When God and Costco Battle for a City's Soul: Can the Religious Land Use and Institutionalized Persons Act Fairly Adjudicate Both Sides in Land Use Disputes?

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Imagine a city denying a special use permit to construct a church so that the city can condemn property and clear space for a Costco.[1] Imagine a resident of a quiet suburban neighborhood hosting religious worship activities for hundreds of people at her home, disturbing the quiet residential lifestyle neighbors have come to expect.[2] Natural sympathies and notions of fairness rest with the church in the first example and with the neighbors whose lives have been disrupted in the second example. However, the same federal law, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[3] has been used to protect churches from cities with big-box-retailer dreams, as well as to protect neighbors with non-traditional religious practices from cities trying to preserve a quiet residential environment.

As part of a longstanding community right, local governments enforce land use decisions through their recognized police power of promoting the general health, safety, and welfare of their citizens.[4] Historically, courts uphold local land use decisions as long as they appear to serve the public interest and the chosen means were

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1. *See* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

2. *See* Murphy v. Zoning Comm'n of New Milford, 223 F. Supp. 2d 377 (D. Conn. 2002).

3. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000). Commentators have questioned the constitutionality of the law, while groups such as the ACLU have praised it for its contributions to religious freedom. Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 WHITTIER L. REV. 493, 494 (2002).

4. Local land use decisions are presumed constitutional. Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962).

reasonably necessary to serve the designated purpose without being unduly oppressive.[5]

However, what happens if a local government's decision appears to satisfy constitutional minimums of reasonableness, but nonetheless, prevents a religious institution from exercising its religious freedoms? Congress, relying on its spending and commerce powers as well as the enforcement provision of the Fourteenth Amendment,[6] sought to preserve religious exercise by passing the Religious Freedom Restoration Act in 1993 (RFRA)[7] and then RLUIPA in 2000.[8]

This Note will examine RLUIPA as an approach to the balancing of religious freedom and the desire for well planned communities. Part I examines the history and legislative intent of RLUIPA's predecessors, including the RFRA. Part II examines the legislative history and case law of RLUIPA. Part III analyzes the fairness of using RLUIPA to adjudicate land use decisions involving religious uses. Additionally, Part III proposes a judicial construction of RLUIPA that allows the Act to be invoked to protect religious freedom, but still recognizes the superiority and need for local control over land use decisions.

I. CONGRESS RECOGNIZES A NEED FOR GREATER PROTECTION OF RELIGIOUS EXERCISE AND ACTS

The trigger point to Congress's recent interest in religious protection was the Supreme Court's opinion in *Employment Division v. Smith*.[9] In that case, the Court was presented with a state law that

5. *See* Lawton v. Steele, 152 U.S. 133, 137 (1894). This rule has been extended to zoning ordinances. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding zoning ordinances valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health safety, morals, or general welfare").

6. U.S. CONST. art. I, § 8, cls. 1, 3 & amend. XIV, § 5.

7. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)). The RFRA sought to apply strict scrutiny to all laws that substantially burden religious exercise. § 2000bb(b)(1). The Act has since been ruled unconstitutional. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

8. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statements of Sen. Kennedy and Sen. Hatch).

9. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). For a summary of *Smith* as well as the Supreme Court's free exercise jurisprudence leading up to the

denied individuals their unemployment benefits because of their sacramental peyote use.[10] The individuals claimed that peyote use was sacramental for members of their Native American Church and that the law interfered with his constitutional right to free religious exercise.[11] The Oregon Supreme Court held that the prohibition of sacramental peyote use violated the Free Exercise Clause.[12] However, the U.S. Supreme Court[13] refused to accept the Free Exercise Clause argument and held that the clause cannot, by itself, be used to "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[14] Upset with this holding, Congress began work on legislation to effectively overturn *Smith*[15] as evidenced by the enactment of both the RZUIPA and RFRA.

A. The Religious Freedom Restoration Act

The ruling in *Smith* had the effect of denying constitution-based religious exemptions from generally applicable, neutral laws.[16] Unhappy that the holding weakened religious exercise protection, Congress passed the RFRA, explicitly announcing in its findings that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that

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decision, see GREGG IVERS, LOWERING THE WALL 79–93 (1990).

10. 494 U.S. at 874.

11. *Id.*

12. Smith v. Employment Div., 763 P.2d 146 (Or. 1988).

13. Justices Rehnquist, White, Stevens, Stevens, and Kennedy joined Justice Scalia's majority opinion. However, Justices Brennan and Marshall joined Blackmun in a dissenting opinion.

14. 494 U.S. at 879 (citations omitted). The Court noted that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Id. at 881. The effect of this holding was to only require a rational relationship test to generally applicable laws that may burden religious exercise. S. REP. NO. 103-111, at 7–8 (1993), *reprinted in* 1993 U.S.S.C.A.N. 1892, 1897.

15. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 15.3 (5th ed. 2000).

16. *Id.* § 17.6.

this law was meant to overrule *Smith* on the matter.[17] Additionally, the RFRA provided that the state and federal governments cannot "substantially burden" an individual's exercise of religion even if the law is neutral and generally applicable, unless the government demonstrates that the burden imposed furthers a compelling governmental interest and is the least restrictive alternative.[18] The Act specifically calls for a reinstatement of the compelling interest test used in *Sherbert v. Verner*[19] and *Wisconsin v. Yoder*[20] and guarantees application of the test in all cases where free exercise of religion is substantially burdened.[21] Effectively, Congress imposed a strict scrutiny[22] level of judicial review on any government action that substantially burdens religious exercise.

The RFRA achieved bipartisan support from Congress with support ranging from conservatives such as Senator Orrin Hatch to

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17. 42 U.S.C. § 2000bb(a) (2000) Findings.

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior government interests.

18. *Id.* § 2000bb-1(a), (b) (2000).

19. 374 U.S. 398 (1963) (where a burden is placed on the free exercise of religion, the government must demonstrate that it is the least restrictive means to meet a compelling interest).

20. 406 U.S. 205 (1972).

21. 42 U.S.C. § 2000bb(b)(1) (2000). The RFRA also provided a claim or defense to persons whose religious exercise has been substantially burdened by government action. *Id.* para. (2).

