Notes

The Constitutional Standard for Zoning Cases under the Texas Religious Freedom Restoration Act

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I. Introduction

A. Vignette

The scene could be anywhere in Texas. John and Sally Smith and their two children live in a suburban ranch-style house. The neighborhood has plenty of kids but is quiet overall. The Smiths decide to host a Wednesday evening Bible study class. Every week between fifteen and twenty of their fellow church members meet at their house for an hour or two. No loud music is played, no yelling or shouting occurs, and no alcohol is consumed. At worst the group could be called mildly boisterous.

Over time, the Smith's neighbor, Jones, becomes frustrated with the Wednesday evening Bible study class. She complains of parking problems. Jones cites a date on which someone blocked her driveway for an hour, and she does not like the occasional bursts of loud laughter that come from next door. On another occasion, she was disturbed by car doors slamming at 9:00 p.m. After six months the situation is intolerable, so Jones confronts Mr. Smith and requests that the 'loud bible-thumping' stop. Mr. Smith responds by inviting her for dinner and to sit in next Wednesday, but Jones storms off.

Jones decides she is going to do something about the situation. She calls the city's zoning compliance board and requests that the city shut down the illegal church next door. The following week, a zoning code compliance officer makes an inspection and concludes that the Smith's study group not only creates parking problems but it also

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violates the city's single-family residential zoning ordinance's prohibition on places of worship. Although places of worship are allowed in multi-family residential areas, they are restricted from single-family areas. The Smiths are issued a citation and ordered to stop holding their Bible study meetings.

This vignette could occur in Texas, and its outcome would depend on how the Texas Religious Freedom Restoration Act (Texas RFRA) is interpreted. Texas RFRA was passed to ensure that the government does not substantially burden a person's free exercise of religion; it was passed to bolster existing federal Constitutional rights.[1] However, a large unknown exists in the legislation. The bill provides separate protection for general religious activity and the zoning of churches. The general protection for religious activity is written clearly and provides strong protections, but the zoning provision is written ambiguously. One may rightly wonder if the metaphorical head of religious freedoms, the right and tradition to congregate together to worship, was handed to the zoning lobby on a silver platter. Before considering background and arguments on the implications of Texas RFRA on religious land use, this note will consider the importance of land to all faiths.

B. Importance of Religious Land Use

In general, land use regulation refers to the body of laws, usually municipal ordinances, governing how land can be used, what can be built on property, what constitutes a nuisance, and many other aspects of owning real property. This collective body of regulations governing real property is often referred to as zoning. This note will use the terms land use regulation and zoning interchangeably. Zoning affects every property owner in most large cities. For example, zoning defines minimum lot sizes for residential communities, how many parking spaces businesses must provide, and allocates areas within cities for residential, business, and other uses.

Land use regulation is beneficial for the health, safety, and welfare of the community and has been upheld by the Supreme Court as a valid state interest.[2] However, it can be an obstacle to the free exercise of religion. Almost every religion requires or promotes assembly of its members.[3] From Jews to Jehovah's Witnesses, from Methodists to

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[1] *See* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 601, 76th Leg., R.S. (1999), *available at* http://www.capitol.state.tx.us/tlo/billsrch/textsrch.htm (search under 76th Legislature, keyword "RFRA").

[2] *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding zoning ordinance as a valid exercise of police power bearing a substantial relationship to the general public welfare).

[3] Even ethical societies that are equated with religions need meeting places. *See* Washington Ethical Society v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957) (granting property tax exemption to

Muslims, religious groups meet not only in temples, kingdom halls, churches, and mosques, but also as smaller groups in private homes. Without a place of assembly or worship, most faiths would be severely stymied if not eliminated. Having a place to worship requires real property, and this need for property has led to conflicts between land use regulators and religion.

Large faiths and small faiths alike conflict with zoning regulation; however, minority religions have been involved in a disproportionate number of land use cases. According to one study, 8.83% of the population accounted for nearly half of the zoning cases over disputed locations for houses of worship.[4] Specifically, Jews make up 2.2% of the population but account for 20% of the zoning location cases; Jehovah's Witnesses account for 0.80% of the population but brought 15.2% of the zoning location cases.[5] These statistics present only a glimpse into the conflict between religion and zoning. As with all civil rights, a society is only as free as the least popular minority,[6] and zoning regulation threatens every religion because of its pervasiveness.

Although other protections for religious land use are available, such as state and federal constitutional protections and the recently enacted Religious Land Use and Institutionalized Persons Act of 2000,[7] this note will address the tension between the Free Exercise Clause and land use regulation under the Texas RFRA. First, the background on the issue must be established. The impact and background of *Employment Division v. Smith*[8] will be discussed because *Smith* is widely noted for marking a drastic shift in free exercise rights. This is followed by the congressional reaction to *Smith*, Federal RFRA.[9] The impact of *City of Boerne v. Flores*[10] on Federal RFRA will be noted to flesh out the underpinnings of the debate and provide the introduction to state RFRAs. Next, the Texas RFRA will be examined. Finally, this paper will argue that the Texas RFRA must afford religious land use the same protections and deference it affords all other forms of religious free exercise under a strict scrutiny test. Two arguments for the *Sherbet-Yoder* strict scrutiny test are made: (1) Strict scrutiny is the appropriate test because it coincides with the general body of free exercise law, and other circuits

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ethical society); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 755-56 (1999); *see also* Islamic Ctr. of Miss. v. City of Starkville, 840 F.2d 293, 300 (5th Cir. 1988) (noting that assembly of a community of believers is an integral part of most religious faiths).

[4] *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999), *available at* http://www.house.gov/judiciary/keet0512.htm (appendix to the statement of Von Keetch, Counsel to the Church of Jesus Christ of Later-Day Saints).

[5] *Id.*

[6] *Id.*

[7] 42 U.S.C. § 2000cc (2000).

[8] 494 U.S. 872 (1990).

[9] 42 U.S.C. § 2000bb (1993).

[10] 521 U.S. 507 (1997).

have not established an alternate test; (2) The RFRA's language binds Texas courts to a Fifth Circuit case from 1988 applying the *Sherbert-Yoder* strict scrutiny standard in the area of religious land use.

