RELIGIOUS LAND USE IN THE FEDERAL COURTS UNDER RLUIPA

The Constitution makes religious belief a private matter, but in the age of the megachurch and the perceived "war on Christmas," where and how Americans express their faith are matters of great public interest. Consequently, much has been written about the zoning provisions of the Religious Land Use and Institutionalized Persons Act of 2000[1] (RLUIPA), Congress's most recent attempt to countermand the Supreme Court's restrictive reading of the Free Exercise Clause in *Employment Division v. Smith*.[2] Despite this voluminous literature,[3] little effort has been dedicated to assessing the efficacy of RLUIPA as a litigation tool. Writers purporting to make such an assessment have generally examined the law only in the abstract; there has been no systematic study of how RLUIPA plaintiffs have fared in court in comparison with religious land use claimants under previous legal regimes.[4] The dominant view derives not from empirics but from a logical argument: the "compelling interest" test announced by the Supreme Court in *Sherbert v. Verner*[5] as the standard for Free Exercise Clause claims was strict in theory but just as deferential as *Smith* in fact;[6] RLUIPA did little more than reenact the *Sherbert* test for appli-

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

[2] 494 U.S. 872 (1990).

[3] *See* Becket Fund for Religious Liberty, RLUIPA Scholarship, http://www.rluipa.com/index.php/topic/21.htm (last visited May 11, 2007) (listing law review articles).

[4] Some writers have purported to evaluate the effect of RLUIPA's land use provisions, but by and large they have done so in a vacuum, without reference to the efficacy of previous legal regimes protecting religious exercise. *See, e.g.*, Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 841 (2006) ("[A] statute that Congress meant to be a tool against intentional religious discrimination [has instead been] an impediment to the valid application of local zoning ordinances."); Kevin M. Powers, *The Sword and the Shield: RLUIPA and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB. INT. L.J. 145, 146 (2004) (declaring that RLUIPA is a "potent weapon in the quiver of religious groups"); Corey Mertes, Note, *God's Little Acre: Religious Land Use and the Separation of Church and State*, 74 UMKC L. REV. 221, 234–35 (2005) (crediting RLUIPA's "substantial and negative" impact on city governments to the Department of Justice's "unusually active role" in supporting religious plaintiffs as "part of a larger assault on the wall traditionally separating church and state"); Sara Smolik, Note, *The Utility and Efficacy of the RLUIPA: Was It a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723, 759 (2004) (concluding that RLUIPA creates "an atmosphere in which religious liberty is more easily protected by courts uncertain of how far to push the limits of *Smith*").

[5] 374 U.S. 398 (1963).

[6] *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1417, 1429–34 (1992); *cf.* Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENT. 147, 154 (1987) (noting that since *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), "the Supreme Court has shown little enthusiasm" for applying strict scrutiny to free exercise claims).

cation to land use claims; therefore, religious exemption claimants will be as frustrated under RLUIPA as in the past.[7]

This Note challenges that prediction. An analysis of religious land use cases in the federal appellate courts since 1980 demonstrates that RLUIPA has in fact succeeded,[8] modestly but clearly. RLUIPA has not only restored the right to religious exemptions from land use laws to its pre-*Smith* status, but also broadened this right considerably. This success has been achieved despite a jurisprudential regime that is less friendly to religious exemption claims generally and a statutory scheme that claims to do no more than reverse *Smith*.

Part I briefly relates the history of free exercise exemptions since *Sherbert* and the prevailing scholarly assessments of the various legal regimes of that period. Part II catalogues the outcomes of all free exercise claims brought in federal appeals courts by religious land use plaintiffs between 1980 and RLUIPA's passage in 2000. Part III examines in greater depth all such cases since RLUIPA. Part IV suggests possible explanations for the increased success of religious land use claimants since 2000 and hypothesizes that, by codifying an abandoned judicial gloss on the Constitution that was never fully enforced by the courts, RLUIPA has enabled lower courts to aspire to the view of the Free Exercise Clause first promised by *Sherbert*.

I. FREE EXERCISE EXEMPTIONS SINCE *SHERBERT*

A. The Law

In 1963, the heyday of the Warren Court's rights-protective jurisprudence, *Sherbert* announced a strict scrutiny test for governmental action as applied to religious individuals: no government could enforce a law in a manner that burdened the exercise of a person's religion unless enforcement of the law was the least restrictive means of achieving a compelling governmental interest.[9] Thus, the *Sherbert* Court held that South Carolina could not deny unemployment compensation benefits to a Seventh-day Adventist who lost her job for re-

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[7] *See* Lawrence G. Sager, Commentary, *Free Exercise After* Smith *and* Boerne, 57 N.Y.U. ANN. SURV. AM. L. 9, 15 (2000); Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After* Boerne, 68 GEO. WASH. L. REV. 861, 921 (2000) ("The strict scrutiny test embodied in § 2(a)(1) of the RLUIPA . . . has not borne fruit in previous religious land use decisions, and there is little reason to believe that this new iteration will fare any better."); *cf.* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 25 (1993) (theorizing that courts narrowly construe statutes that attempt to circumscribe judicial discretion and continue on preexisting doctrinal paths).

[8] The word "succeeded" is used descriptively, as this Note takes no position on the question of whether free exercise exemptions from generally applicable land use laws are constitutionally sound or otherwise normatively desirable.

[9] *See Sherbert*, 374 U.S. at 403.

fusing to work on Saturday.[10] Similarly, the Court held in *Wisconsin v. Yoder*[11] that Wisconsin lacked a compelling reason to force Amish children to attend public high school against their beliefs.

In 1990, the Court sharply limited the reach of the compelling interest test. Writing for a five-Justice majority in *Smith*, Justice Scalia announced that the *Sherbert* test did not apply to a neutral and otherwise valid law of general applicability — that is, to any law that was not directly targeted at a religious group.[12] The Court noted that the test was developed in unemployment compensation cases — "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[13] Apart from such cases, Justice Scalia wrote, the Court had granted exemptions from neutral laws of general applicability only in "hybrid" cases that intertwined free exercise claims with claims based on other constitutional provisions.[14]

The scholarly and popular reaction to Justice Scalia's limiting of *Sherbert* was strongly negative.[15] Responding to that backlash, Congress passed by overwhelming margins[16] the Religious Freedom Restoration Act of 1993[17] (RFRA), which purported to overrule *Smith* and reinstate the rule of *Sherbert* and *Yoder*[18] by using language from those cases.[19] But in 1997, in *City of Boerne v. Flores*,[20] the Supreme Court invalidated RFRA as applied to state and local governments, holding that RFRA exceeded Congress's power under Section 5 of the Fourteenth Amendment to enforce the Free Exercise Clause against the states. The Court explained that Congress was empowered to provide remedies for the violation of constitutional rights, but not to redefine the scope of those rights.[21]

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[10] *Id.* at 399, 410.

[11] 406 U.S. 205.

[12] *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990). *Smith* held that the claimants — members of the Native American Church who ingested peyote as a sacrament, *id.* at 874 — were not entitled to an exemption from a law denying them unemployment benefits on account of their illegal drug use. *Id.* at 884–85.

[13] *Id.* at 884.

[14] *Id.* at 881–82.

[15] *See* Ryan, *supra* note 6, at 1409–10 (summarizing negative reactions to the decision).

[16] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994) (noting that the Act was passed unanimously in the House of Representatives and by a 97–3 vote in the Senate).

[17] Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to 2000bb-4 (2000)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[18] 42 U.S.C. § 2000bb(a)(4), (b)(1).

[19] *See id.* § 2000bb-1(a)–(b) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden . . . is the least restrictive means of furthering [a] compelling governmental interest.").