22. The RFRA provided that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (2000).

liberals like Senators Edward Kennedy and Paul Wellstone.[23] Congress had little doubt that its broad measure to defend the public from any substantial burden on their free exercise of religion was within its power:

> [C]ongressional power under Section 5 to enforce the 14th amendment includes congressional power to enforce the free exercise clause. Because the Religious Freedom Restoration Act is clearly designed to implement the free exercise clause—to protect religious liberty and to eliminate laws "prohibiting free exercise of religion"—it falls squarely within Congress' section 5 enforcement power.[24]

Neither the broad nature of the RFRA nor its constitutionality was heavily debated.[25]

The passage of RFRA illustrated the concern Congress had that some neutral laws, as upheld by courts, undermined the free exercise of religion by certain groups.[26] When the *Smith* Court refused to utilize a high level of scrutiny in cases involving religious exercise,[27] Congress decided to intervene. The *Smith* decision, which refuses to protect religious exercise from burdensome laws of general applicability, held that protection from such laws could be accomplished through the political process.[28] Hearings began in 1990

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23. S. REP. NO. 103-111, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N 1892, 1893.

24. *Id*. at 14.

25. *See id*. at 18–24. Most of the debate centered around whether the bill would lead to an increase in prisoner litigation, from inmates challenging restrictions such as prison uniforms on free exercise grounds. *Id.* (additional views of Senator Simpson, the lone member of the Senate Committee on the Judiciary to vote against sending the bill to the Senate for a vote).

26. *See* H.R. REP. 103-88 at 2 (1993) (citing written testimony of Professor Douglas Laycock before the House Civil and Constitutional Rights Subcommittee, May 14, 1992, at 2–5).

27. 494 U.S. at 888. The Court found the test inappropriate because it would result in judicial determination of the centrality of religious beliefs to exercise of religion as well as the resulting anarchy from the inability of many current laws to withstand a heightened scrutiny analysis (including compulsory military service, cruelty to animals, child labor, etc). *Id*.

28. The Court pointed out that many states had made exceptions to their drug laws for sacramental peyote use. *Id.* at 890; *see also, e.g.*, N.M. STAT. ANN. § 30-31-6(D) (Supp. 1989) (providing exception for sacramental peyote use). While leaving religious exercise exceptions in the political process may create a disadvantage for groups whose type of exercise is not widely practiced, it is a consequence of democratic government and a superior to judicial interpretation under a compelling interest test. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990). Congress did not share the Court's faith in the political

on predecessor bills to the RFRA, only months after the court announced the *Smith* decision.[29]

The congressional theory behind the need for a compelling interest was that the Supreme Court had erred in leaving religious protection up to the political process.[30] Furthermore, Congress believed the Court had failed to follow its own precedent that interpreted the Bill of Rights as requiring the withdrawal of certain subjects from political controversy so that fundamental rights, including the freedom to worship, would not depend on the outcome of elections.[31]

To provide the greatest protection for religious exercise, Congress wanted the RFRA to be applied as broadly as possible.[32] However, controversy arose regarding how strictly the compelling interest test should apply.[33] The Act specifically called for the restoration of the test as applied in *Sherbert* and *Yoder*.[34] There was contention over whether the standard applied in *Sherbert* and *Yoder* was in fact, more stringent than what had been applied to the cases between then and *Smith*.[35] However, the specific references to the *Sherbert* and *Yoder* opinions indicate reliance on a strict application of the compelling

process, finding that "[I]t is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute." H.R. REP. NO. 103-88, at 6. In response to its feasibility concerns of specific legislation necessary to create religious exemptions for every neutral law, Congress was determined to allow RFRA to be applied as broadly as possible. *Id.* Thus, the RFRA encompassed "all cases where the free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb.

29. *See* 101 H.R. 5377 § 2(b)(1)-(2) (1990). The proposed Religious Freedom Restoration Act of 1990 contains the same compelling interest test enacted in the RFRA. *Cf.* 42 U.S.C. § 2000bb.

30. H.R. REP. NO. 103-88 at 6 (1993) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). In *Barnette*, the Court struck a school board regulation requiring students to salute the American flag or face expulsion. *Id*.

31. *Id*.

32. H.R. Rep. 103-88 at 6. "[T]he definition of governmental activity covered by the bill is meant to be all inclusive." *Id*.; *see also supra* note 28.

33. *See generally* H.R. REP. NO. 103-88 (1993).

34. *See supra* notes 20 and 21.

35. H.R. Rep. 103-88 at 15. Prior to the introduction of the RFRA to the 103d Congress, the committee made an effort to delete reference to the *Sherbert* and *Yoder* cases. *Id*. The House version when introduced to the House on March 11, 1993 replaced references to the *Sherbert* and *Yoder* opinions with text calling for the restoration of "the compelling interest test as set forth in Federal court cases before Employment Division of Oregon v. Smith." H.R. 1308, § 2(b)(1), 103d Cong. (1993) (as introduced in the House).

interest test.[36] The RFRA would force courts to apply the test broadly and strictly.[37]

Nonetheless, in 1997 the Supreme Court struck down the RFRA in *City of Boerne v. Flores*.[38] In *Boerne*, an Archbishop applied for a building permit to enlarge a church in Boerne, Texas, to meet demand for a growing parish. However, the local authority, relying on a city ordinance regarding historic landmarks, denied the permit.[39] The Archbishop filed suit to challenge the denial of the permit and claimed the RFRA as a basis for relief.[40] The District Court held the RFRA unconstitutional for exceeding the scope of Congress's enforcement power under Section Five of the Fourteenth Amendment.[41] The Fifth Circuit reversed, finding the RFRA constitutional.[42] Subsequently, the Supreme Court reversed the Fifth Circuit and invalidated the RFRA. Writing for the Court, Justice Kennedy noted that while the RFRA sought to instill a compelling interest test in cases such as *Smith*, the result would be "an anomaly in the law, a constitutional right to ignore neutral laws of general applicability."[43]

The Archbishop urged the Court to recognize the RFRA as legislation designed to protect liberties guaranteed by the Fourteenth Amendment.[44] The Court admitted that the Fourteenth Amendment provides "a positive grant of legislative power," including the ability

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36. 103 Pub. L. No. 141 § 2(b)(1). The RFRA as enacted into law contains the reference to the *Sherbert* and *Yoder* decisions. *Id*.