II. Invitation for State RFRAs

This section will set a foundation for the reasons Texas enacted the Religious Freedom Restoration Act. Texas RFRA changes how religious claims are analyzed by restoring the standard for examination of free exercise claims to the pre-*Employment Division v. Smith* standard. To understand why RFRA legislation uses a standard prior to *Employment Division v. Smith,*[11] one must consider the Supreme Court's decision in *Smith.*

Smith held that generally applicable criminal laws should not be subject to a compelling interest standard.[12] Prior to the *Smith* decision, a state law that substantially burdened a First Amendment free exercise religious liberty required the state to show that the law served a compelling state interest and that the law was narrowly tailored to meet its goals by the least restrictive means.[13] Both the state and the claimant were required to make a showing. The initial threshold required the religious claimant to show a substantial burden on free exercise. In turn, the state had to justify its interest in regulating the area burdening religion and show that its regulation was the least restrictive means to accomplish its goals.[14]

Smith involved an unemployment claim by two men who were dismissed from their jobs for ingesting peyote as part of a Native American religious ritual.[15] The men claimed that because ingesting peyote was part of a religious ritual, their conduct should be exempted from the generally applicable prohibition on drug use.[16] Oregon denied them unemployment compensation because they were discharged for misconduct—specifically, violating state drug laws.[17] The Supreme Court upheld the claimants' discharge, rejecting a compelling interest test because of the general applicability of Oregon's drug laws.[18]

Smith's holding that facially neutral laws, with the exception of certain hybrid rights, cannot be challenged on Free Exercise grounds, has broad implications.[19] For example, a prohibition on serving alcohol to minors is facially neutral. On its face, the law prohibits priests from

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[11] 494 U.S. 872.
[12] *Id.*
[13] *Id.* at 894-95.
[14] *Id.*
[15] 494 U.S. at 874.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 885.
[19] *Id.* at 882 (distinguishing cases using the compelling interest test by calling them "hybrid rights" cases).

serving sacramental wine to minors in Catholic services. Although this would be a substantial burden on the free exercise of the Catholic faith, because of its importance and centrality to Catholicism, a claim for an exemption from that law would not prevail under a strict *Smith* analysis. *Smith* changed the constitutional level of scrutiny for laws by no longer requiring the State to show a compelling interest when its laws burdened a person's free exercise rights. This change in constitutional standard also applies to church zoning cases because zoning laws are generally applicable.

Examples documented by a newspaper last year illustrate the operation of the *Smith* standard in zoning cases:

> In Los Angeles's Hancock Park neighborhood, Rabbi Chaim Rubin's small congregation of mostly elderly Orthodox Jews has been refused a permit to gather in a home for services; they were told that doing so would be a 'detriment to the quality of life.' . . . In affluent Belmont, Mass[achusetts], local property owners are fighting the zoning board's decision allowing variances to the Church of Jesus Christ of Latter-day Saints for a 94,000-square-foot temple. The temple will open . . . without its traditional six spires or a board-approved 139-foot steeple."[20]

Under *Smith*, neither Los Angeles, California nor Belmont, Massachusetts would have to weigh the competing interests of the cities, the neighborhoods, or the religious groups. As long as a law is facially neutral, it passes muster. If groups in general are prohibited from meeting in Hancock Park homes, then Rabbi Rubin's congregation ought to be prohibited. If others are denied spires and steeples, then the Mormon temple should be denied its architectural heritage on the same basis. *Smith* gave governments the unfettered discretion to make unilateral decisions on zoning issues as long as the decision is applicable to everyone in general.

In response to uncertainty created by *Smith* regarding the status of the Free Exercise clause, Congress passed the Federal RFRA to return the law to the pre-*Smith* compelling interest standard, articulated in *Sherbert-Yoder*.[21] *Smith* cast doubt on the state of free exercise claims, and Congress wanted to clarify matters. Congress stated that laws neutral on their face may nonetheless burden religion, and "governments should not substantially burden religious exercise without compelling

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[20] Jane Lapman, *Uneasy Neighbors, Religious Groups Find Cities Less Hospitable on Zoning*, CHRISTIAN SCIENCE MONITOR, Sept. 21, 2000, at 13.

[21] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(4) (1993).

justification."[22] The statute explicitly stated its purpose was to restore the *Sherbert-Yoder* compelling interest test.[23]

Congress's attempt to change the *Smith* ruling was negated by *City of Boerne v. Flores.*[24] Congress intended Federal RFRA to apply to the states by means of the Fourteenth Amendment's Due Process Clause.[25] However, the Supreme Court concluded that RFRA went beyond the enforcement power inherent in the Due Process clause.[26] The majority read Congress's attempt as an impermissible intrusion into matters reserved for the states.[27] The federalist concerns in the case invalidated RFRA's application to the states, but *Boerne's* holding still allows Federal RFRA to be applied to the federal government. The federalist concerns over "intrusion[s] into the States' traditional prerogatives"[28] led to state adoption of RFRA legislation. Texas and other states have enacted legislation to accomplish on the state level what Federal RFRA intended to achieve, the restoration of the *Sherbert-Yoder* compelling interest test.[29]

III. The Texas RFRA

This section evaluates the two most pertinent parts of the Texas RFRA. First, the general provision restoring the compelling interest test will be considered. Then, the special section specific to land use will be analyzed. Comparing the two sections raises the question of whether free exercise claims involving zoning are different from non-zoning free exercise claims. Although Texas RFRA addresses zoning separately, this note argues all RFRA claims use the same standard.

The general provision protecting religious freedom is broken into subsections. The first subsection states: "Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion."[30] Free exercise of religion is defined as "an act or refusal to act that is substantially motivated by sincere religious belief."[31] The

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[22] *Id.* at § 2000bb(a)(2)-(3).
[23] *Id.* at § 2000bb(b)(1).
[24] 521 U.S. 507 (1997).
[25] U.S. CONST. amend. XIV, § 5.
[26] 521 U.S. at 519.
[27] *Id.* at 534.
[28] *Id.*
[29] TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon 2000); *see also* Religious Freedom Restoration Act of 1998, FLA. STAT. ANN. §§ 761.01-.05 (West 2000). Alabama passed a state constitutional amendment, the Alabama Religious Freedom Amendment, which is discussed by Thomas C. Berg and Frank Myers in, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47 (2000). California's Religious Freedom Protection Act, A.B. 1617, 1997-98 LEGIS., REG. SESS. (Cal. 1997), was vetoed by Governor Wilson. *See* Mark A. Austin, Comment, *Holier Than Thou: Attacking the Constitutionality of State Religious Freedom Legislation,* 33 LOY. L.A. L. REV. 1183 (2000).
[30] TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a) (Vernon 2000).
[31] *Id.* at § 110.001(a)(1).

protection offered by the bill is very broad, but "does not apply if the government agency demonstrates that the 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 interest."[32]

The portion of the RFRA that covers zoning is titled "Application to Certain Cases." It states that municipalities have no less authority concerning "zoning, land use planning, traffic management, urban nuisance, or historic preservation than ... existed under the law as interpreted by the federal courts before April 17, 1990 [the date of *Employment Division v. Smith*]."[33] This section was not originally included in the proposed legislation. However, extreme opposition by municipalities and community groups to the wording of the general provision provided the impetus for adding this section.[34]

Municipalities and community groups wanted a separate land use provision because they perceived that the wording of the general provision changed the status of land use regulation.[35] In listening to the testimony of many non-lawyers, the general public misinterpreted terms of art such as "sincere religious belief,"[36] "substantially burden,"[37] and "compelling interest."[38] Although the bill sponsors in the Senate hearings tried to educate the lay land use advocates, the fear that municipal zoning power would be diminished by the bill remained substantial.[39] Further, expert testimony that the issue had never been addressed by the Supreme Court prompted the substituted version.[40] Hence, the section on zoning provides that municipalities have all the power they had before *Smith*.[41]

This note's two arguments begin in the next section. First, this note advocates that strict scrutiny, as embodied in the *Sherbert-Yoder* compelling interest test, is the appropriate standard because it coincides with the general body of free exercise law, and other circuits have not established a uniform alternate test. The second argument, "The Direct Argument," takes the position that RFRA's language binds Texas courts

