices."[322] However, the court recognized that this seemed to be an expansive definition of religious exercise and thus of substantial burden as well.[323]

Based on the record of alleged discrimination motivating the enactment of RLUIPA, Congress likely concluded that many zoning and landmark laws imposed substantial and unreasonable burdens on religious exercise. If Congress had not considered such zoning regulations to burden religious exercise, then its use of Section 5 power would be unwarranted, and RLUIPA itself would be unnecessary. According to Congress's reasoning, therefore, denying special permits to religious institutions that seek to build or expand constitutes a substantial burden and thus should be subject to the

317. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C. § 2000cc(a)(1) (2001).

318. *See, e.g.*, *Murphy*, 148 F. Supp. 2d at 188 (noting that "by not limiting the scope of [RLUIPA's] protections to the exercise of religious beliefs compelled by or central to a particular faith, Congress now requires that some of the language used by the Supreme Court in discussing 'substantial burden[s]' be applied in a broader context"). The court further noted that RLUIPA's definition of "religious exercise" potentially expands the Supreme Court's free exercise jurisprudence despite Congress's "expressed . . . intent not to change this definition." *Id.* Note that this potential expansion is yet another possible weakness in RLUIPA.

319. RLUIPA, § (8)(7)(B).

320. *Murphy*, 148 F. Supp. 2d at 189.

321. *Id.*

322. *Id.*

323. *See supra* note 318.

compelling governmental interest test. If subjected to a standard of such stringency, zoning boards will seldom prevail.[324]

Moreover, a comparison with the Voting Rights Act of 1965, which the Supreme Court upheld as a valid use of Section 5 power, demonstrates RLUIPA's relative lack of proportionality to the ends sought to be achieved.[325] For instance, in enacting RLUIPA, Congress failed to target specific geographical areas or land-use contexts where the alleged discrimination against religious land-use was particularly severe. Instead of analyzing the discrimination on a region-by-region basis, Congress imposed the compelling interest standard nationwide.[326] Nor did Congress impose a "termination date or termination mechanism,"[327] which is often appropriate in cases of remedial legislation.

Therefore, it appears that by its enactment of RLUIPA Congress intended to equip religious institutions with a powerful weapon. Congress evidently also envisioned a drastic goal—that zoning boards should rarely prevail in land-use disputes with religious organizations. In this sense, the "means"—RLUIPA's compelling interest test—are congruent to those "ends" that Congress sought to achieve. But these very ends are themselves highly disproportionate to any evidence of discrimination. They neither remedy past discrimination (for the record does not support such a finding), nor aim in any reasonable way to prevent future discrimination. Rather, these ends represent a substantive interpretation of the Free Exercise Clause[328] that goes beyond any reasonable use of Congress's Section 5 power under the Supreme Court's remedial definition.

B. *RLUIPA Is Legally Invalid Under* Smith

While Congress's factual record clearly fails to meet the necessary "pattern or practice" standard, RLUIPA's legal validity under the *Smith* doctrine is somewhat less clear-cut. The Supreme Court has never specifically addressed to what extent zoning laws that involve individualized assessments should be considered generally applicable within the meaning of *Smith*.[329] However, at least some of the zoning

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324. South Carolina v. Katzenbach, 383 U.S. 301 (1966); *see supra* notes 314-16.

325. *See supra* notes 92-93 and accompanying text.

326. See *South Carolina v. Katzenbach*, where the measures designed to combat racial voting discrimination were limited to those areas of the country in which such discrimination was heavily documented. 383 U.S. at 315.

327. City of Boerne v. Flores, 521 U.S. 507, 532 (1993); *see also id.* at 518 (citing cases where Congress successfully invoked its Section 5, Fourteenth Amendment power and many of which involved a termination date).

328. Indeed, zoning laws "valid under *Smith* would fall under [RLUIPA] without regard to whether they had the object of stifling or punishing free exercise." *Id.* at 534; *see also infra* Part III.B.

329. Indeed, the Court has never defined exactly what "generally applicable" means. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520,

laws encompassed by RLUIPA are generally applicable despite the presence of individualized assessments, and therefore should not be subject to a compelling interest standard. For this reason, RLUIPA fails to codify the Court's free exercise jurisprudence and instead unconstitutionally broadens it.