37. Cases with RFRA components appeared in a wide array of circumstances. *See, e.g.*, *In re* Young, 89 F.3d 494 (8th Cir. 1996) (holding that fraudulent transfers provision of U.S. Bankruptcy Code violates the RFRA for not recognizing special status of amounts tithed to a religious association as part of a sincere religious belief); Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (finding school's total ban on weapons in violation of RFRA because it forced Khalsa Sikh children to choose between a fundamental religious tenet, carrying ceremonial knives, and expulsion); Muslim v. Frame, 897 F. Supp. 215 (E.D. Pa. 1995) (holding that RFRA applies to action challenging "no hats" rule in prison).

38. 521 U.S. 507 (1997).

39. *Id*.

40. *Id*.

41. 877 F. Supp. 355, 357–58 (W.D. Tex 1995).

42. 73 F.3d 1352, 1364–65 (5th Cir. 1996).

43. 521 U.S. at 513.

44. *Boerne*, 521 U.S. at 517. The Archbishop contended that "Section 5 includes the power to enact legislation designed to prevent, as well as remedy, constitutional violations [and] that Congress's § 5 power is not limited to remedial or preventive legislation." *Id*.

to use legislation to deter violations.[45] However, the Court also found that Section Five of the Fourteenth Amendment provides no authority for Congress to alter the meaning of the Free Exercise Clause by adding a constitutional right to ignore laws of general applicability.[46] Any substantive change made by Congress would be a separation of powers violation.[47]

B. The Religious Liberty Protection Acts of 1998 and 1999

After *Boerne* struck down the RFRA, Congress wasted little time in preparing a more narrowly applicable successor. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[48] contains a compelling interest test on substantial burdens to free exercise, similar to the RFRA.[49] However, instead of broad applicability, RLUIPA is limited to land use decisions and institutionalized persons.[50] Although Congress passed RLUIPA with

45. *Id*. (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). It is long established that preventive measures are sometimes appropriate as remedial measures if it is appropriate in the light of the evil sought to be cured. *Katzenbach*, 384 U.S. at 808. The *Boerne* Court reviewed the legislative history of the RFRA and found that the "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Boerne*, 521 U.S. at 530. Therefore, the Court argued, it was impossible to construe the RFRA as a remedial measure to end religious bigotry since the proposed means (the RFRA) were so out of proportion with the ends. *Id.* at 530–32.

46. *Boerne*, 521 U.S at 519. The Court felt that the line between what Congress is allowed to legislate under the Fourteenth Amendment (preventive and remedial measures) and what it is not allowed to legislate (substantive changes to the meaning) is not always clear. *Id*. at 519–20. However, by ensuring that there is a proportional relationship between the injury to be prevented or remedied and the means adopted to reach that end, Congress would avoid making any forbidden substantive changes. *Id*.

47. *Id*. at 520–29. Arguing that the Fourteenth Amendment did not give Congress authority to change the meaning of constitutional rights and allowing Congress to do so could make legislative acts superior to the constitution. *Id*.

48. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5, 2000bb-2(1)–(2), (4), 2000bb-3(a)).

49. §§ 2000cc(a)(1), 2000cc-1(a).

50. *Id.* A land use regulation is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." § 2000cc-5(5).

wide bipartisan support, the switch from a broad approach under RFRA to the narrow approach of RLUIPA was not a swift one.[51]

The first hearing was held less than three weeks after the *Boerne* decision was announced.[52] The first fruit from Congress's second attempt was the Religious Liberty Protection Act (RLPA) of 1998, which never made it out of committee.

The RLPA of 1998 retained most of the RFRA's broad reach,[53] but the Act also specifically addressed the creation of three restrictions on land use regulations.[54] One of these restrictions revised the compelling interest test applicable to other laws under the Act by

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51. *See* 146 CONG. REC. S7779, H7192 (2000) (daily ed. July 27, 2000). The effort toward passing RLUIPA began almost immediately after the *Boerne* decision struck down the RFRA. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000*, 9 GEO. MASON L. REV. 929, 943 (2001). The House Judiciary Committee began hearings on alternatives to the RFRA almost immediately. *Id*. Bills were proposed in successive Congresses—the Religious Liberty Protection Act of 1998 and Religious Liberty Protection Act of 1999. *Id*. The 1999 Act managed to pass the House, but was stalled in the Senate where opponents feared it could be used to avoid state anti-discrimination claims. *Id*.; *see also* Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999); Religious Liberty Protection Act of 1998, S. 2148, 105th Cong. (1997); Religious Liberty Protection Act of 1997, H.R. 4019, 105th Cong. (1997).

52. *Protecting Religious Freedoms After* Boerne v. Flores, *Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 105th Cong., July 14, 1997.

53. H.R. 4019, § 2 states:

> (a) GENERAL RULE.—Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise—
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> (1) in a program or activity, operated by a government, that receives Federal financial assistance; or
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> (2) in or affecting commerce with foreign nations, among the several States, or with Indian tribes; even if the burden results from a rule of general applicability.
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> The bill also proposed to avoid invalidating laws of general applicability by allowing the government retaining the neutral policy, but exempting religious exercise from its enforcement.

54. Section 3(b)(1) created the following restrictions:

> (1) No government shall impose a land use regulation that—
>
> (A) substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety;
>
> (B) denies religious assemblies a reasonable location in the jurisdiction; or
>
> (C) excludes religious assemblies from areas in which nonreligious assemblies are permitted.

requiring only a showing that the regulation is the "least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety."[55]

Congress's next attempt was the Religious Liberty Protection Act of 1999.[56] The RLPA of 1999 passed only the House. The proposed Act reinstated the least restrictive means in furtherance of a compelling interest test to land use regulations.[57] However, the proposed Act also limited the applicability of the compelling interest test to cases where the "government has the authority to make individualized assessments of the proposed uses to which real property would be put."[58]

This limitation was included as a direct response to the *Boerne* decision.[59] The House believed its hearing produced the necessary findings to support the use of the compelling interest test as a preventive remedial measure.[60] Additionally, the House believed that the statutory wording would allow the RLPA of 1999 to be upheld as a proper exercise of the commerce and spending powers.[61]

The RLPA of 1999 also imposed other restrictions on local land use control. These restrictions were based on discrimination against religious institutions.[62] Instances of such discrimination would not

55. *Id*.

56. H.R. 1691, 106th Cong. (1999). RLPA of 1999 passed the House, but was not voted on in the Senate. *Id*. RLPA of 1999 contains the same language of applicability as RLPA of 1998. *See supra* note 48.