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[32] *Id.* at § 110.003(b).
[33] *Id.* at § 110.010.
[34] See Michael Saul and Todd J. Gillman, *Religious Freedom Restoration Act Draws Opposition From 2 City Panels Some Fear Measure Would Blunt Ability to Enforce Land Laws*, THE DALLAS MORNING NEWS, Mar. 3, 1999, at 20A (noting strong opposition from municipal regulators).
[35] *See Texas Religious Freedom and Restoration Act: Hearing on Tex. S.B. 138 Before the Senate Comm. On State Affairs*, 76th Leg., R.S. (Feb. 25, 1999) [hereinafter Texas Senate Hearings] (tapes are available in the Tarlton Law Library at the University of Texas at Austin); *Texas Religious Freedom and Restoration Act: Hearing on Tex. H.B. 601 Before the House Comm. On State Affairs*, 76th Leg., R.S. (Mar. 15, 1999) [hereinafter Texas House Hearings] (tapes are available in the Tarlton Law Library at the University of Texas at Austin).
[36] TEX. CIV. PRAC. & REM. CODE ANN. § 110.001.
[37] *Id.* at § 110.003.
[38] *Id.*
[39] Texas Senate Hearings, *supra* note 35.
[40] Texas Senate Hearings, *supra* note 35; Texas House Hearings, *supra* note 35.
[41] 494 U.S. 872.

to a Fifth Circuit case applying strict scrutiny in the area of religious land use.

IV. The *Sherbert-Yoder* Standard for Religious Land Use

*A. Pre-*Smith *Standard*

Prior to the *Smith* decision, when the free exercise of religion was burdened by a law, the law had to pass a compelling interest test.[42] The initial threshold requires the religious claimant to show a substantial burden on the free exercise of her religion. A substantial burden can only be defined in reference to case law. It is not a quantitative test requiring that a claimant show that her religion was burdened by a certain percentage or dollar figure. Rather, it is a facts and circumstances test. In turn, the state had to justify its interest in regulating the area burdening religion. The state was required to show that the law served a compelling state interest and that the law was narrowly tailored to meet its goals by the least restrictive means. Considering how this test worked will illustrate its strength.

One of the cases most often cited for the compelling interest standard is *Sherbert v. Verner*.[43] The plaintiff in the case lost her job because she would not work on Saturday.[44] When she filed for unemployment, she was denied unemployment benefits because she was found to be unavailable for work without good cause.[45] She claimed that withholding unemployment benefits because of her religious beliefs as a Saturday Sabbatarian was a burden on her free exercise of religion.[46] The Supreme Court agreed with her claim of a burden and required that this burden on her religion be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[47] No compelling state interest was shown, so the infringement on her First Amendment rights was not justified.[48] This clear standard set in *Sherbert* was followed in later cases.

The other seminal case using the compelling interest test is *Wisconsin v. Yoder*.[49] It involved a claim by Amish parents that requiring compulsory schooling for their children beyond the eighth grade was a substantial burden on their free exercise of religion.[50] The

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[42] *Id.* at 894-95.
[43] 374 U.S. 398 (1963).
[44] 374 U.S. at 399.
[45] *Id.* at 401.
[46] *Id.* at 404-06.
[47] *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
[48] *Id.* at 407.
[49] 406 U.S. 205 (1972).
[50] *Id.* at 209.

Yoder court accepted the parents' position that requiring Amish children to attend school after the eighth grade would interfere with the Amish faith.[51] The Amish objection to high school education was "firmly grounded in . . . central religious concepts."[52] Since the parents established a burden, the court turned to the state's interest. The *Yoder* court stated only government interests of the highest order could outweigh free exercise claims.[53]

Wisconsin argued that its interest in educating children was a compelling state interest outweighing the religious interests of the Amish for two reasons. First, Wisconsin argued that additional education builds a self-reliant, productive society.[54] The court rejected the state's argument, downplaying the incremental benefit of two more years of education.[55] Second, Wisconsin argued that children have a substantive right to education, and the state as *parens patriae* ought to extend education to children regardless of parents' wishes.[56] The court rejected this argument too, noting "[t]his case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[57] Together, the compelling interest tests employed in *Sherbert* and *Yoder* have come to be known as the *Sherbert-Yoder* test.

B. Did the Sherbert-Yoder *Standard Fall Prior To* Smith*?*

Some critics of this standard for Free Exercise claims state that the *Sherbert-Yoder* test had been eviscerated even before *Smith.*[58] Two cases in close temporal proximity to *Smith* are cited for rejecting the *Sherbert-Yoder* standard. The first, *Goldman v. Weinberger,*[59] explicitly rejected the compelling interest test.[60] Goldman was an orthodox Jewish rabbi in the United States Air Force who was prohibited from wearing a yarmulke.[61] The court agreed with the Air Force that its interest in uniformity permitted strictly enforcing military dress code.[62] However, the court viewed the case as fundamentally different from civilian free exercise claims.[63] The court stated: "Our review of military regulations challenged on First Amendment grounds is far more deferential than

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[51] *Id.* at 212-13.
[52] *Id.* at 210.
[53] *Id.* at 215.
[54] *Id.* at 224.
[55] *Yoder*, 406 U.S. at 225.
[56] *Id.* at 229.
[57] *Id.* at 230.
[58] Texas House Hearings, *supra* note 35 (statement of Marci Hamilton, Professor of Law at Yeshiva University).
[59] 475 U.S. 503 (1986).
[60] *Id.* at 506-07.
[61] *Id.* at 505.
[62] *Id.* at 509-10.
[63] *Id.* at 507.

constitutional review of similar laws or regulations designed for civilian society."[64] Thus, the constitutional standard used in *Goldman* can be differentiated from land use claims because the military "is a specialized society separate from civilian society."[65]

A second case cited for using a standard of review lower than the compelling interest is *O'Lone v. Shabazz*.[66] This case required the court to consider claims by inmates that prison regulations prohibited Muslim prisoners "from attending Jumu'ah, a Muslim congregational service held on Friday afternoons, and . . . violated their rights under the Free Exercise Clause of the First Amendment."[67] The court gave much deference to the prison, using rational basis review.[68] The court upheld the prison regulations noting "that the regulations alleged to infringe constitutional rights were reasonably related to legitimate penological objectives."[69] *O'lone v. Shabazz* should be viewed in its unique context of prison regulation. Like the military dress claim in *Goldman*, prison claims have a special context of limited freedoms and use a different level of review. The deferential standard of review cannot be applied to general free exercise claims.

Critics of the compelling interest standard also cite very old cases like *Reynolds*[70] that have never been explicitly overruled.[71] However, the general consensus of scholars and lawmakers is that the *Sherbert-Yoder* compelling interest standard was the general standard used for Free Exercise claims prior to *Employment Division v. Smith*.[72] Cases that apply a standard of review lower than compelling interest can generally be differentiated by their context. Hence, the general standard of review for Free Exercise claims prior to *Smith* was the *Sherbert-Yoder* compelling interest test.