[20] 521 U.S. 507.

[21] *See id.* at 519–20.

Still, Congress was determined to revive the compelling interest test in any arena in which the Court would permit it to do so. Seizing on the *Smith* dictum suggesting a loophole for "individualized governmental assessment[s],"[22] Congress in 2000 enacted RLUIPA to require the application of *Sherbert* in two areas in which such assessments were common: land use decisions and regulations governing the conduct of institutionalized persons.[23] Section 2(a)(1) of RLUIPA applies the strict scrutiny language of RFRA and *Sherbert* to the land use context.[24] The law states that "use, building, or conversion of real property" for religious purposes constitutes "religious exercise" for purposes of the statute.[25] To avoid RFRA's fate, RLUIPA specifies that section 2(a)(1) applies only to cases that implicate Congress's spending or commerce power and cases in which the regulating government can or does make individualized assessments of proposed uses of land.[26] Section 2(b) of RLUIPA proscribes treatment of religious assemblies and institutions "on less than equal terms" with nonreligious entities, as well as "total[] exclu[sion]" or "unreasonable" restriction of religious uses within a jurisdiction.[27]

B. Past Assessments

Previous empirically based analyses and predictions regarding the efficacy of a strict scrutiny rule for religious land use exemptions have been predominantly pessimistic. In a 1992 student note, now-Professor James Ryan surveyed cases from the decade preceding *Smith* and found that lower courts had rejected almost all claims for religious exemptions, even as they had paid lip service to the *Sherbert* compelling interest test.[28] Professor Ryan found only one case between 1980 and 1990 in which a U.S. court of appeals awarded a plaintiff a free exercise exemption that would likely not have been granted under *Smith*'s openly deferential review.[29] He concluded that the proposed RFRA, to the extent that it purported to resurrect the pre-*Smith* legal standard, was bound to have little effect.[30] Other commentators soon followed in pointing out the weakness of the pre-*Smith* constitutional stan-

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[22] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

[23] This Note confines its discussion of RLUIPA to the statute's land use provisions.

[24] *See* 42 U.S.C. § 2000cc(a)(1) (2000) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden . . . is the least restrictive means of furthering [a] compelling governmental interest.").

[25] *Id.* § 2000cc-5(5), (7)(B).

[26] *Id.* § 2000cc(a)(2).

[27] *Id.* § 2000cc(b)(1), (3).

[28] *See* Ryan, *supra* note 6, at 1417.

[29] *See id.* at 1429–34.

[30] *Id.* at 1413.

dard[31] and reasoning that judges, accustomed to that standard, were likely to apply an intentionally identical statutory standard in exactly the same way.[32] Even RFRA's most fervent supporters in the academy qualified their optimism.[33] After *Boerne*, Professor Ira Lupu surveyed the wreckage and found that plaintiffs had won relief in only nine of fifty reported non-prison federal court cases during the statute's lifespan.[34]

Predictions of RLUIPA's efficacy have been similarly dour. Professor Robert Tuttle argues that historically unsuccessful land use exemption claims are no more likely to succeed under RLUIPA given judges' belief that "strict scrutiny [is] disproportionate to the harms typically involved in religious land use cases."[35] Urging that equal protection and free speech alternatives may be more protective of religious land uses than free exercise claims, Professor Tuttle concludes that the codification of the *Sherbert* standard in section 2(a)(1) of RLUIPA should be abandoned, as it will accomplish nothing on its own and may blunt the effectiveness of the equal protection provisions of section 2(b) by association.[36]

II. RELIGIOUS LAND USE IN THE FEDERAL COURTS, 1980–2000

Before RLUIPA's enactment in 2000, the conventional view largely held true. A survey of all cases decided on the merits by the U.S. courts of appeals demonstrates that religious land use plaintiffs were almost uniformly unsuccessful — whether under the constitutional compelling interest test of *Sherbert* from 1980 to 1990, the constitutional rational basis test of *Smith* from 1990 to 1993, the statutory compelling interest test of RFRA from 1993 to 1997, or the restored

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[31] *See* Lupu, *supra* note 7, at 54, 55 n.245 (arguing that what RFRA really sought to "restore" was a "high water mark in the case law," represented by *Sherbert* and *Yoder*, that had receded prior to *Smith*); Sager, *supra* note 7, at 12 ("RFRA attempted to make the nominal rule of *Sherbert* the actual rule and thereby purported to 'restore' a regime of religious liberty that had never existed.").

[32] *See* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 580 (1999) ("[J]udicial gloss on religious liberty legislation ultimately will tend to converge upon the same set of outcomes as the application of constitutional principles . . . ."); Lupu, *supra* note 7, at 25–27.

[33] *See* Laycock & Thomas, *supra* note 16, at 244 ("RFRA cannot succeed unless it changes the judicial and bureaucratic climate that *Employment Division v. Smith* both reflected and aggravated." (footnote omitted)).

[34] *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (1998). For Professor Lupu, this evidence demonstrated that "religion will fare better under constitutional standards . . . than under the strict codification presented by RFRA." *Id.* at 601.

[35] Tuttle, *supra* note 7, at 867.

[36] *Id.* at 921–22; *see also* Sager, *supra* note 7, at 14 (arguing that the defense of RLUIPA "as a prophylaxis against discrimination by municipalities against disfavored churches . . . represents a distinct conceptual advance" but cannot justify the reintroduction of the *Sherbert* test).

Smith test from 1997 to 2000. However, district court cases decided under RFRA suggest that Congress's codification of the *Sherbert* standard did have significant effects.[37]

A. Before Smith*: Strict Scrutiny in Name Only*

In the decade prior to *Smith*, the success rate of plaintiffs claiming free exercise exemptions from neutral laws of general applicability was quite low. Professor Ryan's survey found that of the ninety-seven free exercise cases decided by the federal courts of appeals in that time, the plaintiff was successful at the circuit court level in only twelve.[38]

1. The Winning Cases. — Of the seven winning non-prisoner cases identified by Professor Ryan, only one was a land use case: *Islamic Center of Mississippi, Inc. v. City of Starkville*,[39] a case that Professor Ryan concluded was among the three least likely to be affected by *Smith*.[40] In *Islamic Center*, the city refused to grant a Muslim group an exception from its zoning ordinance, which otherwise prohibited all religious uses of property near the University of Mississippi. Nine Christian churches had received exceptions, and no church had ever been denied one.[41] As the Supreme Court subsequently indicated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[42] when it invalidated the city's "religious gerrymander" targeting Santeria animal sacrifice,[43] *Smith* clearly did not change the fact that intentional discrimination against a religious group almost always violates the Free Exercise Clause.[44] Two other free exercise land use claims suc-

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[37] Because there are no reported cases in the U.S. courts of appeals between RFRA's passage in 1993 and its invalidation as applied to the states in 1997, section II.C departs from this Note's exclusive focus on appellate cases and analyzes district court cases under RFRA.

[38] Ryan, *supra* note 6, at 1416–17. Some of Professor Ryan's cases were miscategorized or misidentified. For instance, Professor Ryan mistakenly listed *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193 (5th Cir. 1984); *McCurry v. Tesch*, 738 F.2d 271 (8th Cir. 1984); and *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981), as losing cases. *Philly's, Inc. v. Byrne*, 732 F.2d 87 (7th Cir. 1984), was not a free exercise case. In *Crowley v. Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980), the plaintiff did not press his free exercise claim on appeal. Professor Ryan also omitted at least a few cases in which free exercise claims were asserted, including the land use cases *Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221 (9th Cir. 1990); and *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988).

[39] 840 F.2d 293 (5th Cir. 1988).