57. H.R. 1691 § 3(b)(1)(A); *cf.* H.R. 4019 § 3(b)(1)(A).

58. H.R. 1691 § 3(b)(1)(A).

59. H.R. REP. NO. 106-219, at 17 (1999).

60. *Id.* The *Boerne* Court argued that the use of the compelling interest test could only qualify as a valid remedial measure under Congress's Section Five Enforcement Power if it was proportional. *See supra* note 45 and accompanying text. Congress based its findings on the Supreme Court decision in *Smith*, which implied that when government bodies have the authority to make decisions based on "individualized assessments," they may not substantially burden an individual's free exercise activities without a compelling interest. H.R. REP. NO. 106-219, at 17; *see also* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).

61. H.R. REP. NO. 106-219, at 35.

62. H.R. 1691 § 3(b)(1)(B) ("No government shall impose or implement a land use regulation in a manner that does not treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions."), (C) ("No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."), (D) ("No government with zoning authority shall

result in application of a compelling interest test, instead such discrimination would be completely banned.[63]

Although the RLPA of 1999 passed the House, the RLPA of 1999 was not widely supported.[64] Ten members of the House Committee on the Judiciary filed dissenting views.[65] The dissenters supported the goal of providing greater protection for religious exercise, but believed that the RLPA of 1999 was a flawed vehicle for providing such protection.[66] One group of dissenters argued that the RLPA of 1999 did not cure the unconstitutionalities found in the RFRA.[67] These dissenters contended that the proposed law was not supported by enough evidence in the legislative history to be found proportional to the perceived discrimination, which was a necessary requirement to be constitutional under the Enforcement Powers of the Fourteenth Amendment.[68] These dissenters believed, moreover, in light of *United States v. Lopez*,[69] the Supreme Court would likely strike the Act down as exceeding Congress's Commerce Power. Finally, this group asserted that additional constitutional problems would arise under the Spending Clause[70] and separation of powers doctrine.[71]

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unreasonably exclude from the jurisdiction over which it has authority, or unreasonably limit within that jurisdiction, assemblies or institutions principally devoted to religious exercise.").

63. In relying on a proportionality test stated in *Boerne*, the proper remedy for such discrimination was to ban it altogether. H.R. REP. NO. 106-219, at 17; *see also Boerne*, 521 U.S. 507, 519 (1997).

64. H.R. REP. NO. 106-219, at 17.

65. *Id*. at 32–42.

66. *Id*.

67. *Id*. at 32–39.

68. *Id*. at 34. Dissenters argued that the legislative history thus far bore a "striking similarity" to the record found insufficient in *Boerne*. *Id*.

69. United States v. Lopez, 514 U.S. 549 (1995). In *Lopez*, the Court invalidated the Gun-Free School Zone Act of 1990 because it exceeded Congress's commerce power. *Id*. Previously, the Court had generally given deference to Congress's determination of the reach of its Commerce Clause power, but in *Lopez* the Court declared that there must be a rational nexus between the Act and interstate commerce. *Id*. at 561. The dissenters argued that the RLPA of 1999 failed the *Lopez* test because the act does not provide a facially valid interstate commerce nexus, meaning courts would have the incredulous task of providing preliminary hearings on whether the claimant has provided a great enough interstate commerce nexus to proceed on the merits. H.R. REP. NO. 106-219, at 35–36. Moreover, application of such hearings would result in biases toward larger religious groups more capable of providing a nexus. *Id*.

70. The RLPA applies to all "programs or activities" receiving federal financial assistance, but Congress's Spending Clause power is limited to areas where legislation establishes a nexus between the conditions of accepting funds and the purpose of those funds. H.R. REP. NO. 106-219, at 36; *see also* South Dakota v. Dole, 514 U.S. 549 (1995) (holding

The first group of dissenters joined with a second dissenting group in arguing that the broad nature of the RLPA of 1999 provided an unwarranted risk that religious groups would use the law to legalize discrimination.[72] Additionally, the second group of dissenters claimed that the defects of the RLPA could be cured by adoption of an amendment offered by Representative Jerrold Nadler that would have prevented non-religious corporate entities from attacking civil rights laws through the RLPA of 1999.[73]

II. A COMPROMISE IS REACHED AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS BORN

On July 13, 2000, Senators Orrin Hatch and Edward Kennedy introduced an amended version of the RLPA of 1999, known as RLUIPA.[74] RLUIPA contains a jurisdictional underpinning distinct from the RFRA.[75] RLUIPA's scope is limited to state action aimed at land use decisions and persons in jails or mental facilities.[76] The application of RLUIPA is limited to cases that affect federally financed programs, interstate and foreign commerce, or decisions

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that spending power was proper because a nexus existed between the conditions of federal funding and the purpose of federal funds).

71. The broad scope of the RLPA creates a separation-of-powers concern because it represents Congress's attempt to overrule the Court on a constitutional interpretation. H.R. REP. NO. 106-219, at 37.

72. H.R. REP. NO. 106-219, at 39–41. Religious groups could claim that certain civil rights laws were a substantial burden on their religious exercise, thereby making protection of such rights rest on whether the government had a compelling interest in preventing such discrimination and whether the law is the least restrictive means. H.R. 1691 § 2(b)(1)-(2), 106th Cong. (1999); *see also, e.g.*, Smith v. Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) (government's interest in providing equal housing opportunities for unmarried heterosexual couples is compelling); *cf.* Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (no compelling government interest in preventing marital status discrimination).

73. H.R. REP. NO. 106-219, at 41–42. The dissenters argued that the proposed amendment would recognize a proper balance of individual rights, both those of free exercise of religion and the right to be free from unwarranted discrimination. *Id*.

74. 146 CONG. REC. S6687 (daily ed. July 13, 2000). The stated purpose of the RLUIPA was to "provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith." *Id*. The Act achieved unanimous support in both the House of Representatives and the Senate. 146 CONG. REC. S7779 (daily ed. July 27, 2000); *id.* at H7192.

75. Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1220–21 (C.D. Cal. 2002).