V. Argument for the *Sherbert-Yoder* Standard as the Appropriate Pre-*Smith* Standard for Religious Land Use

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[64] *Id.*
[65] *Goldman*, 475 U.S. at 506-07 (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).
[66] 482 U.S. 342 (1987).
[67] *Id.*
[68] *Id.* at 349, 352.
[69] *Id.* at 352.
[70] Reynolds v. United States, 98 U.S. 145 (1878) (upholding the prohibition of polygamy).
[71] *See generally* Texas House Hearings, *supra* note 35 (statement of Marci Hamilton, Professor of Law at Yeshiva University).
[72] *See generally* 42 U.S.C. § 2000bb; Texas Senate Hearings, *supra* note 35 (statement of Kelly Shackelford, Adjunct Professor of Law at The University of Texas School of Law); Texas House Hearings, *supra* note 35 (statement of Douglas Laycock, Professor of Law at The University of Texas School of Law).

Religious claims over zoning should be afforded the same rigorous protection as general pre-*Smith* free exercise claims. Some courts, however, have been reluctant to apply the *Sherbert-Yoder* test to zoning cases. Additionally, the Supreme Court has consistently dismissed, or refused to hear, cases on religious land use.[73] According to one constitutional scholar the issue is up for grabs.[74] This note argues that the *Sherbert-Yoder* compelling interest test is the appropriate pre-*Smith* standard because three often-cited United States Courts of Appeals cases that did not apply the test did so because the religious claimants failed to make a showing of a burden on religion.[75] Additionally, those cases did not establish a lower level of review for religious land use. This note will examine cases not applying the *Sherbert-Yoder* test to religious land use. Then, an examination of several cases decided under and after Federal RFRA will bolster the conclusion that the compelling interest standard is appropriate. Counter-analysis and arguments for distinguishing the cases will be included as the topics are considered.

A. The Authority Finding in Favor of Zoning Provides No Standard

An important pre-*Smith* case considering the issue and analyzing prior zoning precedent is *Grosz v. City of Miami Beach Florida*.[76] *Grosz* is a good example of judicial discomfort with religious land use. It exemplifies the tension among religious free exercise rights, property rights, and the state's interest in zoning. *Grosz* cites *Sherbert* and *Yoder*, but ignores the test they employ. Instead, *Grosz* selectively interpreted existing case law to fit its result; the consequence was a holding without a discernable standard. Additionally, *Christian Gospel Church v. San Francisco*[77] is a case that relies on *Grosz* and applies its reasoning. Neither case provides a standard for future cases. At best they can be summarized as finding no burden on the religious claimants, an assertion which also corresponds to the first part of the *Sherbert-Yoder* test. Since these cases fail to present a standard that can be applied to future cases,

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[73] Ann L. Wehener, *When a House Is Not a Home But a Church: A Proposal for Protection of Home Worship from Zoning Ordinances*, 22 CAP. U. L. REV. 491, 493 (citing Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1991); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984); Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989)); *See also* Presiding Bishop v. City of Porterville, 338 U.S. 805 (1949) (per curiam) (dismissing for want of a substantial federal question).

[74] Texas House Hearing (statement of Marci Hamilton).

[75] The three often cited Circuit Courts of Appeals cases that have addressed religious land use claims will be considered *infra*. The Sixth, Ninth, and Eleventh Circuits did not use the *Sherbert-Yoder* test. The Fifth Circuit used the *Sherbert-Yoder* test and will be considered *infra*.

[76] 721 F.2d 729 (11th Cir. 1983).

[77] Christian Gospel Church v. San Francisco, 896 F.2d 1221 (9th Cir. 1990).

this note contends that it is more appropriate to view them as applying the burden prong of the *Sherbert-Yoder* standard.

1. Grosz

Mr. Grosz was an orthodox Jewish Rabbi who used a converted garage on his property for worship.[78] Generally, ten to twenty people who were family, friends, and neighbors attended the worship service.[79] Occasionally, as many as fifty people attended.[80] According to the tenants of the sect, ten adult males were required to be present for the services.[81] At times ensuring that ten males were present necessitated inviting people off the street.[82] Additionally, Mr. Grosz did "not exclude members of the public from attending these services."[83] According to Miami Beach, the religious meetings constituted organized, publicly attended religious services that violated zoning ordinances for single family residences.[84] The city issued a "notice of violation" and threatened prosecution.[85]

One can parse the court's analysis into two sections. First, it used a construct weighing the city's interest against the Grosz's and awarding the weightier interest victory. Second, the court relied on several lines of reasoning from a medley of cases to add weight to the city's interest

The weighing test avoided the *Sherbert-Yoder* standard. The court drew a distinction between direct and indirect burdens upon religion and corresponding varieties of governmental interests.[86] Direct burdens, as "when the government totally precludes religious conduct by imposing criminal sanctions," are the heaviest.[87] However, less significant burdens against religion do not weigh as heavily against governmental interests.[88] The court stated that the city's interest in uniform zoning law was substantial.[89] "In comparison to the religious infringements analyzed in previous free exercise cases [*Prince*,[90] *Gillette*,[91] *Bruanfeld*,[92] and *Sherbert*,[93]] the burden here stands towards

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[78] *Grosz*, 721 F.2d at 731.
[79] *Id.* at 731.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Grosz*, 721 F.2d at 732.
[85] *Id.*
[86] *Id.* at 736.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 738-09.
[90] Prince v. Massachusetts, 321 U.S. 158 (1944). This case is considered *infra.*
[91] Gillette v. United States, 401 U.S. 437 (1971) (upholding exemptions to the draft).
[92] Braunfeld v. Brown, 366 U.S. 599 (1961) (denying a challenge to Sunday closing laws by Jewish store owners).

the lower end of the spectrum."[94] The court concluded that the government's interest outweighed the burden on Grosz and ruled in favor of the city.[95]

The court sidestepped an obvious burden: finding another location would cost money and impact how Grosz worshiped. It seems difficult to satisfy the *Grosz* court's articulation of a burden as "criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit."[96] However, from an economic perspective, imposition of additional costs is equivalent to the reduction or loss of livelihood.[97] If the government forces a person to spend more money to perform a specific activity it is no different from imposing a discriminatory tax on the activity. The Orthodox Jews in *Grosz* would be forced to (1) procure property farther away and (2) drive six days of the week and walk on the Sabbath. The *Grosz* court did not classify these factors as burdens.

The court relied on several strands of reasoning to bolster its conclusion and add weight to the city's interest. First, the court looked at two cases it viewed as analyzing restrictions upon religious activities in public places. Second, it pointed to a zoning case that found no real burden on the religious claimants. Third, the Supreme Court's tangential comments on the issue were considered.