[40] Ryan, *supra* note 6, at 1429–30.

[41] *Islamic Ctr.*, 840 F.2d at 294.

[42] 508 U.S. 520 (1993).

[43] *Id.* at 535 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)) (internal quotation marks omitted).

[44] *Id.* at 533. Ironically, the district court in *Lukumi*, hearing the case before *Smith*, originally *rejected* the plaintiffs' free exercise claim while purporting to apply the *Sherbert* compelling interest test. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1487 (S.D. Fla. 1989). Thus, it was not until *after Smith* had overruled *Sherbert* that the *Lukumi* plaintiffs won relief in the Supreme Court.

ceeded in the circuit courts in the 1980s, but neither involved the typical fact pattern of a religious landowner requesting an exemption from a zoning ordinance of general applicability.[45]

2. The Losing Cases. — The losing appellate cases implicating land use were more numerous and far more influential. The circuits disagreed on how to apply *Sherbert*, but whenever zoning laws of general applicability were neutrally applied to free exercise claimants, the courts uniformly denied the claims for religious exemptions. In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,[46] the Sixth Circuit denied the plaintiff an exemption from an ordinance that banned church construction in residential zones and effectively limited such construction to ten percent of the city's area. The court did so by imposing at the threshold a restrictive test for the substantiality and directness of the burden imposed on plaintiffs.[47] In *Grosz v. City of Miami Beach*,[48] the Eleventh Circuit held that the plaintiffs had no free exercise right to perform small religious services in a single-family home. The court determined that the city's broad interest in enforcing its zoning ordinance outweighed the plaintiffs' religious interests.[49] In *Messiah Baptist Church v. County of Jeffer-*

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[45] *McCurry v. Tesch*, 738 F.2d 271 (8th Cir. 1984), held unconstitutional an overzealous sheriff's interpretation of a state court order enjoining the operation of an unauthorized church school — the sheriff had forcibly removed worshippers from the church and padlocked its doors shut, pursuant to an order that the building be locked except during prayer services on three designated evenings per week. The Eighth Circuit reasoned that the sheriff's actions burdened the plaintiffs' religious exercise and were not the least restrictive means of furthering what it assumed was the state's compelling interest in stopping the school from operating. *Id.* at 275–76. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), held that a seminary had made out a prima facie case that its free exercise rights were violated by the city's condemnation of the seminary's land to make room for a court-ordered housing project. The Second Circuit held that the seminary could argue on remand that the taking was not necessary to further a compelling state interest, and added that the asserted political difficulty of securing any other site for the housing project could not in itself be considered compelling. *Id.* at 872.

[46] 699 F.2d 303 (6th Cir. 1983).

[47] *See id.* at 305. The court held that the burden on the plaintiff's religious observance imposed by the denial did not rise to the level of an imposition on the plaintiff's First Amendment rights. It narrowly characterized the congregation's desired observance as building a church in a residential area — an activity not fundamental to its beliefs — and the burdens on that observance as merely indirect and financial. Thus, there was no need to determine, under *Sherbert*, whether enforcing the ordinance against the congregation was the least restrictive means of furthering a compelling government interest. *See id.* at 307–08.

[48] 721 F.2d 729 (11th Cir. 1983).

[49] *See id.* at 738–41. Unlike *Lakewood*, *Grosz* did not inquire as a threshold matter whether the burden on the plaintiffs' religious exercise was sufficient to implicate the First Amendment and trigger the *Sherbert* compelling interest test. Rather, the court held that *Sherbert* scrutiny was merely a special application of a more general Free Exercise Clause balancing test in which burdens on religious exercise and burdens on government are compared; when the government can further its purposes through less restrictive means *at zero additional cost*, the plaintiff wins no matter how light the burden on her religious exercise. *See id.* at 734, 737. The court identified as burdens on government the actual negative results of the plaintiffs' conduct, the impairment of

son,[50] the Tenth Circuit combined the theories of *Lakewood* and *Grosz* to uphold the county's denial of a special use permit to a church seeking to build in an agricultural zone. The court reasoned that because the plaintiff's proposed construction was merely a matter of secular preferences, and because ad hoc balancing always favors the government when the plaintiff faces no religious burden, the Free Exercise Clause did not mandate an exemption.[51] In *Christian Gospel Church, Inc. v. City of San Francisco*,[52] the Ninth Circuit applied a test it had developed outside the land use context — one that both embraced ad hoc balancing and acknowledged the significance of a state interest being "compelling"[53] — and upheld the denial of a conditional use permit to worship in a single-family residence.[54] Beyond these typical land use cases, plaintiffs asserting free exercise violations without preexisting property rights in the land at issue were likewise unsuccessful, either because they lacked standing[55] or because the Free Exercise Clause does not constrain governments in their use of public land.[56]

B. Smith*: No Relief for Plaintiffs*

Between the *Smith* decision and the effective date of RFRA, religious land use plaintiffs may not have done any worse than they did before *Smith*, but they certainly did no better: no free exercise plaintiff won on the merits in any federal court. The Eighth Circuit rejected a Native American religious claim on pre-*Smith* grounds.[57] The Second

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the city's ability to maintain a consistent land use plan, and the difficulty of administering exceptions to generally applicable policies; against these interests, the court held, the plaintiffs' interest in praying at home twice daily with at least ten adult males was insufficient. *See id.* at 738–39, 741.

50 859 F.2d 820 (10th Cir. 1988).

51 *See id.* at 824–26.

52 896 F.2d 1221 (9th Cir. 1990).

53 *See id.* at 1224 (citing Callahan v. Woods, 736 F.2d 1269, 1273 (9th Cir. 1984)).

54 *Id.* at 1225. The court found the burden on the plaintiff's religious practice to be minimal, because the permit denial banned the congregation only from worshiping in one particular home, and because the congregation had previously been praying in a hotel banquet hall rather than a home. In contrast, the city's interests in not granting the permit, which consisted of protecting the interests of neighbors and maintaining the integrity of the zoning scheme, were strong. *See id.* at 1224–25.

55 *See* Love Church v. City of Evanston, 896 F.2d 1082 (7th Cir. 1990) (holding that a church's difficulty acquiring rental property was not fairly traceable to a city ordinance requiring churches to secure special use permits and that its injury was not likely to be redressed by a favorable decision).

56 Most cases in this category involved the religious rights of Native Americans. Several courts in the 1980s held that Native Americans could neither claim a special right under the Free Exercise Clause to use government-owned land for religious purposes nor enjoin the government from developing, or allowing tourism on, its own land. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); United States v. Means, 858 F.2d 404 (8th Cir. 1988); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

57 *See* Lockhart v. Kenops, 927 F.2d 1028, 1037 (8th Cir. 1991).

Circuit cited *Smith* in rejecting a church's free exercise challenge to the application of a neutral, generally applicable landmarks law.[58] In rejecting a religious school's challenge to a special exception requirement to locate a school in a residential zone, the Fourth Circuit declined to decide whether the case presented a "hybrid" claim subject to strict scrutiny under *Smith*, and instead held that plaintiffs had failed to establish that the law burdened their free exercise.[59] The Eleventh Circuit rejected a church's bid to keep open its homeless shelter, holding that the zoning ordinance at issue was a neutral law of general applicability, and in the alternative, under *Grosz*, that the balance of interests favored the county's ability to enforce its land use regulations.[60]

C. RFRA: Strict Scrutiny Awakened

RFRA appears to have boosted the litigation prospects of at least some religious land use plaintiffs. Of the 144 reported RFRA cases decided in the federal courts during the three-and-a-half years when RFRA was applicable to the states,[61] seven — all on the district court level — implicated land use. Plaintiffs succeeded in two of the seven.