76. 42 U.S.C. §§ 2000cc–2000cc-1 (2000).

made as part of an individualized assessment.[77] Essentially, RLUIPA's jurisdiction limits enforcement to cases where Congress has power under the Commerce Clause, the Spending Clause, or Section Five of the Fourteenth Amendment.[78] Congress believed the narrow scope of RLUIPA effectively limited the type of religious liberty protection it had sought to install in RFRA.[79]

A. RLUIPA Heads to the Courts

Although RLUIPA possessed support from a wide array of groups,[80] many commentators were not convinced that RLUIPA had cured the unconstitutionality of the RFRA.[81] When RLUIPA actions

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77. *Id*. §§ 2000cc(a)(2). Applying RLUIPA to individualized assessments is a recognition of the Supreme Court's holding in *Smith* that individualized assessments are subject to strict scrutiny. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990); *see also Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1221 (Congress codified the individualized assessment jurisprudence of Free Exercise cases); Freedom Baptist Church of Del. County v. Township of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002). "Since cases involving such individualized assessments are not 'neutral laws of general applicability'—like the general prohibition against peyote use in *Smith*—the Act does not expand the application of the Free Exercise Clause, as did the RFRA, and so does not violate Section 5 of the Fourteenth Amendment." Storzer and Picarello, *supra* note 51, at 949.

78. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statements of Rep. Canady).

79. 146 CONG. REC. S7776 (daily ed. July 27, 2000). Senator Hatch, among others, would have preferred a broader scope to the RLUIPA. *Id*. However, in order to achieve overwhelming bi-partisan support, he supported the narrow scope of RLUIPA. *Id*. In addition, the Justice Department was convinced that the narrow scope of RLUIPA would withstand Supreme Court scrutiny. *Id*.

80. 146 CONG. REC. S6688 (daily ed. July 13, 2000) (statement of Sen. Kennedy). RLUIPA has the support of the Free Exercise Coalition, which represents over fifty diverse and respected groups, including the Family Research Council, Christian Legal Society, American Civil Liberties Union, and People for the American Way. *Id*. The bill also has the endorsement of the Leadership Conference for Civil Rights. *Id*. The ACLU had opposed the proposed RLPA of 1999 because of its possible effects on civil rights laws, but supported the RLUIPA as a vehicle for restoring "[t]he balance between the needs of religion and the larger community's concerns [which] has been off kilter for far too long." ACLU, *ACLU Hails Plans to Sign Religious Freedom Bill into Law*, Sept. 22, 2000, *available at* http://aclu.org/religiousliberty/religiousliberty.cfm?id=8122&c=142. However, the Municipal Art Society of New York described RLUIPA as a "'Pandora's box' that . . . could greatly inhibit governments' ability to protect the health, safety, and welfare of [its] citizens" and the Georgia Municipal Association called RLUIPA a "direct blow to local governments and to their authority to govern their communities." Santoro, *supra* note 3, at 494–95.

81. Marci A. Hamilton, *Federalism and the Public Good*, 78 IND. L.J. 311 (2003); Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001); Gregory S. Walston, *Federalism and Federal Spending*, 23 U. HAW. L. REV. 479 (2001);. Caroline R. Adams, Note, *The*

were first brought to the courts, the first defense for cities questioned the Act's constitutionality.[82] The courts, however, were willing to rule that RLUIPA was constitutional.[83] Recently, the Supreme Court denied *certiorari* of a Ninth Circuit Court of Appeals decision affirming RLUIPA's constitutionality.[84] Nevertheless, appeals of

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Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000, 70 FORDHAM L. REV. 2361, 2392 (2002) (RLUIPA exceeds Congress's Section Five Powers and is not a codification of *Smith*); Evan M. Shapiro, Note, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255 (2001) (RLUIPA exceeds Congress's power under the Commerce Clause).

Hamilton has criticized the RLUIPA as not being justified because of the lack of evidence that religious discrimination actually exists in land use decisions and that the RLUIPA unfairly favors churches over non-religious land uses. Marci Hamilton, FindLaw, Struggling with Churches as Neighbors (Jan. 17, 2002), *at* http://writ.news.findlaw.com/hamilton/20020117.html; Marci Hamilton, The Federal Government's Intervention on Behalf of Religious Entities in Local Land Use Disputes (Nov. 6, 2003), *at* http://writ.news.findlaw.com/hamilton/20031106.html. *But see* Storzer & Picarello, *supra* note 51 (RLUIPA is constitutional); Shawn Jensvold, Note, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 B.Y.U. J. PUB. L. 1, 35 (2001) (RLUIPA's land use provisions meet the concerns raised in *Boerne* and it is unlikely the Court would strike them down).

82. The first RLUIPA claim was filed mere hours after President Clinton signed the RLUIPA on September 22, 2000. Santoro, *supra* note 3, at 495. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Township, 675 N.W.2d 271 (Mich. Ct. App. 2003). The case concerned the plaintiff's desire to operate a religious elementary school (kindergarten through third grade) in an area zoned as an office park and the defendant's refusal to grant the necessary permits. *Id*. at 276. The trial court granted summary judgment for the township, citing a plaintiff's failure to establish a prima facie case. *Id*. at 277. The Michigan Court of Appeals reversed, holding that a question of material fact existed as to whether the township's denial was a substantial burden under 42 U.S.C. § 2000cc(a)(2)(A) (2000). *Id*. at 289–90.

83. *See, e.g.*, Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87 (D. Conn. 2003) (RLUIPA does not exceed Congress's powers under Section Five of the Fourteenth Amendment); Westchester Day School v. Village of Mamaronek, 280 F. Supp. 2d 230, 235 (S.D.N.Y. 2003) (same); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002) (RLUIPA is constitutional under the Commerce and Spending Clauses and to the extent RLUIPA is enacted under Section Five of the Fourteenth Amendment, it merely codifies precedent); Freedom Baptist Church of Del. County v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (holding that Congress did not exceed its authority under the Commerce Clause). Only one judge has found RLUIPA to be unconstitutional in a land use context. *See* Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163, 1182 (C.D. Cal. 2003) (RLUIPA exceeds Congress's power under Section Five of the Fourteenth Amendment).

84. Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002), *certiorari denied*, Alameida v. Mayweathers, 124 S. Ct. 66 (2003). In *Mayweathers*, the Ninth Circuit held that: (1) RLUIPA is a legitimate exercise of Congress's spending powers; (2) RLUIPA does not violate the Establishment Clause of the First Amendment; (3) RLUIPA does not usurp state power under the Tenth Amendment; and (4) RLUIPA does not violate the Separation of Powers doctrine. 314 F.3d at 1066–70.

decisions finding RLUIPA constitutional are still pending in more than one circuit.[85]

As more courts uphold the constitutionality of RLUIPA, questions regarding RLUIPA's application have gained prominence. RLUIPA's statutory language leaves much room for judicial interpretation.[86] Religious exercise is defined in RLUIPA as "any exercise of religion, whether or not compelled by, or central to, a system of religion."[87] The only other definition contained in the statutory language states that the use of a building or real property for the purpose of religious exercise is considered a religious exercise.[88]

As part of the prima facie case, a court must consider whether the disputed land use regulation substantially burdens religious exercise before the court can determine whether the government's actions represented both a compelling interest and the least restrictive means of furthering that purpose.[89] There is no statutory definition of

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85. *See* rluipa.com. The website, funded by the Beckett Fund for Religious Liberty, provides updates on many pending RLUIPA lawsuits (last visited May 17, 2005).