(i) Restrictions upon Religious Activities in Public Places

First, the *Grosz* court stated it considered two cases upholding restrictions upon religious activities in public places.[98] *Prince v. Massachusetts* involved the application of Massachusetts' child labor law to one of Jehovah's Witnesses who provided magazines to her niece for distribution on the street.[99] The *Grosz* court characterized the case as one regulating the location of religious conduct.[100] However, the *Prince* court framed the issue as weighing religious practice on the one hand and society's interest in child welfare on the other. The court stated: "Against these sacred private interests [freedom of religion and parental

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[93] Sherbert v. Verner, 374 U.S. 398 (1963).
[94] *Grosz*, 721 F.2d at 739.
[95] *Id.* at 741.
[96] *Id.* at 739.
[97] To illustrate, assume Smith earns $100 during a specific time period. Smith worships in a nearby church and incurs an expense of $1 to attend every Friday. If the government forces his church to relocate, thereby increasing his travel expense to $2, the additional expense would be the economic equivalent of taxing Smith $1 for attending his church. This is parallel to tax expenditure theory, recognizing that exemption from a tax is tantamount to a subsidy. *See generally* JOSEPH M. DODGE, THE LOGIC OF TAX 290 (1989).
[98] *Grosz*, 721 F.2d at 740. The two cases were *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir.1979).
[99] *Prince*, 321 U.S. at 164 n.5 (observing that Massachusetts' classification of the activity as commercial was out of harmony with other states). The aunt was the child's custodian. *Id.* at 159.
[100] *Grosz*, 721 F.2d at 739-40.

authority over children], basic in a democracy, stand the interests of society to protect the welfare of children."[101]

Courts and commentators have viewed *Prince* as standing for the principle that government intervention in the family may be necessary to protect the interests of the child under extreme circumstances.[102] The *Sherbert* Court limited *Prince*'s application to acts posing a "substantial threat to public safety, peace or order,"[103] and the *Yoder* court further differentiated *Prince*.[104] The *Yoder* Court confined *Prince* to the evils associated with child labor, noting its treatment in *Sherbert*.[105] Thus, the *Grosz* court's reliance on *Prince* referenced a governmental interest that is always found to be compelling—child safety.[106]

Further, the *Grosz* court misread the Supreme Court's statement in *Prince* that literature distribution by adults could be "regulated within reasonable limits in accommodation to the primary and other incidental uses [of streets]."[107] The *Prince* Court had allowed the Massachusetts state court's interpretation of the distribution of religious literature as commercial activity to stand.[108] What Massachusetts calls commercial activity is a matter of state law. The Supreme Court deferred to Massachusetts' classification of religious activity as commercial, but it noted that the Massachusetts' interpretation of Jehovah's Witnesses' distribution of magazines was out of harmony with other states at that time.[109] It would be highly unlikely that any court in 1983 would agree with the 1940's Massachusetts interpretation.[110] Hence, the assumption that *Prince* stood for the government's power to regulate the place and manner of religious conduct is not accurate. *Prince* should be read as a case upholding the state's interest regulating commercial activity and in ensuring the health and welfare of children. By relying on *Prince*, the *Grosz* court sidetracked its analysis and applied the wrong standard.

The other case the *Grosz* court cited as regulating the place and manner of religious conduct, *International Society for Krishna Consciousness v. Eaves*,[111] dealt with a free speech claim. The Atlanta

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[101] *Prince*, 321 U.S. at 165.

[102] For example, the government's interest in the health and safety of children may override parental religious objections to certain forms of medical treatment. *See* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488, 504 (W.D. Wash. 1967) (interpreting *Prince* as a foundation for state intervention on the basis of child health and welfare).

[103] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[104] Wisconsin v. Yoder, 406 U.S. 205, 230-34 (1972).

[105] *Id.* at 229-30.

[106] Texas House Hearing , *supra* note 35 (statement of Douglas Laycock).

[107] *Grosz*, 721 F.2d at 740 (quoting *Prince*, 321 U.S. at 169).

[108] *Prince*, 321 U.S. at 164.

[109] *Id.* at 164 n.5.

[110] The issue of whether Jehovah's Witnesses are engaged in a commercial activity is now moot. Scott R. Schmedel, *A Special Summary and Forecast Of Federal and State Tax Developments*, WALL ST. J., Mar. 7, 1990, at A1 (noting "Jehovah's Witnesses will stop seeking specific payments for the church literature they distribute and instead will accept volunteered donations").

[111] 601 F.2d 809 (5th Cir. 1979).

airport regulated proselytizing and solicitation for security reasons.[112] The airport allowed proselytizing and solicitation of money, but allowed the acceptance of contributions only in one area of the airport.[113] The religious society made a free speech claim that the airport's restriction on soliciting donations was a form of content based discrimination.[114] Free speech case law differentiates regulation of general topics and viewpoints. For free speech claims involving limited public forums, government regulation of content (viewpoints) must pass a compelling interest and least restrictive means test.[115] However, general regulations pertaining to limited forums only require rational basis review. Since the Atlanta airport did not have to open its property to the public, the airport was considered a limited forum. Atlanta could set general parameters on public free speech in the airport. Once general parameters on topics are set, specific viewpoints on a topic cannot be favored or disfavored. The court accepted Atlanta's perspective that the restriction was not based on content and upheld the regulation because the airport was a limited forum.[116] The *Grosz* court's reliance on *Eaves* is therefore faulty for two reasons: (1) *Eaves* was set up as a free speech claim in a special environment with security concerns; and (2) the *Eaves* court applied the lowest form of constitutional scrutiny, rational basis review. *Grosz* referenced a specialized area of the law applying a free speech test to a free exercise claim.

(ii) A Minor Burden on Religion

The second line of reasoning in *Grosz* relied on *Lakewood, Ohio Congregation of Jehovah's Witnesses Inc. v. City of Lakewood,*[117] a case that reframed the issue of building a church as one of property rights rather than religious rights, upholding a zoning ordinance prohibiting churches from being built in residential areas.[118] The congregation wanted to relocate its place of worship from a rented storefront to a location more conducive to worship.[119] The congregation bought land in an area zoned exclusively for residential use and sought an exception for their Kingdom Hall.[120] The City of Lakewood did not grant an exception, and the congregation challenged the city's decision.

The *Lakewood* court found "the burdens of the ordinance are the increased cost of purchasing land and the violation of the Congregation's

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[112] *Id.* at 815-16.
[113] *Id.* at 816.
[114] *Id.* at 826-29.
[115] *See generally* Widmar v. Vincent, 454 U.S. 263 (1981); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Good New Club v. Milford Cent. Sch., 533 U.S. 98 (2001).
[116] *Eaves*, 601 F.2d at 828.
[117] 699 F.2d 303 (6th Cir. 1983).
[118] *Grosz*, 721 F.2d at 740.
[119] *Lakewood*, 699 F.2d at 304.
[120] *Id.*

aesthetic senses."[121] The burdens on free exercise were only incidental, and the city's interest in zoning was great.[122] The *Lakewood* court did not apply a compelling interest standard. Instead, the court chose to apply rational basis review citing *Village of Euclid v. Ambler Realty Company.*[123] The *Lakewood* court stated that the congregation did not "demonstrate the requisite infringement of a fundamental right."[124] The *Lakewood* court treated building a place of worship as a secular interest.[125] In other words, *Lakewood* recast the issue as one of constructing a building rather than the religious use of a building.[126] Since the congregation did not "demonstrate the requisite infringement of a fundamental right,"[127] no burden was shown. Without a burden on religion, the city's zoning was accorded the deferential treatment of presumptive validity.[128]

Ironically, *Grosz* overlooked another key statement in *Lakewood.* The Lakewood court reasoned that the congregation was not unilaterally being denied a place to meet. Continuing, the court stated that "[t]he zoning ordinance does not prevent the Congregation from practicing its faith through worship *whether the worship be in homes,* schools, other churches, or meeting halls. . . ."[129] The congregation of 175 members was meeting in a storefront and wanted a meeting place more suited to its needs.[130] Although the congregation had alternatives, including meeting in private homes, Mr. Grosz appeared more limited in his options.