1. The Winning Cases. — In the two winning cases, churches successfully claimed a RFRA right against land use regulations that limited their ability to minister to the homeless. In both cases, district courts held that churches had demonstrated a "substantial burden" on their religious exercise. These rulings contrasted with pre-*Smith* case law holding that similar claims reflected mere secular preferences and that frustration of those preferences did not substantially burden religious exercise.[62] Moreover, by considering the plaintiffs' constitutional as well as statutory claims, these district courts suggested that RFRA had actually modified the *Smith* standard. In the first case, the District Court for the District of Columbia found that the plaintiffs' program to feed the homeless was motivated by sincere religious belief and was, in fact, "an important religious function."[63] The court held that the District's regulation violated both RFRA and the Free Exer-

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

59 Christ Coll., Inc. v. Bd. of Supervisors, 944 F.2d 901, 1991 WL 179102, at *4 (4th Cir. 1991) (unpublished table decision). *But see* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472–73 (8th Cir. 1991) (affirming the lower court's determination that an ordinance excluding churches and other nonprofits from commercial and industrial zones was a neutral law of general applicability under *Smith*, but remanding on the question of whether the claim fell under the "hybrid" exception to *Smith*).

60 First Assembly of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 423–24 (11th Cir. 1994). Although the case was argued after RFRA became effective, neither party raised the issue of its potential applicability, and so the court did not consider it. *See* First Assembly of God of Naples, Fla., Inc. v. Collier County, 27 F.3d 526 (11th Cir. 1994) (denying petition for rehearing).

61 Lupu, *supra* note 34, at 591.

62 *See, e.g.*, Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 825 (10th Cir. 1988).

63 W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 546 (D.D.C. 1994).

cise Clause, mentioning *Smith* but writing as if *Sherbert* governed both the constitutional and statutory analysis.[64] Similarly, a Virginia district court awarded a group of churches a temporary restraining order against the enforcement of a city ordinance that restricted the number of homeless persons that the churches' daily meal ministry could accommodate.[65] The court credited the plaintiffs' testimony that feeding the homeless in their churches and in one large group was "the essence of their faith," and held that the city had failed to show a compelling interest, having shown "only that several complaints had been made over a period of a few days about noise, unruly behavior and urination on private property."[66]

2. The Losing Cases. — None of the five losing cases would likely have fared any better before *Smith*. Of the three claims with any merit,[67] one was clearly controlled by pre-*Smith* precedents involving a government's use of its own land,[68] and another simply disagreed with the Virginia and D.C. district courts.[69] In the third case, an Illi-

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[64] *See id.* at 544–47. Interestingly, despite the *Grosz* dictum — quite influential before *Smith* — that the consistent enforcement of land use regulation was itself an overwhelming governmental interest, in the *Western Presbyterian* litigation the District claimed no such broad interest and instead conceded that it had no compelling interest in stopping a church's program to feed the homeless so long as appropriate controls were in place. *Id.* at 545.

[65] Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1241 (E.D. Va. 1996). The court did not specify whether its grant of a temporary restraining order was based on a likelihood that plaintiffs would win on the merits of their RFRA claim alone or on the merits of both that claim and their First Amendment claim, although the court's reliance on the doctrine that violation of First Amendment rights constitutes per se irreparable injury, *see id.* at 1235, suggests the latter.

[66] *Id.* at 1239. The city argued, following *Lakewood*, that church members could comply with the ordinance by feeding the homeless through other programs or by conducting their meal ministry at multiple churches simultaneously, as the six churches were all within five blocks of one another. It reasoned that substantial burdens are not created when government merely makes religious practice more expensive. *See id.* at 1238.

[67] One of the two weak losing cases, *Storm v. Town of Woodstock*, 944 F. Supp. 139 (N.D.N.Y. 1996), presented the rare fact pattern in which plaintiffs had a better case under the First Amendment than under RFRA. Participants in spiritual nighttime gatherings in a meadow challenged a town's ban on nearby nighttime parking, which forced them to walk a half-mile from their cars. The district court held that the plaintiffs had not shown a "substantial" burden on their religious exercise under RFRA, but allowed them to attempt to show that the regulation violated the Free Exercise Clause by targeting their religious practice. *See id.* at 145–46. They later lost on this claim as well. *See* Storm v. Town of Woodstock, 32 F. Supp. 2d 520, 528 (N.D.N.Y. 1998). In the other case, a church for some reason sued a zoning board that had *granted* it a variance. Germantown Seventh Day Adventist Church v. City of Philadelphia, Civ. A. No. 94-1633, 1994 WL 470191, at *1 (E.D. Pa. Aug. 26, 1994).

[68] Thiry v. Carlson, 78 F.3d 1491, 1495–96 (10th Cir. 1996) (holding that RFRA did not bar the Kansas transportation department from condemning land in order to build a highway, despite the fact that the condemnation would require plaintiffs to move the gravesite of their stillborn child).

[69] Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995) (noting *Western Presbyterian*, but holding that the plaintiff's religious exercise was not substantially burdened and that even if it were, the city's ordinance was the least restrictive means of furthering its compelling interest in regulating homeless shelters).

nois district court focused on the existence of a significant government interest in a particular parcel of land — the location of a vacant department store in the city's depressed business district — in upholding the city's denial of a special use permit for a church to relocate there.[70] The court held that RFRA did not recognize increased cost, "at least so long as it is not an inflated expense not imposed upon most landowners," as a substantial burden.[71]

D. Back to Smith*: No Relief, Again*

Few free exercise claims relating to land use regulation reached the federal appeals courts in the period between *Boerne* and the enactment of RLUIPA. In the one such case decided on the merits, the Sixth Circuit held that a city's refusal to rezone land so it could be converted to a Catholic cemetery did not violate the Free Exercise Clause.[72] Most litigation involving land use and religion during this interregnum involved claims that state or local laws *exempting* religious uses from generally applicable regulations violated the Establishment Clause; these laws were largely upheld as constitutional.[73]

III. RLUIPA: PLAINTIFFS BREAK THROUGH, 2000–2007

Since the advent of RLUIPA, religious land use plaintiffs have been more successful in the federal courts than ever before. Free exercise claimants have won substantial victories on fact patterns no more sympathetic than those presented by losing plaintiffs in the pre-*Smith* era. The circuit courts have interpreted the compelling interest test set forth in section 2(a)(1) of RLUIPA much more vigorously than they did the textually identical constitutional doctrine of *Sherbert*. And in areas where RLUIPA is broader than *Sherbert* — for instance, its "equal terms" provision in section 2(b) — courts have applied surprisingly strict scrutiny as well.

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[70] Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 879 (N.D. Ill. 1996).

[71] *Id.* at 880. Though the court's reasoning in this regard apparently followed *Lakewood*, the court also noted that the city had invested a great deal of money in the department store and was counting on filling the space with a new business in order to revitalize the depressed business district. The city therefore likely would not have refused the church a permit to locate elsewhere in the business district — or in the sixty percent of the city zoned for residential use, where churches could operate as of right. *See id.* at 879.

[72] Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 403–05 (6th Cir. 1999) (holding that the zoning ordinance was neutral and generally applicable and that the cemetery association plaintiff had no standing because it had no religious beliefs or members and because third parties did not allege that their religion would be burdened if they could not be buried there).

[73] *See, e.g.*, Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283, 292 (4th Cir. 2000) (upholding a local ordinance exempting parochial schools from the normal requirement that schools obtain a special exception as a prerequisite for construction).