86. § 2000cc(a)(1). In applying RLUIPA to land use disputes courts must interpret the following statutory language:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

Id.

87. *Id.* § 2000cc-5(7)(A).

88. *Id.* § 2000cc-5(7)(B). A variety of activities have been found to be "religious exercises" for the purposes of the RLUIPA. *See, e.g.*, Kikumura v. Hurley, 242 F.3d 950, 961 (10th Cir. 2001) (pastoral visits by Christian pastors to institutionalized persons); *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1224 (seeking to build a church); Murphy v. Zoning Comm'n of Town of New Milford, 148 F. Supp. 2d 173, 188–89 (D. Conn. 2001) (prayer groups at a private home); Dilaura v. Ann Arbor Charter Township, 30 Fed. Appx. 501, 509 (6th Cir. 2002) (same).

89.

> In order to establish a *prima facie* case that RLUIPA has been violated, a plaintiff must present evidence that the land use regulation in question: (1) imposes a substantial burden; (2) on the 'religious exercise;' (3) of a person, institution, or assembly . . . . If the plaintiff makes this prima facie showing, the burden shifts to the local government to demonstrate that the land use regulation furthers a compelling governmental interest and that the land use regulation is the least restrictive means of furthering that interest.

"substantial burden."[90] However, the legislative history of RLUIPA indicates that Congress intended "substantial burden" to mean the same as the Supreme Court's definition in the Court's free exercise jurisprudence.[91] The Supreme Court's definition of a "substantial burden" incorporates the pressure to make a person, group, or religious institution act contrary to their religious beliefs.[92] Specifically, land use regulations that merely economically or otherwise inconvenience a religious institution are not considered to substantially burden religious exercise.[93] Furthermore, while affected religious beliefs do not need to be either fundamental or a central tenet to the exercise of a religion, affected beliefs cannot be incidental to religious exercise.[94] In applying RLUIPA, lower courts have interpreted this language either strictly or liberally.[95]

Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1193–94 (D. Wyo. 2002); *see also* 42 U.S.C. § 2000cc(a)(1) (2000).

90. *See Grace United Methodist Church*, 235 F. Supp. 2d at 1194 (stating that RLUIPA does not define what constitutes a substantial burden).

91. 146 CONG. REC. S7774 (daily ed. July 27, 2000). In a joint statement Senators Hatch and Kennedy, cosponsors of RLUIPA, wrote:

> The Act does not include a definition of the term "substantial burden" because it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

Id.

92. Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) (a government action is a substantial burden to a religious activity when it has the tendency to coerce individuals into acting contrary to their beliefs); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717–18 (1981) (substantial burden exists where the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

93. Henderson v. Kennedy, 265 F.3d 1072, 1074 (D.C. Cir. 2001); *Grace United Methodist Church*, 235 F. Supp. 2d at 1195. In *Henderson*, the Federal Circuit held that a regulation, which prohibited plaintiffs from selling t-shirts on the National Mall, did not substantially burden religious exercise.

94. RLUIPA's definition of religious exercise is broad:

> (A) . . . The term `religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

The Seventh Circuit has taken a very strict approach to what constitutes a substantial burden.[96] The court has refused to grant RLUIPA protection to any difficulties, such as the scarcity of affordable land within areas with acceptable zoning, procedural requirements, and the inherent political aspects of any special use permit application.[97] In taking such a strict interpretation, the court recognizes that "the harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them."[98]

In *Grace United Methodist Church v. City of Cheyenne*,[99] the court denied summary judgment for the church, who was seeking to build a daycare facility in a residential zoned area that did not allow such uses. The court found that the Cheyenne zoning code did not

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> (B) . . . The 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.

42 U.S.C. § 2000cc(7).

In context of the broad definition of religious exercise, a land use regulation that imposes a substantial burden on religious exercise must be a regulation that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

95. Although RLUIPA does not define substantial burden, legislative history indicates that the same substantial burden test under the RFRA should apply. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000).

96. *See Civil Liberties for Urban Believers*, 342 F.3d at 752.

97. *Id*. at 761. In this case, an association of area churches sued the city of Chicago, claiming its ordinance requiring special use approval for churches to operate in commercial and business areas violated RLUIPA. *Id*. The court disagreed with the plaintiffs and held that RLUIPA could not be used to grant religious users an exemption from land use regulations. *Id*.

Courts that have not found in favor of churches on RLUIPA disputes often find that land use regulation does not present a substantial burden. *See, e.g.*, Davis v. Zoning Bd. of Appeals, 797 N.E.2d 548, 552 (Ohio Ct. App. 2003) (off-street parking restrictions did not substantially burden church); N. Pac. Union Conference Ass'n of the Seventh Day Adventists v. Clark County, 74 P.3d 140, 147 (Wash. Ct. App. 2003) (regulation that prevented church from constructing administration building on land zoned for agricultural uses does not represent a substantial burden).

98. *Id.*; *see also* Braunfield v. Brown, 366 U.S. 599, 605 (1961) ("It is well established that there is no substantial burden placed on an individual's free exercise of religious where a law or policy merely operates to make the practice of the individual's religious beliefs more expensive.").

99. Grace United Methodist Church v. City Of Cheyenne, 235 F. Supp. 2d 1186 (D. Wyo. 2002).

substantially burden the church in the sense that it put "substantial pressure on Grace United to modify its behavior or violate its religious beliefs."[100] The court held that the city's zoning code, at most, placed one restriction on a multitude of means by which Grace United could engage in its religious vocation.[101]

Other courts have followed a more liberal approach. For example, one court held that a substantial burden existed because a church needed a larger facility to meet as one body (as its religious tenets instruct).[102] Although the church had spent money preparing the application materials for a conditional use permit, the church had not begun construction nor was there a showing that other tracts of land were not available to build a larger facility.[103] Another court found a substantial burden in siding with a Jewish Day School's wish to expand because the necessary modifications were necessary and in furtherance of the school's mission of providing a religious education.[104] This version of the substantial burden test appears to both broaden the concept of central religious belief and blur the line between inconvenience and interference.