Reliance on *Lakewood* skewed the analysis, comparing apples and oranges. It involved a much larger group that seemingly had more location options. In adopting *Lakewood's* reasoning, the *Grosz* court mistakenly used the lowest standard of review, rational basis review. Most importantly, *Lakewood* focused on property rights rather than religious rights.

(iii) The Supreme Court's Tangential Comments

The third line of reasoning the *Grosz* court applied comes from *Corporation of the Presiding Bishop v. City of Porterville.*[131] This is

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[121] *Id.* at 307.
[122] *Id.* at 308. The city's great interest in prohibiting churches from residential areas focused on traffic and parking concerns. *Id.*
[123] 272 U.S. 365 (1926) (establishing the validity of zoning).
[124] *Lakewood,* 699 F.2d at 308-09.
[125] Scott David Godshall, *Land Use Regulation and the Free Exercise Clause,* 84 COLUM. L. REV. 1562, 1570 (1984).
[126] Islamic Ctr. of Miss. v. City of Starkville, 840 F.2d 293, 301 (5th Cir. 1988).
[127] *Lakewood,* 699 F.2d at 308-09.
[128] *Id.* at 308.
[129] *Id.* at 307 (emphasis added).
[130] *Id.* at 304.
[131] 338 U.S. 805 (1949) (per curiam) (dismissing for want of a substantial federal question).

another case that does not work for the *Grosz* court's balancing test, but it is nonetheless thrown onto the city's side of the scale. The Supreme Court has not directly considered the issue of religious land use; however, *Corporation of the Presiding Bishop* is the closest the Court has come to addressing the issue. The Court dismissed the Latter Day Saint's appeal from state court because the case lacked a federal question.[132] The Court did not stop at dismissing the case on jurisdictional grounds, though. In a later case in the same term, it commented on the zoning claim. The *Grosz* court looked at neither the state law context of *Corporation of the Presiding Bishop* nor the context of the Supreme Court's comments. This sub-section will first look at the case on the state level and then will consider the Supreme Court's comments on it. Looking to the context of the case will show that the level of scrutiny for a First Amendment claim depends on the facts of the case.

The California District Court of Appeals found that the group of Latter Day Saints had not alleged facts to support its claim that the zoning ordinance forbidding churches in residential areas was unreasonable and invalid.[133] This meant the congregation failed to allege a burden sufficient to overcome the deferential rational basis review accorded to the city.[134] This is not inconsistent with the *Sherbert-Yoder* test, because, in order for the compelling interest test to be invoked, the religious claimant must first show a burden. The group appealed to the Supreme Court, and the case was dismissed for lack of a substantial federal question.[135]

The Supreme Court commented on *Corporation of the Presiding Bishop* in a subsequent case, *American Communications Association v. Douds*.[136] The *Douds* court upheld a portion of the National Labor Relations Act on Congress's Commerce Clause power.[137] Generally, Commerce Clause legislation is scrutinized by rational basis review.[138] In *Douds*, the Supreme Court noted that the legislation was designed to improve interstate commerce by preventing Communist political strikes.[139] Members of the Communist party advocated application of the free speech "clear and present danger" test rather than rational basis

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[132] *Id.*

[133] Corporation of the Presiding Bishop v. City of Porterville, 203 P.2d 823, 826 (Cal. Dist. Ct. App. 1949).

[134] *Id.* (stating "In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances . . . . It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare.") (citations omitted).

[135] Corporation of the Presiding Bishop v. City of Porterville, 338 U.S. 805 (1949).

[136] 339 U.S. 382, 398 (1950).

[137] *Id.* at 387.

[138] *See generally* United States v. Lopez, 514 U.S. 549 (1995) (noting that the Court examines whether a rational basis to conclude that a regulated activity sufficiently affects interstate commerce).

[139] *Douds*, 339 U.S. at 391.

review.[140] The Court differentiated the free speech test[141] and reasoned it "was never the intention of this Court to lay down an absolutist test" to apply to all circumstances.[142] The Court then elaborated on *Corporation of the Presiding Bishop v. City of Porterville* by stating: "We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas."[143]

The comment on zoning, taken in context, should be read as meaning that strict scrutiny is not an automatic level of review for First Amendment claims. The Communists in *Douds* wanted the "clear and present danger" test, and the Latter Day Saints wanted a higher level of review for zoning in their case, as well. Both *Douds* and *Corporation of the Presiding Bishop* are cases where a higher level of review was not warranted based on the facts. The *Grosz* court missed this point by concluding that *Corporation of the Presiding Bishop* automatically rejected strict scrutiny for zoning. Rather, the case stands for looking at the facts to determine the standard of scrutiny. If no burden is found, there is no reason to adopt a higher level of scrutiny.

(iv) *Conclusion on* Grosz

Grosz is a good example of how courts have struggled with religious land use. The *Grosz* court was reluctant to recognize the importance of according weight to the religious claim but was also hesitant to find a burden. Instead of applying the strict scrutiny of the *Sherbert-Yoder* test, the court used a balancing test. This balancing test was inappropriate because the government's interest in the aggregate will almost always be greater than an individual's interest in a specific property. Applying a balancing test shifts the focus from the First Amendment right to property rights. The burden shifting required by the *Sherbert-Yoder* test ensures that the government not only has a good reason for regulation, but also ensures that the regulation is specifically tailored to minimally impact or to do the least harm.

The *Grosz* court supported its reasoning with a variety of cases. It relied on *Prince*, a case about the state's interest in child welfare, an interest that always wins; *Eaves*, a free speech case upholding reasonable restrictions in a limited public forum, applying a rational basis standard; *Lakewood*, where the focus was on property rights rather than religious rights; *Corporation of the Presiding Bishop*, a case that had no facts to

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[140] *Id.* at 393-94.
[141] *Id.* at 396.
[142] *Id.* at 397.
[143] *Id.* at 397-98 (citing Corporation of the Presiding Bishop v. City of Porterville, 338 U.S. 805 (1949)).

show a burden on free exercise; and *Douds*, a case tangentially mentioning zoning to make the point that First Amendment claims do not automatically subject government regulations to strict scrutiny. This medley of cases provides no coherent standard. The next section looks at a later zoning case relying on *Grosz* for support.