A. The Losing Cases

1. No Land Use Regulation. — Though section 2(b) of RLUIPA, with its nod to equal treatment, may be broader than pre-*Smith* free exercise jurisprudence, section 2(a)(1)'s compelling interest test is narrower, due to its requirement that the burden on religious exercise be imposed pursuant to a "land use regulation." Courts have construed this provision to create a threshold requirement, holding that neither an ordinance requiring a church to tap into a sewer system[74] nor a city's decision to locate a roadway between two church-owned lots[75] qualified as a land use regulation under the meaning of RLUIPA.

2. No Substantial Burden. — One indication that the compelling interest test is being taken more seriously under section 2(a)(1) than it was under *Sherbert* is that in the cases in which circuit courts have determined that a plaintiff's religious exercise is burdened by a "land use regulation," they have never ruled against the plaintiff on the ground of a compelling government interest. Instead, they have held that any burden on the plaintiff's religious exercise was not substantial. The courts' reluctance to find compelling government interests advanced by narrowly tailored laws comports with the application of strict scrutiny in other contexts, in which government action almost never survives.[76] In one case, the Eleventh Circuit held that a plaintiff had not shown that a local sign ordinance substantially burdened its religious exercise.[77] In two other cases, the Third and Ninth Circuits suggested that plaintiffs who failed to exhaust local processes for gaining approval for special land uses could not demonstrate a substantial burden.[78] Following a rare RLUIPA jury trial, the Tenth Circuit affirmed a verdict that the rejection of a church's application for a variance to

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[74] Second Baptist Church of Leechburg v. Gilpin Twp., 118 F. App'x 615 (3d Cir. 2004).

[75] Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002).

[76] For instance, only once has the Supreme Court upheld race-based affirmative action as narrowly tailored to further a compelling state interest. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

[77] Christopher's Creative Design, Inc. v. City of North Palm Beach, 181 F. App'x 860 (11th Cir. 2006).

[78] *See* Lighthouse Inst. for Evangelism Inc. v. City of Long Branch, 100 F. App'x 70, 74, 76 (3d Cir. 2004) (rejecting a church's substantial burden claim when the church had not appealed the denial of its permit application, filed for a variance, or ascertained whether it would have received a permit had it self-identified in its application as an "assembly hall" rather than a church); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004) (finding no substantial burden on a religious college whose rezoning application was rejected due to the college's failure to submit a complete application with sufficient environmental analysis of foreseeable future development); *cf.* Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005) (holding RLUIPA claim unripe in light of plaintiffs' failure to seek a variance by appealing to the city's zoning appeals board).

open a daycare facility in a residential neighborhood was not substantially burdensome.[79]

Only the Seventh Circuit has denied relief to plaintiffs on an interpretation of the substantial burden requirement reminiscent of pre-*Smith* free exercise case law. In *Civil Liberties for Urban Believers v. City of Chicago*[80] (*C.L.U.B.*), the Seventh Circuit rejected a group of churches' RLUIPA challenge to the city's zoning ordinance, narrowly defining a regulation producing a substantial burden as "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable" and holding that the ordinary financial costs imposed on churches by the zoning scheme — for instance, the scarcity of affordable property in areas permitting churches and the expense of satisfying procedural requirements for special uses — did not constitute a substantial burden.[81]

B. The Winning Cases

1. Substantial Burden and No Compelling Interest. — In the decade prior to *Smith*, a single circuit court found a free exercise violation in a case of blatant religious discrimination. Purportedly following the same doctrinal test under RLUIPA's section 2(a)(1), three circuits since 2000 have granted four plaintiffs exemptions from neutral zoning laws.

First, in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,[82] the Ninth Circuit sustained the plaintiff's claim to a conditional use permit to build a Sikh temple on land zoned for agricultural use. Departing from earlier cases suggesting that even significant expense or delay would not constitute a substantial burden, the Ninth Circuit held that theoretical availability of an alternate site was not enough when the county's rationale for denying a permit logically diminished the plaintiff's chances of finding a site by shrinking the amount of land on which it could hope to secure a permit.[83]

Second, in *Elsinore Christian Center v. City of Lake Elsinore*,[84] the Ninth Circuit upheld a district court's decision that the denial of a

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[79] Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 662–64 (10th Cir. 2006) (holding that the district court erred in instructing the jury that the church was required to demonstrate a substantial burden on an activity "fundamental" to its religion, but concluding that the error was harmless due to the jury's finding that the church's religious exercise was not sincere).

[80] 342 F.3d 752 (7th Cir. 2003).

[81] *Id.* at 761. *See also* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 993–94 (7th Cir. 2006) (upholding the denial of a special use permit for a church, as the church's 120 members would have been comfortably accommodated within the ordinance's 55,000-square-foot limit).

[82] 456 F.3d 978 (9th Cir. 2006).

[83] *See id.* at 991–92.

[84] 197 F. App'x 718 (9th Cir. 2006).

conditional use permit to a church violated RLUIPA,[85] despite the fact that granting the permit would have displaced a blighted urban neighborhood's sole grocery store. The district court had found a substantial burden on facts similar to those deemed not to warrant relief under *Sherbert* and RFRA, reasoning that RLUIPA's explicit redefinition of "religious exercise" to include activities not central to a claimant's faith changed the substantial burden test.[86] The district court admitted that RLUIPA did not change the pre-*Smith* standard of review; however, it cited only Supreme Court precedents identifying compelling interests that withstood equal protection and free speech strict scrutiny, while ignoring the many pre-*Smith* lower court cases holding that cities have a compelling interest in enforcing common zoning ordinances.[87] This move allowed the district court to conclude that generating tax revenue could not be a compelling interest.[88]

Third, in *DiLaura v. Township of Ann Arbor*,[89] the Sixth Circuit held that a religious retreat was entitled to a variance from the town's bed-and-breakfast regulations, agreeing that the regulations substantially burdened the retreat's religious exercise under RLUIPA. The regulations would have required the retreat to charge visitors and prevented the retreat from providing communion wine (due to a ban on alcohol) or meals other than breakfast and snacks.[90]

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[85] The district court had found a RLUIPA violation but held that RLUIPA unconstitutionally exceeded Congress's Section 5 powers. *See* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1096, 1104 (C.D. Cal. 2003). Because the city did not contest its RLUIPA violation on appeal, the Ninth Circuit, having held RLUIPA constitutional in *Guru Nanak*, awarded the plaintiff relief. *See Elsinore Christian Ctr.*, 197 F. App'x at 719.

[86] *See Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1090–91. The church claimed that its old building was too small and had insufficient parking, requiring churchgoers to park on the street. *Id.* at 1086. *But see* Storm v. Town of Woodstock, 944 F. Supp. 139, 141, 146 (N.D.N.Y. 1996) (holding that parking a half-mile away from a religious site posed no substantial burden). The court distinguished *Foursquare Gospel* only on compelling interest grounds, *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1094, ignoring *Foursquare Gospel*'s holding that a city's strong interest in a particular parcel minimizes the burden on a claimant by suggesting the city would welcome an application for a conditional use permit on another property in the same zone. *See* Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 879 (N.D. Ill. 1996). The court characterized the denial of the permit as a denial of use of the land, as opposed to a limit on building size or occupancy. *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1091.

[87] *See, e.g.*, Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221, 1224–25 (9th Cir. 1990).

[88] *See Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1092–93. The court further held that even if the city's other claimed purpose, curbing urban blight — that is, avoiding the loss of jobs and services that would be caused by the departure of the neighborhood's only grocery store — were a compelling interest, the city had not shown that denying the permit would guarantee the fulfillment of that interest. *See id.* at 1094–95.

[89] 112 F. App'x 445, 445 (6th Cir. 2004) (per curiam).