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100. *Id*. at 1197.

101. *Id*.

102. *Supra* note 1 and accompanying text.

103. *Id*. Eventually the city and the church reached a settlement agreement in which the city bought the church's land and the church bought another large tract to build a new facility. Mark A. Spykerman & Daniel R. Mandelker, RECENT CASES IN WHICH THE GOVERNMENT WON (USUALLY), AM. LAW INST. (2003), *available at* Westlaw: SJ015 ALI-ABA 71; *cf.* San Jose Christian Coll. v. City of Morgan Hill, 2002 WL 971770 (N.D. Cal. Mar. 5, 2002) (finding that the Christian college could not demonstrate a substantial burden on its religion because having the college in that particular area was not a religious experience mandated by the plaintiff's fate).

104. Westchester Day School v. Vill. of Mamorneck, 280 F. Supp. 2d 230, 241 (S.D.N.Y 2003). The school's mission was to provide a dual curriculum of secular and Judaic studies. *Id*. The proposed modifications included the addition of a chapel, but also that of a library, music room, art room, and cafeteria. *Id*.

The outcomes in *Cottonwood* and *Westchester Day School* appear contrary to what courts insisting on a strict interpretation would have found. Compare *Cottonwood* and *Westchester Day School* with *Vineyard Christian Fellowship v. City of Evanston*, 250 F. Supp. 2d 961, 991 (2003) (court could not say that the church was substantially burdened).

III. USING RLUIPA TO FAIRLY ADJUDICATE LAND USE DISPUTES INVOLVING RELIGIOUS ENTITIES

Land use is fundamentally a local issue.[105] When a locality designs a zoning ordinance or approves a special use permit, it is the locality and its residents that must live adjacent to the uses. Often, localities have legitimate reasons for regulating the location of religious uses. For example, churches can bring traffic and parking problems to quiet residential neighborhoods that zoning ordinances are meant to protect.[106]

Religious land use decisions often result in negotiations between a church and the locality. A locality must feel comfortable with the impacts a particular religious use may have on the surrounding community. In most religious land use decisions, compromises are inevitably made. Localities will usually grant permission for the religious use on the condition of mitigating some of the impacts to the surrounding neighborhood, such as providing enough off street parking.[107] RLUIPA cases typically arise when neither the locality nor the religious group is willing to compromise by refusing permits or refusing to mitigate the locality's concerns.[108] RLUIPA is meant to respect the tradition of local control that, for the most part, includes a choice not to compromise with a religious use, and only limit local control when it has the effect of substantially burdening free exercise.[109]

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105. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). Furthermore, the Court will generally interpret the laws affecting local land use decisions to preserve local authority rather than override it. *See, e.g.*, Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (refusing to interpret provision of the Clean Water Act to alter the traditional power and responsibility of the state in land use decisions).

106. *See, e.g.*, Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 108 (D. Conn. 2003) (A compelling interest exists in "enforcing the town's zoning regulations and ensuring the safety of residential neighborhoods.").

107. JOHN E. NOWAK & RONALD R. ROTUNDA, CONSTITUTIONAL LAW § 11.12 (6th ed.) (2000). Often zoning ordinances require that churches obtain a special use or conditional use permit in order to develop, improve, or use a structure within a certain zoned district.

108. Religious uses should not bring RLUIPA claims until they have reasonably pursued compromises with local officials. SIDLEY AUSTIN BROWN & WOOD'S RELIGIOUS INSTS. GROUP & RLUIPA LITIG. TASK FORCE, QUESTIONS & ANSWERS ABOUT THE FEDERAL RELIGIOUS LAND USE LAW OF 2000, at 6, *available at* http://sidley.com/db30/cgi-bin/pubs/web%20version%20of%20rluipa%20booklet.pdf (last visited May 17, 2005).

109. 42 U.S.C. § 2000cc-2(a)(1) (2000). The legislative history of RLUIPA makes clear

The fairness in RLUIPA application depends on the court's definition of a substantial burden. After the RFRA was ruled unconstitutional and measures to pass a RLPA were muttled by questions of its constitutionality, the framers of RLUIPA were careful to ensure that the Act would not suffer the same fate as its predecessors.[110] In doing so, RLUIPA was not meant to make religious entities immune to the enforcement of generally applicable land use laws or individualized land use decisions disfavoring a specific religious use.[111]

A fair application of RLUIPA exists only when a strict definition of "substantial burden" is met.[112] A strict definition of "substantial burden" ensures that religious uses will only receive RLUIPA protection when a locality's land use decision knowingly discriminates or has the effect of discrimination against a religious use.[113] There is no question that purposeful religious discrimination in

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that the Act is not intended to give religious uses immunity from traditional local control. 146 CONG. REC. S7774 (daily ed. July 27, 2000) ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.").

110. RFRA was held unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The *Boerne* Court felt that the effect of RFRA in legalizing otherwise illegal behavior if it stymied religious exercise was not a proportional response to the record's evidence of religious discrimination. *Id*. Those legislators against the 1999 RLPA viewed it as a flawed vehicle for religious protection. *See supra* notes 65–68. After the learning experiences with the RFRA and RLPAs, RLUIPA's framers were careful to present the Act as only an effort to protect religious entities from discriminatory land use decisions and not to give them an advantage over non-religious uses. 146 CONG. REC. S7774 (daily ed. July 27, 2000).

111. *See supra* note 109.

112. *See* Civil Liberties for Urban Believers v. City of Chicago, 342 U.S. 752, 761–62 (7th Cir. 2003). The strict definition of "substantial burden" has the effect of preventing successful RLUIPA claims when the effect of a local land use decision merely makes it more expensive or inconvenient for a religious use to locate in an area. *Id*. If "substantial burden" is not held to such a strict definition, the result would be an unfair advantage to religious uses over non-religious uses (comparable non-religious uses would still be subject to the same land use control, while religious uses would be effectively exempt. *Id*.