2. Christian Gospel Church

A parallel case relying on *Grosz* comes from the Ninth Circuit in *Christian Gospel Church v. San Francisco.*[144] This case involved a small religious group that applied for a conditional use authorization seeking the use of a residential home as their place of worship.[145] The court enunciated a three-part test similar to the balancing act of *Grosz.*[146] The test considered:

> (1) the magnitude of the statute's impact upon the exercise of the religious belief;
> (2) the existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and
> (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.[147]

In considering the first prong of its test, the court found no burden on the church.[148] The church emphasized the religious importance of using a home for worship in its free exercise claim. Three reasons were put forth to defend the church's position. First, home worship historically protected minority religions from persecution.[149] Second, home worship is a fundamental belief or tenet of its faith.[150] Third, home worship provided an environment insulated from tenet commercialism.[151] However, the court found all three of the reasons unpersuasive, because prior to applying for the exemption, the church had been meeting in a rented hotel banquet room.[152]

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[144] 896 F.2d 1221 (9th Cir. 1990).
[145] *Id.* at 1222.
[146] *Grosz*, 721 F.2d at 741 (stating "[w]e who perform on this flying trapeze may not always be daring and young, but we must avoid that slip that could take us into the doctrinal confusion below").
[147] *Christian Gospel Church*, 896 F.2d at 1224.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

The court seemed skeptical regarding the centrality of home worship to the group's religion. However, courts are ill-equipped to determine the validity of a religious tenet.[153] "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[154] Skepticism over religious beliefs is an insufficient basis to declare that no burden exists on those beliefs. One commentator has reasoned that the court's logic rested on the temporal aspects of the burden. Because the zoning ordinance affected a future religious practice, rather than a current one, their belief and the burden were minimized.[155]

The court said it could see no burden in denying the exemption for the specific home.[156] The court downplayed the burdens, classifying them as burdens of "convenience and expense, requiring appellant to find another home or another forum for worship."[157] Like the *Grosz* court, the *Christian Gospel Church* Court concluded that the minimal burden on religion could not outweigh the city's interest in zoning.[158] *Christian Gospel Church* did not offer a different standard of review. The court expressed skepticism over the belief that meeting in homes was religiously required. Thus, *Christian Gospel Church* rested on the lack of a burden on religion, providing no standard for future cases.

3. *Coherence in the Cases*

Finding a coherent standard of review in the cases considered is facially impossible. Forcing a classification, these cases could be interpreted as requiring a lower level of scrutiny for land use cases because religion lost. However, the syllogism that a new standard of review was set because the religious interest lost the case is faulty. Simply because the government interest prevailed does not mean the government interest was subjected to a new standard of review. Rather, in *Grosz* and *Christian Gospel Church*, the more accurate reading is one of religion not being burdened (or of the court not recognizing the burden).

Interpreting these land use cases as calling for a lower standard of review for zoning does not present a unifying explanation because the standards applied were cobbled together from commerce clause, free speech, and parental rights cases. Although the governmental interest in regulating land use is obvious, zoning codes present massive amounts of

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[153] *See* United States v. Ballard, 322 U.S. 78, 86 (1946)("[t]he law knows no heresy . . . ." (quoting Watson v. Jones, 13 Wall 679, 728 (1871)).
[154] Thomas v. Review Bd., 450 U.S. 707, 714 (1981).
[155] Ann L. Wehener, *When a House Is Not a Home But a Church: A Proposal for Protection of Home Worship from Zoning Ordinances*, 22 CAP. U. L. REV. 491, 500 (1993).
[156] *Christian Gospel Church*, 896 F.2d at 1224.
[157] *Id.*
[158] *Id.* at 1225.

regulation for a general interest to promote the health and safety of the community. Zoning is a means to ensure that the community is preserved and protected. However, in the cases considered above, the governmental interest in zoning seems to be treated as an end in itself.

One could interpret this line of cases as employing but misstating the *Sherbert-Yoder* test. Under the *Sherbert-Yoder* test, the claimant must first show a burden or the government automatically wins. All of the cases either explicitly or implicitly held that the religion did not show a burden. Since the first step in the *Sherbert-Yoder* test had been applied in the cases, the application of a low or high standard of review for the government regulation would be immaterial. The obvious counter-argument is that the cases favoring the government's zoning interest did not address the *Sherbert-Yoder* test. However, the cases reflect disingenuousness by finding no burden existed, dancing around the *Sherbert-Yoder* test, uttering one test but implementing another, and misreading precedent. *Sherbert* and *Yoder* are cited in *Grosz* and *Lakewood*, but the constitutional protection these cases afford to religion is ignored.[159]

B. The Sherbert-Yoder *Standard is the Best Available Test*

This section presents authority where the interests in free exercise exceed the state's interest in zoning, through the examination of three cases. These cases consider: (1) regulation that is not generally applicable; (2) the conflict over accessory uses; and (3) the propriety of changing uses. They show that the *Sherbert-Yoder* standard is workable and fair to all parties, supporting the conclusion that this standard should be applied to all religious land use claims.

The cases in this section were all decided after *Employment Division v. Smith*. One may raise the objection that any case decided after April 17, 1990 should have no bearing whatsoever on a religious liberty case brought under Texas RFRA because of the date incorporated in the statute.[160] However, the statute says that municipalities have no less authority than "existed under the law as interpreted by the federal courts before April 17, 1990."[161] The interpretation of municipal zoning power is the critical element; that interpretation must be consistent with that of federal courts prior to *Smith*.

Additionally, an analogy will explain why cases after *Smith* still have a bearing on Texas RFRA. Picture a series of hurdles in an equestrian competition. Each hurdle is higher than the next. Generally,

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[159] *Grosz*, 721 F.2d at 737; *Lakewood*, 699 F.2d at 305. *Grosz* and *Lakewood* are cited in footnote 2 of *Christian Gospel Church*, but *Sherbert* and *Yoder* were not cited. *Christian Gospel Church*, 896 F.2d at 1224 n.2.

[160] TEX. CIV. PRAC. & REM. CODE ANN. § 110.010 (Vernon 2000).

[161] *Id.*

if a horse can jump the highest hurdle, it can also clear the lowest in the series, *ceteris paribus*. Commentators and the legal community in general agree that *Smith* marked a change in free exercise jurisprudence, by raising the bar for free exercise claims. If a free exercise claim can win after *Smith*, it can also win under a past, lower standard. In the case of religious zoning claims, the Texas legislature basically said that free exercise claims must jump the interpretive hurdle prior to *Smith*.

1. Airmont – *Not Generally Applicable*

Only three reported circuit court cases dealing with home worship have been decided.[162] The most recent home worship case arose in the Second Circuit. *LeBlanc-Sternberg v. Village of Airmont*[163] involved group worship in private homes, and, applying Federal RFRA, the Second Circuit found in favor of the religious claimants. Although the case was decided under Federal RFRA, it would have turned out the same without Federal RFRA, thereby applying a post-*Smith* analysis. Any case that can win after *Smith* can jump a hurdle prior to *Smith*.

A neighborhood association incorporated an area of Ramapo, New York, in order to prevent Hasidic Jews from moving into the area and to prevent home synagogues.[164] The court's record indicated that Ramapo allowed Hasidic Jews to use their homes for group worship under a liberal interpretation of a home office exception.[165] The Village of Airmont, a subset of Ramapo, decided to incorporate in order to change the zoning interpretation and law.[166] The record showed hostility toward the Hasidim.[167] The underlying purpose for changing the home synagogue exception was to keep Hasidic Jews out of the area. If a synagogue is not within walking distance, the group is effectively excluded from the community because Hasidic Jews do not drive on the Sabbath. The strong factual record indicating that the incorporation and subsequent changes in zoning law were motivated by religious animus toward the Hasidim prompted the court to conclude that the plaintiff's free exercise rights and federal civil rights had been violated.[168] The

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[162] John M. Smith, Note & Comment, *Zoned for Residential Uses—Like Home Prayer? Home Worship and Municipal Opposition in LeBlanc-Sternberg v. Fletcher*, 2000 B.Y.U. L. REV. 1153, 1160 (2000). The three cases are Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983); Christian Gospel Church v. San Francisco, 896 F.2d 1221 (9th Cir. 1990); LeBlanc-Sternberg v. Village of Airmont, 67 F.3d 412 (2d Cir. 1995).