[90] *Id.* at 446. In addition to exempting plaintiffs from the regulations, the Sixth Circuit later awarded over $72,000 in attorney fees and costs. DiLaura v. Twp. of Ann Arbor, 471 F.3d 666, 668 (6th Cir. 2006).

Fourth, and perhaps most dramatically, in *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*,[91] the Seventh Circuit seemingly retreated from the anti-plaintiff test it had announced in *C.L.U.B.* Applying *C.L.U.B.*, the district court had rejected the plaintiff church's request for rezoning because it had not shown that its land was the only parcel on which it could build.[92] In an opinion by Judge Posner, the Seventh Circuit reversed, reinterpreting *C.L.U.B.* as having held only that an ordinance requiring churches to *seek* a permit did not impose a substantial burden.[93] By contrast, the requirement in *City of New Berlin* caused "delay, uncertainty, and expense" by forcing the church either to sell its land and find another parcel or to restart the permitting process on the same parcel. The court, citing *Sherbert*, concluded that this requirement constituted a substantial burden.[94]

2. Equal Terms and Settlements. — The circuit courts have also awarded relief to RLUIPA plaintiffs outside of section 2(a)(1). The Eleventh Circuit has twice applied strict scrutiny to zoning ordinance provisions that distinguish religious uses from other uses, invalidating their application to plaintiffs under the "equal terms" requirement of section 2(b).[95] The Sixth and Ninth Circuits also have held for plaintiffs in litigation to enforce settlements of RLUIPA suits.[96]

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[91] 396 F.3d 895 (7th Cir. 2005).

[92] *See id.* at 899.

[93] *See id.* at 899–900.

[94] *Id.* at 901 (noting that although the church might have eventually found suitable land after a long search, the harm to the plaintiff in *Sherbert* was not negated by the fact that she might have found other work had she looked harder and longer).

[95] *See* Konikov v. Orange County, 410 F.3d 1317, 1320–21, 1329 (11th Cir. 2005) (per curiam) (invalidating a law prohibiting the operation of a "religious organization" on property in a specified residential zone without a permit as applied to a rabbi who was fined for holding unauthorized religious assemblies at his home); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231–35 (11th Cir. 2004) (holding that a zoning ordinance excluding churches and synagogues from a business district, where similarly situated private clubs and lodges were permitted, was not narrowly tailored to advance the town's stated interest in retail synergy, as required to satisfy strict scrutiny). *But see* Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1299–1300, 1313 (11th Cir. 2006) (upholding the denial of a variance from a requirement that nonagricultural, nonresidential uses of property be separated by 1000 feet from existing agricultural and residential uses).

[96] *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309 (6th Cir. 2005), involved a consent judgment in which a town agreed to allow a church to locate in an area where it was not allowed under the zoning ordinance in exchange for the church agreeing to certain regulations. *See id.* at 312. The city council had agreed to rezone the property that the church wanted to buy, but a popular referendum overruled the decision. The church brought a suit alleging free exercise and RLUIPA violations, and the town agreed in the consent judgment that the ordinance passed by referendum was unconstitutional. *See id.* at 311–12. The Sixth Circuit enforced the consent judgment by denying a committee of residents opposed to the rezoning the right to intervene. *See id.* at 311. In *Congregation Etz Chaim v. City of Los Angeles*, 371 F.3d 1122 (9th Cir. 2004), the Ninth Circuit interpreted the terms of a settlement agreement between a synagogue and the city as barring revocation of the synagogue's building permit. *See id.* at 1123.

C. Constitutional Analysis: Did RLUIPA Revise Smith?

Perhaps the strongest evidence that RLUIPA strengthened free exercise rights is found in opinions in which judges did not explicitly rely on RLUIPA. For example, in *Fifth Avenue Presbyterian Church v. City of New York*,[97] the church waived its RLUIPA claim by not raising it at trial, but the Second Circuit held that the church was likely to prevail on its free exercise claim to enjoin the enforcement of a zoning law that kept the homeless from sleeping on church premises.[98] *Fifth Avenue Presbyterian* thus suggests that RLUIPA's enactment had injected skepticism into the deferential *Smith* test. While pre-RLUIPA cases had also held interference with ministries to the homeless unconstitutional in theory, those cases had leaned on RFRA for support,[99] whereas *Fifth Avenue Presbyterian* relied only on the Constitution.[100]

Similarly, in his dissent in *C.L.U.B.*, Judge Posner argued that the zoning ordinance challenged in that case violated the Equal Protection Clause[101] — not, as the Eleventh Circuit later held, that RLUIPA's equal terms provision required heightened scrutiny for religious classifications in land use law. Judge Posner relied solely on the Constitution, essentially positing that regulation of religious land use, like that of housing for the mentally disabled, demanded more than typical rational basis review[102] — a view clearly at odds with both *Smith* and the dominant pre-*Smith* doctrines of *Lakewood* and *Grosz*.

IV. EXPLAINING RLUIPA'S SUCCESS

Why have courts suddenly become receptive to religious plaintiffs' land use claims? For years they invoked a strict constitutional test but

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97 293 F.3d 570 (2d Cir. 2002).

98 *See id.* at 573, 575–76 (citing Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996); W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994)). In order to find for the plaintiff while applying *Smith*, the court asserted that the city's professed bases for regulation (nuisance law and the power to license and regulate shelters) were inapplicable to the case. *See id.* at 575–76.

99 *See supra* section II.C.1, pp. 2186–87.

100 A recent case suggests that RLUIPA may have had a similar effect on RFRA. In *Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024 (9th Cir. 2007), the Ninth Circuit upheld a RFRA claim by Native American tribes on the ground that the Forest Service's decision to authorize upgrades to a ski area in a national forest substantially burdened the tribes' religious practice without serving any compelling governmental interest. The court relied heavily on RLUIPA's definition of "religious exercise" in concluding that RFRA imposed a "significantly more demanding standard" than the Free Exercise Clause, *id.* at 1047, and thus distinguishing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), despite the fact that *Lyng* acknowledged the burden on the plaintiffs' religious exercise and instead rested its holding on the government's prerogative with regard to its own land, *id.* at 448–49.

101 *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 768–69 (7th Cir. 2003) (Posner, J., dissenting).

102 *See id.* at 769–70 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)).

applied it with great deference. But when RLUIPA wrote that test into the United States Code and told the courts to apply it as they had in the past, land use plaintiffs began to win lawsuits. RLUIPA thus appears to be an unusually striking vindication of the popular constitutionalist notion that changing context and ongoing dialogue among the branches of government may impact legal doctrines and outcomes without any change in the relevant text.[103] But what context and dialogue are responsible for RLUIPA's effects?

A. Some Possibilities

1. A Weakened Establishment Clause. — While Congress and the federal courts were fighting over *Smith*, RFRA, and *Boerne*, states were busy passing their own RFRAs,[104] reading their constitutions to mandate more free exercise exemptions than *Smith* required,[105] and enforcing targeted exemptions for religious groups.[106] The Rehnquist Court's cases limiting the Establishment Clause suggested that there was room between the two religion clauses for state governments to provide religious exemptions that were neither forbidden nor required by the federal Constitution,[107] but some lower courts read these cases as bolstering free exercise.[108] In this political and jurisprudential atmosphere,[109] courts might have felt inclined to read the broad statu-

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[103] *See, e.g.*, Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11–41 (2003) (arguing that Title VII implicitly influenced the Supreme Court's interpretation of the Equal Protection Clause in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) (explaining how an unenacted constitutional amendment was implicitly incorporated into the Equal Protection Clause).

[104] *Cf.* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS. L. REV. 755 (1999) (concluding that state RFRAs may help religious land use plaintiffs if interpreted correctly).