Although "neutral" and "generally applicable" have never been precisely defined, the Court's central inquiry focuses on whether "prohibiting the exercise of religion . . . is . . . the object of the [law or] merely the incidental effect."[330] Because zoning laws do not target religion, the precise definitions of "neutral" and "generally applicable" need not be ascertained for the purposes of assessing RLUIPA's constitutionality. Moreover, the Court has stated that the terms "neutral" and "general applicability" are "interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied."[331] Furthermore, Justice Scalia considers it unnecessary "to make a clear distinction between the two terms" at all because they "substantially overlap."[332]

To distinguish zoning laws from generally applicable laws in enacting RLUIPA, Congress apparently focused on *Smith*'s language that defined *Sherbert* as involving "a system of exemptions" and "individualized governmental assessment of the reasons for the relevant conduct."[333] However, in limiting RLUIPA to land-use cases involving "individualized assessments,"[334] Congress altered *Smith*'s terminology as well as the underlying concepts on which the Court's free exercise jurisprudence has relied. Indeed, RLUIPA imposes the compelling interest test on zoning boards whenever the "government makes . . . individualized assessments of the proposed *uses* for the property involved,"[335] rather than "individualized . . . assessment of the *reasons* for the relevant conduct" under *Smith*.[336] In altering "*reasons* for the relevant conduct" to "*uses* for the property" involved in the text of RLUIPA, Congress substantially broadened the *Sherbert* exception.

According to the language of *Smith*, the *Sherbert* exception is triggered where the government assesses an applicant's motivation in seeking a legal exception. For example, in *Sherbert*, South Carolina deemed unemployment applicants ineligible for benefits where they

543 (1993) (noting that the Court "need not define with precision the standard used to evaluate whether a prohibition is of general application").

330. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).

331. *Lukumi Babalu*, 508 U.S. at 531.

332. *Id.* at 557 (Scalia, J., concurring).

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

334. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(2)(C), 42 U.S.C. § 2000cc(a)(2)(C) (2001).

335. *Id.* (emphasis added).

336. *Smith*, 494 U.S. at 884 (emphasis added).

had refused work without "good cause."[337] While permitting a series of secular excuses to qualify as good cause, South Carolina denied good cause status to the applicant's refusal to work on Saturday, the Sabbath for Seventh-Day Adventists.[338] The good cause inquiry involved assessing the *reasons* for the applicant's refusal to work,[339] and the Court in *Sherbert* held that, absent a compelling state interest, South Carolina could not deny the exemption for *religious* reasons while granting it for secular ones.[340]

Moreover, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court found that a law prohibiting the sacrificial killing of animals was not generally applicable because the law effectively prohibited only killing for *religious reasons*.[341] Instead of prohibiting all killing of animals, the ordinance exempted secular reasons for killing animals while specifically targeting killing by members of the Santerian religion.[342] The asserted interests against cruelty to animals and in promoting public health "were pursued only with respect to conduct motivated by religious beliefs."[343] Just as the law in *Sherbert* permitted South Carolina to assess the *reasons* for denying work on a case-by-case basis, so too the prohibition and its many exemptions in *Lukumi* reflected a legislative assessment of the motives for killing animals that discriminated against *religious reasons* for so doing.[344]

In contrast to the unemployment law at issue in *Sherbert* and the ordinance in *Lukumi*, zoning decisions do not usually involve any inquiry into the *reasons* for applicants' wishing to build or expand. Zoning boards do not typically grant or deny permits based on religious versus secular reasons for building.[345] Rather, they traditionally take into account the type of building sought to be constructed, or the "proposed uses" of the property, in order to assess the potential impact on, and compatibility with, the surrounding environs.[346] Therefore, in shifting from the assessment of "reasons," as in *Smith*, to the assessment of "uses," RLUIPA substantially increases the number and variety of instances where the compelling interest test would affect zoning boards. In so doing, RLUIPA diverges from the Court's free exercise jurisprudence.

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337. Sherbert v. Verner, 374 U.S. 398, 400-01 (1963).
338. *Id.* at 399-401.
339. *See id.* at 401.
340. *See id.* at 406.
341. *See* Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 544-46 (1992).
342. *Id.* For example, the prohibition exempts the killing of animals for use as food. *Id.* at 535-37.
343. *Id.* at 524 (six Justices joined this portion of the opinion).
344. *Id.*
345. The lack of any significant factual or statistical evidence indicating land-use discrimination against religious institutions corroborates the validity of this presumption. *See supra* Part III.A.
346. *See supra* Part III.A.

Significantly, the Court in *Smith* cites the traffic law in *Cox v. New Hampshire*[347] as exemplifying a law that is generally applicable despite requiring a permit and board-assessment of the proposed uses.[348] In *Cox*, the challenged law was a state statute that prohibited "a 'parade or procession' upon a public street without a special license."[349] Notably, the statute provided for a "[l]icensing [b]oard" which "shall have delegated powers to investigate and decide the question of granting licenses."[350]

While lacking "unfettered discretion," the licensing board in *Cox* had a duty to investigate whether "the convenience of the public in the use of the streets would . . . thereby be unduly disturbed" and to consider "time, place and manner in relation to the other proper uses of the streets."[351] This function closely resembles that of zoning boards, although land-use decisions require more in-depth consideration of the proposed uses because their impact is usually longer-lasting. Neither type of law involves assessing the *reasons* behind the seeking of a permit, as was true of the unemployment benefits law in *Sherbert*.