113. A court, in deciding whether a land use decision that prevented construction of a faith-based elementary school represented a "substantial burden", gave a list of factors that should be considered:

> Whether the are alternate locations in the area that would allow the school consistent with zoning laws; the actual availability of alternate property, either by sale or lease; the availability of property suitable for a K-3 school; the proximity of the homes of parents who would send their children; and the economic burdens of alternate locations.

a land use context is constitutionally suspect.[114] Effective discrimination occurs when cities unreasonably limit religious uses through seemingly neutral zoning codes or individualized land use decisions.[115]

Liberal and more stretching definitions of "substantial burden" are more likely to result in decisions that overrule local land use decisions affecting religious uses even though a comparable non-religious use would find the local decision binding.[116] While, a strict definition of substantial burden might also lead to scenarios where RLUIPA might work to give a religious use an advantage not enjoyed by a non-religious use, such scenarios will be rare and limited to cases in which the advantage given to the religious use is necessary to avoid a substantial burden. This might occur, for example, when a city tries to prevent religious services from being held within walking distance of a heavily Orthodox Jewish neighborhood.[117]

Moreover, questions of constitutional validity will more likely plague RLUIPA if a liberal definition of "substantial burden" is regularly applied. The liberal definition likely sparks equal protection attacks on the constitutionality of RLUIPA or opens the door to the same constitutional attacks that the Supreme Court espoused in

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Shepard Montessori Ctr. Milan v. Ann Arbor Charter Township, 675 N.W.2d 271 (Mich. Ct. App. 2003). Consideration of these factors will allow for a judge or jury to decide whether the local land use decision was merely an inconvenience to the religious use or constituted an actual "substantial burden" in the sense that it actually interfered with religious exercise to the point of making constructing a functioning faith based school a practical impossibility. *Id.*

114. U.S. CONST. amend. XIV; City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (local ordinances that make classifications based on religion are suspect).

115. H.R. 106-219 at 20. Effective discrimination often occurs without any discriminatory intent by a city. An example would be a built suburb limiting new churches to only residential zones, when the actual ability to build in a residential lot would involve buying multiple adjacent lots and tearing down the homes to secure enough land to build a church. Douglas Laycock, *Symposium: State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 761 (1999). The court in *Shepard Montessori Ctr.* identified actual availability of land as a factor in determining a substantial burden. *See supra* note 104.

116. *Compare* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2002) (finding no substantial burden) *with* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (finding a substantial burden).

117. Joel Rubin, *House of Prayer Splits Neighbors*, L.A. TIMES, Oct. 26, 2003, at B1 (article describing how "Orthodox Jews' use of a residentially zoned house in upscale Hancock Park as a Synagogue, and their plan to build another nearby, prompt area residents to file suit."). *Id.*

Boerne.[118] Favoring religious uses equates to disfavoring uses for not being religious. This could be construed as a clear violation of equal protection.[119] It would also strengthen the attacks of some commentators who believe RLUIPA violates the Establishment Clause and principles of Federalism.[120]

Perhaps the most fearsome effect of a liberal approach defining "substantial burden" would be the creation of a feeling of omnipotence over land use decisions by religious uses. Localities seeking to mitigate harms caused by religious uses would risk RLUIPA litigation. Following the decision in *Cottonwood*, would RLUIPA protection extend to religious groups which wash to prevent a city from limiting on street parking because it would substantially burden the ability of the congregation to attend church? [121]

Contrary to the liberal approach, a strict definition of "substantial burden" will actually foster compromise and negotiation between localities and religious groups. Localities will be aware that they cannot set up so many restrictions as to effectively zone out religious uses from an area. Religious groups will be aware that RLUIPA will not give the unfettered power to ignore local land use decisions. The result is that both the locality and religious groups will be motivated to find a solution that protects the central tenets inherent in the religious use while causing the least negative effects to the surrounding community. Furthermore, religious entities can still

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118. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

119. *See* 42 U.S.C. § 2000cc(b)(1) (2000). RLUIPA, itself prohibits treating religious uses on unequal terms than non religious uses. *Id.* (This provision essentially codifies equal protection jurisprudence on governmental distinctions based on religion.)

120. *See, e.g.*, Marcie A. Hamilton, *Federalism and the Public Good*, 78 IND. L.J. 311, 319–23 (2003).

121. The *Cottonwood* court found a substantial burden existed because RLUIPA defines the "[t]he use, building, or conversion of real property for the purpose of religious exercise" as the exercise that cannot be substantially burdened absent a compelling interest. Since *Cottonwood* had thousands of members the burden was more substantial, and the time involved in obtaining the Cottonwood property. 218 F. Supp. 2d at 1226–27. The Court made no inquiry into the availability of other land (the church drew its members from a wide geographic area so a reasonable area in which alternate land could be available would be quite large), nor the economic burden of finding an alternate location. *Id*. Though, the Court quotes precedent that a "substantial burden" cannot be just a convenience, it gives no analysis into the difference between the two terms. *Id.* at 1226. Failure to determine a difference between an inconvenience and an actual "substantial burden" will result in the very immunity to generally applicable laws and negative land use decisions that were not intended by the RLUIPA. *See supra* note 109.

protect themselves from land use decisions made in bad faith by localities under the normal system of challenges to local land use decisions.[122]

CONCLUSION

Congress has decided that religious exercise needs further protection from certain generally applicable laws and individualized assesments that might effect free exercise. After its initial attempt was rebuked by the Supreme Court in *City of Boerne v. Flores*,[123] Congress reacted with a new law, RLUIPA,[124] which was more narrow in scope than the RFRA in order to meet the Supreme Court's constitutional concerns. The narrow scope of RLUIPA applied only to local land use decisions and institutionalized persons. In the land use context, RLUIPA made local decisions that "substantially burden" religious exercise invalid unless they were for a "compelling governmental reason" and represented "the least restrictive" alternative.[125]

In applying RLUIPA to local land use decisions, it is clear that only a strict definition of "substantial burden" can respect local control, avoid constitutional challenges and create a level of fairness between localities and religious uses. Moreover, employing a strict definition of "substantial burden" will result in both the locality and the religious entity being motivated to seek a compromise that protects central religious beliefs, but respects a locality's concern over the effects a religious practice or use may have on the neighboring community.

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122. Localities generally provide for challenges to land use decisions within their city codes. Upon a final local decision, aggrieved parties can also seek judicial review. *See, e.g.*, Fox v. Zoning Bd. of Appeals of Town of Barkhamsed, 854 A.2d 806 (Conn. Ct. App. 2004). A religious use might also sue under § 1983 if it can allege a violation of constitutional rights. *See generally* 30 AM. JUR. PROOF OF FACTS 3d 503 (2004).

123. 521 U.S. 507 (1997); *see also supra* note 36 and accompanying text.

124. § 2000cc(a)(1)(A)–(B).

125. *Id.*