[105] *See, e.g.*, Soc'y of Jesus of New Eng. v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990) (holding that the historic landmark designation of a church interior burdened free exercise in violation of the Massachusetts Constitution).

[106] For examples of such exemptions, see Ryan, *supra* note 6, at 1445–50.

[107] *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (holding that an exemption of religious organizations from Title VII employment discrimination liability did not violate the Establishment Clause); *cf.* Locke v. Davey, 540 U.S. 712, 718–19 (2004) (explaining that "there is room for play in the joints" between the Free Exercise and Establishment Clauses (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)) (internal quotation marks omitted)).

[108] *Compare* Bollenbach v. Bd. of Educ., 659 F. Supp. 1450, 1469–70 (S.D.N.Y. 1987) (holding, before *Amos*, that requiring schools to hire female bus drivers burdened Hasidic Jews' religious exercise but was necessary to further the compelling state interest of not violating the Establishment Clause), *with* Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260, 264 (4th Cir. 1988) (holding that *Amos* dictated that state regulations exempting church-run child care centers from licensing requirements did not violate the Establishment Clause).

[109] *See* Mertes, *supra* note 4, at 230–35 (portraying RLUIPA as part of a larger trend away from antiestablishment principles).

tory provisions of RLUIPA more generously as well. However, the history of the religion clauses does not suggest that one clause's loss is the other's gain, as the Warren Court vigorously expanded the reach of both clauses, and the Rehnquist Court had significantly limited the Establishment Clause by the time it decided *Smith*.

2. Property Rights Retrenchment. — Judges' increasing willingness to mandate religious exemptions for land use plaintiffs might reflect a long-term shift in attitudes toward land use regulations of all kinds, as underscored by the intensely negative reaction to the Supreme Court's decision in *Kelo v. City of New London*.[110] Yet if changing attitudes concerning government regulation of property were responsible for the increasing judicial solicitude for religious land use over time, one would expect some plaintiffs to have succeeded between *Boerne* and the enactment of RLUIPA — but none did. Moreover, to the extent that local government decisions to prohibit religious uses are heavily influenced by residents' concerns for their own property values, pro-plaintiff judicial decisions in this context might actually seem more like takings than would decisions upholding regulation.[111]

3. Congress's Second Try. — With RLUIPA, Congress rebuffed the Supreme Court on free exercise for a second time, and repetitive action often has legal force, either formally or in practice. For instance, some states require constitutional amendments to be passed by successive legislatures.[112] Similarly, the Supreme Court has held that its own repeated reaffirmations of a precedent give that precedent greater force, in terms of immunity from reconsideration, than principles of stare decisis would otherwise require.[113] However, repetition is not always recognized as probative of substantive merit.[114] More significantly,

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[110] 125 S. Ct. 2655 (2005) (holding that a private transfer designed to promote economic development may be a public use for the purposes of the Takings Clause). For a summary of the popular outrage that followed and a review of state legislative responses to *Kelo*, see Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709.

[111] *Cf.* Tuttle, *supra* note 7, at 920 (observing that free exercise exemptions from any generally applicable law impose social costs, but that those costs are normally more diffuse than those imposed by land use exemptions, which force a discrete population of neighbors to bear the brunt of whatever negative externalities result from the exemption).

[112] *See, e.g.*, Mark C. Miller, *Conflicts Between the Massachusetts Supreme Judicial Court and the Legislature: Campaign Finance Reform and Same-Sex Marriage*, 4 PIERCE L. REV. 279, 297 (2006) (describing the procedure in Massachusetts).

[113] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857–58 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[114] For instance, the Court has not yielded to Congress's repeated attempts to reduce administrative costs by allowing some small property interests in land to escheat to Indian tribes upon the deaths of the property interest holders. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court held the escheat provision of the Indian Land Consolidation Act of 1983 to effect a taking of decedents' land without just compensation. *See id.* at 716–18. Congress amended the Act in an effort to circumvent *Hodel*, but the Court again rejected Congress's scheme as violating the Takings

RLUIPA's drafters reacted negatively to *Boerne* without knowing that courts had applied RFRA and the pre-*Smith Sherbert* test with great deference toward the government. Thus, the repetition theory explains only why most of the lower federal courts have held RLUIPA constitutional rather than striking it down; it says little about why they have chosen to read its terms to go beyond what the courts thought the Free Exercise Clause required under *Sherbert*.

4. Textual Change. — RLUIPA did not attempt simply to reverse *Smith*, as RFRA did; rather, it defined "religious exercise" to include the use of a plot of land for religious purposes, and it added "equal terms" and anti-exclusion causes of action. Thus, courts may be granting plaintiffs relief in response to these textual changes in the governing law. The pre-RLUIPA cases, however, did not turn on whether the use of land qualified as "religious exercise." Rather, they conceded that point but rejected plaintiffs' claims on the ground that their exercise was not substantially burdened.[115] And only the Eleventh Circuit has granted relief under RLUIPA section 2(b), which it read as merely codifying review already constitutionally mandated by *Smith* and *Lukumi*.[116] Moreover, the idea that RLUIPA by its own terms strengthened *Sherbert* ignores the many cases in which courts claimed to be following free exercise precedents but effectively extended them,[117] the cases in which courts upheld free exercise claims based only on constitutional grounds,[118] the legislative history indicating that Congress did not intend to expand pre-*Smith* free exercise protections,[119] and the advances (though admittedly less dramatic) made under RFRA.[120]

B. Judicial Manageability and Constitutional Orbits

Because the above explanations fail to account fully for the rise in plaintiff victories under RLUIPA, this Note concludes by offering a two-pronged hypothesis: First, *Smith* decided that free exercise rights should go underenforced due to a perceived lack of judicially manage-

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Clause. *See* Babbitt v. Youpee, 519 U.S. 234, 237 (1997). Flag burning is a more famous example: a year after striking down state bans on flag desecration as inconsistent with the First Amendment in *Texas v. Johnson*, 491 U.S. 397 (1989), the Court rebuffed Congress's attempt to enact its own ban in *United States v. Eichman*, 496 U.S. 310 (1990).

115 *See, e.g.*, Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306 (6th Cir. 1983) (recognizing that the plaintiff's "'religious observance' is the construction of a church building in a residential district"). *But cf.* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1090–91 (C.D. Cal. 2003) (suggesting that RLUIPA's definition of "religious exercise" was dispositive).

116 *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004).

117 *See supra* section III.B.1, pp. 2190–92.

118 *See supra* section III.C, p. 2193.

119 *See, e.g.*, 146 CONG. REC. S7776 (daily ed. July 27, 2000) ("[I]t is not the intent of [RLUIPA] to create a new standard for the definition of 'substantial burden' on religious exercise.").

120 *See supra* section II.C.1, pp. 2186–87.

able standards for courts to use in mandating exemptions.[121] Second, RLUIPA instructed courts to apply a judicial gloss on the Constitution that had been discredited but not directly overruled. If correct, this theory may point toward a surprising strategy for cooperation between Congress and the courts.

According to a theory originated by Professor Lawrence Sager[122] and recently elaborated by Professor Richard Fallon, there is a "permissible disparity" in some cases between the meaning of the Constitution and constitutional norms that can be enforced by courts, due to the judiciary's institutional capacity and separation of powers concerns.[123] Thus, some constitutional norms are underenforced.[124] One important implication of this view is that legislators and executive branch officials, when determining how to uphold the Constitution, should not look solely to judicial interpretations for guidance.[125] Another implication is that the Constitution can be seen as "partly aspirational," not susceptible of full and immediate realization.[126]

The *Sherbert* compelling interest test, if faithfully applied, seems judicially manageable[127] but would arguably overenforce the Free Exercise Clause in land use cases, because the plaintiff would nearly always win.[128] In *Smith*, however, the Court seemingly opted for the opposite disparity between constitutional meaning and doctrine.[129] On

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[121] *See* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 759–61 (1992) (noting this "nonjusticiability" view of *Smith* but doubting that it justifies the decision).