The Court's citation of *Cox* in its discussion of general applicability highlights its intention that not every law involving *any* kind of individualized assessment should be subject to the compelling interest test. On the contrary, the Court considered the traffic law in *Cox* to be generally applicable despite its system of individualized assessments, and specifically held that religious exemptions from laws of that kind were not "constitutionally required."[352] The similarity in procedure between land-use regulations and the traffic law in *Cox* strongly suggests that the former are also generally applicable despite

347. 312 U.S. 569 (1941).

348. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 889 (1990). In *Smith*, the Court gives examples of "general laws" from which religious exemptions would be inappropriate and certainly are not "constitutionally required." *Id.* at 888-89 & n.5. It criticizes the proposal that every law burdening religious exercise should be required to satisfy a "compelling state interest" because such an approach would create:

> the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Id. at 888-89 (citations omitted).

349. *Cox*, 312 U.S. at 570-71.

350. *Id.* at 571 n.1 (quotations omitted).

351. *Id.* at 576 (citations omitted).

352. *Smith*, 494 U.S. at 888-89.

their system of individualized assessments and thus that they do not fit within the *Sherbert* exception.[353]

This limited view of the Court's *Sherbert* exception as inapplicable to most zoning laws is consistent with the Court's use of the terms "generally applicable" and "neutral" to define laws that do not specifically discriminate against religious reasons for certain behavior. Indeed, according to the Court in *Lukumi*, "[t]he principle that government . . . cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[354]

In *City of Boerne*, the Supreme Court contrasted the concept of "deliberate persecution" with "laws of general applicability [that] place incidental burdens on religion."[355] Moreover, the Court specifically identified "zoning regulations and historic preservation laws . . . which as an incident of their normal operation, have adverse effects on churches and synagogues."[356] In so doing, the Court itself included within the generally applicable law category typical land-use regulations, such as the landmark law at issue in *City of Boerne*, which involve discretionary, individualized assessments.

Thus, although land-use laws that involve variances and special permits do, by their very nature, involve individualized assessments of one kind, they are not the same individualized assessments as are discussed in *Smith*. Accordingly, land-use regulations do not fall within the *Sherbert* exception to the *Smith* rule. Moreover, RLUIPA's subjection of all land-use regulations "under which a government makes . . . individualized assessments of the proposed uses for the property involved"[357] to a compelling interest standard fails to track the Court's holding in *Smith*. On the contrary, RLUIPA substantially expands it.

CONCLUSION

The recent enactment of RLIUPA is not a valid use of Congress's Section 5, Fourteenth Amendment power for two closely related reasons. The record upon which Congress relied in enacting RLUIPA failed to demonstrate that land-use regulations consistently suppress,

353. This reasoning is also consistent with that of the Second Circuit in *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 355 (2d Cir. 1990), the Sixth Circuit in *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999), and the Eighth Circuit in *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991). *See supra* notes 231-45 and accompanying text.

354. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

355. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

356. *Id.* at 531.

357. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(2)(C), 42 U.S.C. § 2000cc(a)(2)(C) (2001).

or are designed to suppress, the exercise of religion.[358] Rather, decisions in the land-use context are made on a highly case-specific basis, and take into account a myriad of conflicting interests. Many of these interests are not "compelling" by any traditional definition,[359] and therefore RLUIPA's imposition of a compelling governmental interest standard lacks proportion to any reasonable end. Instead of remedying constitutional violations or preventing potential violations, Congress has created new, substantive protections beyond those required by the Supreme Court's free exercise jurisprudence.

Despite Congress's apparent effort to track the Court's decision in *Smith* by using the "individualized assessment" terminology of the *Sherbert* exception, RLUIPA expands the Court's analysis. Although some of the Court's definitions and concepts have not yet been elucidated, RLUIPA clearly extends to religious institutions protections that exceed the intended boundaries. In creating substantive protections, Congress has exceeded any remedial use of its Fourteenth Amendment power to enforce the Free Exercise Clause. Because these deficiencies are substantial, the Supreme Court will likely invalidate those portions of RLUIPA that are based on Fourteenth Amendment power, just as it struck down RFRA in *City of Boerne*.

358. *See supra* Part III.A.
359. *See supra* notes 312-16 and accompanying text.