[122] *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[123] Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1278–79 (2006).

[124] *See* Sager, *supra* note 122, at 1217–21. For example, the Supreme Court unanimously agreed in a recent case that some partisan gerrymanders violate the Equal Protection Clause, but held 5–4 that, even if the gerrymander challenged in the case did violate the Constitution, no relief was available in the absence of a judicially manageable standard to determine whether such a gerrymander went too far. *See* Fallon, *supra* note 123, at 1281–82 (discussing Vieth v. Jubelirer, 541 U.S. 267 (2004)). By contrast, other constitutional norms may be overenforced by prophylactic rules. *See, e.g.*, *id.* at 1303–06 (describing how *Miranda v. Arizona*, 384 U.S. 436 (1966), overenforces the Fifth Amendment).

[125] *See* Sager, *supra* note 122, at 1221.

[126] Fallon, *supra* note 123, at 1324–25.

[127] After all, the test closely resembles strict scrutiny tests commonly used in other areas of constitutional doctrine.

[128] *See* Tuttle, *supra* note 7, at 919 ("[F]ew of the governmental interests at stake in land use regulation should be termed compelling. . . . Thus, if true strict scrutiny analysis were applied to most religious land use disputes, the religious institution would win in nearly all cases. But this hardly seems a virtuous trait . . . ." (citing Laycock, *supra* note 104, at 766)).

[129] *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) ("[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system . . . in which judges weigh the social importance of all laws against the centrality of all religious beliefs."). Far from asserting that the government's rigid refusal to accommodate

Professor Sager's theory, the political branches would be free to compensate for the courts' underenforcement by legislating specific religious exemptions;[130] yet Congress might insist that adjudication, not politics, is the best way to enforce the Free Exercise Clause.[131]

In a 1993 article, Professor Lupu noted that a federal judiciary exceedingly deferential to government had ushered in an era of diminishing individual rights. He examined the phenomenon of Congress attempting to restore an old status quo through legislation using the language of a prior judicial gloss on the Constitution.[132] Professor Lupu identified the proposed RFRA as a prime example of such a statute and predicted that courts would construe it narrowly, if not strike it down entirely.[133] He argued that drafting statutes closely tied to constitutional provisions — "in tight constitutional orbits," as he called them — that purport to reverse past judicial interpretations of the Constitution is a risky strategy, and that a more "cooperative" approach would be more likely to elicit hospitable readings from the courts.[134] Professor Lupu further cautioned that "restoration" of past judge-made doctrine was "profoundly conservative" and unlikely to spur true constitutional transformations.[135]

The success of RLUIPA suggests that Professor Lupu may have been too pessimistic about the efficacy of legislating in tight constitu-

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costlessly a vitally important religious practice would not violate First Amendment rights, the Court merely pled incompetence to formulate fair rules for identifying such cases.

130 *See* Ryan, *supra* note 6, at 1445–50 (surveying existing statutory religious exemptions and suggesting that free exercise could best be protected through legislative action).

131 *Cf.* Lupu, *supra* note 32, at 567 (arguing that "adjudication, or administration under general constitutional principles, is the appropriate vehicle for creating . . . exemptions," and that "legislation in service of religious liberty is a very poor idea"). Possible reasons include Congress's desire to prevent minority religions from being disadvantaged in the political process, *see Smith*, 494 U.S. at 890; its preference for standards over bright-line rules in determining what exemptions the Constitution requires, *see* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66–69 (1992); and its desire to delegate difficult and potentially unpopular decisions about what situations merit exemptions.

132 *See* Lupu, *supra* note 7, at 1–4. Such legislation is the product of one branch of government being out of step with the others. When a conservative Supreme Court struck down New Deal legislation in the 1930s, the Court was the branch of government least responsive to the popular will. In the 1980s and early 1990s, the entrenched Democratic majority in Congress arguably made the legislature the outlier in an increasingly conservative country. Indeed, the mismatch between congressional and judicial interest in protecting individual rights (in most instances) was eliminated only a year after Professor Lupu's writing with the Republican Revolution of 1994, just as the New Deal mismatch was remedied by the retirement of several conservative Justices. *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 290–93 (1998).

133 *See* Lupu, *supra* note 7, at 52–66. Professor Lupu cited two other examples: the Equal Access Act of 1984, 20 U.S.C. §§ 4071–4074 (2000), which extended to public secondary schools the rule of *Widmar v. Vincent*, 454 U.S. 263 (1981); and the proposed Freedom of Choice Act, introduced in 1989 but never enacted, which would have codified the holding of *Roe v. Wade*, 410 U.S. 113 (1973). *See* Lupu, *supra* note 7, at 5.

134 *See* Lupu, *supra* note 7, at 46, 83.

135 *Id.* at 54, 82.

tional orbits when certain conditions are present: when courts have expressed a constitutional aspiration by expounding a rights-protective doctrinal test that they do not fully enforce; when courts have shifted consciously from covert to open underenforcement by jettisoning their arguably overprotective standard in favor of a doctrine more consonant with the case law; and when the old aspirational standard has not been explicitly rejected as applied to a particular set of cases.[136] Under such conditions, which involve concerns about relative institutional competence rather than substantive merits, the judiciary's decision to delegate constitutional enforcement to Congress, followed by Congress's *redelegation* back to the courts to apply a constitutional gloss that the courts themselves created, might spur courts to pursue the more vigorous enforcement of background rights they had previously resisted due to concerns about the manageability of the task. The gloss remains the same, but the judgments change.[137]

If this hypothesis is right, then RLUIPA could be a model for legislation in other areas in which Congress wants to reduce the disparity between constitutional meaning and doctrine. For instance, if Congress wants the lower federal courts to enforce the Equal Protection Clause's prohibition against partisan gerrymandering in spite of the Supreme Court's recent decision in *Vieth v. Jubelirer*,[138] it might draft a One Person, One Vote Restoration Act reaffirming the Court's previous cases establishing the importance of electoral equality[139] and the justiciability of partisan gerrymandering cases.[140]

The success of land use plaintiffs under RLUIPA undermines the notion that Congress cannot redirect the adjudication of individual rights without legislating specifics. But that success, coupled with RLUIPA's unusual form, also suggests a deeper lesson: by recognizing the courts' role in formulating the aspirational Constitution through judges' own underenforced tests and standards, Congress may find a willing and effective partner in pursuing its own aspirations.

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136 *Cf.* Lupu, *supra* note 32, at 572–73 (arguing that the *Smith* rule may not apply to land use cases on account of its exception for cases involving individualized assessments).

137 This theory is difficult to test, because Congress almost never legislates in tight constitutional orbits, and when it does, it may — as with RFRA — invite invalidation by questioning judicial interpretive supremacy too openly. However, a similar effect is evident in the interpretation of statutes containing judicial glosses on *other statutes*. For example, in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Supreme Court held that the Administrative Procedure Act's adoption of a prior judicially constructed standard was not meant to ratify existing practice under the standard. Rather, the Court interpreted the APA as prodding the courts to adopt a stricter interpretation of their own test — despite the fact that sponsors of the legislation had indicated that they were merely reaffirming the existing test. *See id.* at 483–84, 490.

138 541 U.S. 267 (2004).

139 *See* Reynolds v. Sims, 377 U.S. 533 (1964).

140 *See* Davis v. Bandemer, 478 U.S. 109 (1986).