[163] 67 F.3d 412 (2d Cir. 1995).

[164] *Id.* at 418-19. Hasidic Jews meet twice daily for religious services and are limited to walking for transport on their Sabbath. *Id.*

[165] *Id.* at 417-18.

[166] *Id.*

[167] *Id.* One man expressed his sentiments by stating: "[L]et the people in the unincorporated Area of Ramapo, go ahead and fight for what they believe in. Instead of giving up for what we've worked very hard for, to a bunch of people who insist on living in the past. I am not prejudice [sic] in any way, shape or form but i [sic] will not have a hasidic community in my backyard." *Id* at 418.

[168] *Id.* at 426.

animus toward and focus on the Jews in incorporation is important because the law involved had a specific purpose.

Some commentators have read *Airmont* as connecting the location of worship to the right of free exercise, and perhaps even connecting location and burden.[169] Although that conclusion acknowledges the importance of location, the *Airmont* court bypassed a formal burden analysis.[170] Because the law clearly reflected a specific purpose toward excluding the Jews, the court was able to jump directly to the compelling interest analysis under an exception to *Smith* developed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[171] For this reason, the case would have turned out the same even without Federal RFRA.

A brief summary of *Lukumi* will serve to illustrate how laws that are not generally applicable fare under *Smith.* The City of Hialeah, Florida, passed a law banning the ceremonial killing of animals.[172] The record indicated that the law was passed to stop the Santaria religion from sacrificing animals.[173] The law seemed to be facially neutral, an acceptable law under *Smith* and thus subject only to rational basis review. Relying on *Smith,* the court related neutrality and general applicability to each other.[174] They "are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied."[175] The *Lukumi* court equated the requirement of general applicability in *Smith* with neutrality. A law not generally applicable "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[176] In other words, a law not generally applicable must pass the *Sherbert-Yoder* test. The city ordinance was not generally applicable because it was prompted by hostility toward the Santaria religion. The lack of general applicability in the ordinance invoked the *Sherbert-Yoder* test. The ordinance failed the *Sherbert-Yoder* test and the religious claimants in *Lukumi* prevailed.

Lukumi is strong post-*Smith* precedent for zoning cases not covered by RFRAs because it focuses on general applicability and neutrality. Under *Smith,* a generally applicable law is subject to rational basis review, but a law that is not generally applicable is still subject to strict scrutiny. A law motivated by a purpose directed toward a specific

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[169] John M. Smith, Note & Comment, *Zoned for Residential Uses- Like Home Prayer? Home Worship and Municipal Opposition in LeBlanc-Sternberg v. Fletcher,* 2000 B.Y.U. L. REV. 1153, 1171.

[170] The injunctive relief granted allowing a home synagogue suggests the *Airmont* court connected location to free exercise. *Airmont,* 67 F.3d at 1172.

[171] 508 U.S. 520 (1993).

[172] *Id.* at 527.

[173] *Id.* at 534.

[174] *Id.* at 531.

[175] *Id.*

[176] *Id.* at 531-32.

group cannot be considered a generally applicable law. The animus in the *Airmont* record showed that forming a new township was not being done as a generally applicable law. The new town was formed to keep Jews out.

One may contend that a law with an anti-religious purpose will always lead to a win for the religious claimant. This contention rests on the assumption that proving hostile purpose is the total requirement for a religious claimant. However, *Smith* and *Lukumi* retain the *Sherbert-Yoder* test when general applicability is not present. *Lukumi* interpreted general applicability in light of religious animosity, creating a presumption that a law passed with bad intent forecloses the possibility of general applicability. The bad intent present in *Airmont* would foreclose a finding of general applicability, thereby opening the door for the *Sherbert-Yoder* analysis.

Although *Airmont* was decided under Federal RFRA, it has value in interpreting the pre-*Smith* standard. It would have been decided the same without Federal RFRA because of *Smith's* general applicability standard as interpreted by *Lukumi*. Since the religious claimant passed the *Smith* hurdle, the free exercise claim would also fly over the pre-*Smith* standard. *Airmont* is important because it shows that zoning laws can be applied to harm religious interests. Most of all, it applies the same standard to religious land use issues that other free exercise claims receive.

2. Western Presbyterian – *Accessory Uses*

Some of the cases considered above, involved accessory uses that conflict with zoning regulations.[177] In *Grosz*, the accessory use was the use of his garage as a place of worship.[178] This section considers accessory uses of established churches, not the religious accessory use of homes. For example, some mega-churches include restaurants on-site.[179] The religious nature of the overall enterprise does not allow the church to avoid compliance with general zoning and health regulations for restaurants. Such on-site restaurants are operated for convenience to church members. Running a fast food franchise is not part of the free exercise of religion because it is not associated with a religious belief.[180]

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[177] In zoning parlance an accessory use is generally defined as a use secondary to an expressly stipulated use. Home offices for professionals like lawyers and doctors are common accessory uses in districts zoned for residential purposes. 77 TX JUR. 3d Zoning § 63 (1991).

[178] 721 F.2d at 731.

[179] Texas Senate Hearings, *supra* note 35. By use of the term mega-church, the author does not intend to disparage large congregations. The term was used in the Senate and House hearings to describe churches that accommodate thousands of people and commonly host activities beyond worship services. The example of restaurants in mega-churches was considered in the Senate hearings.

[180] However, one could imagine a scenario where a religion may claim that operating a commercial enterprise is connected to worship. *See generally* Tony and Susan Alamo Found. v. Sec'y of Labor,

Instead, a different issue is raised when an accessory use is related to religious exercise.

This section examines a case involving the religiously motivated feeding of the homeless, *Western Presbyterian Church v. Board of Zoning Adjustment*.[181] The case demonstrates that zoning can have a concrete impact on worship. Unlike *Lakewood*,[182] this case centers its attention on worship rather than property rights. *Western Presbyterian* was brought under Federal RFRA and used the *Sherbert-Yoder* standard.[183] Although the decision has no bearing as precedent on the pre-*Smith* standard, its analysis of the interplay between regulation and worship is valuable. It shows that zoning can affect worship and that the rational basis review of *Smith* is insufficient to protect accessory uses.

Western Presbyterian Church contested the District of Columbia zoning board's decision that its feeding program was not a permitted accessory use. The church claimed that the decision not to recognize the feeding program as a permitted use violated the church's free exercise rights.[184] The free exercise claim was based on the Presbyterian tenets of ministering to the needy and was easily established as a sincerely held religious belief.[185] The District of Columbia did not assert a compelling interest.[186] Rather, the District of Columbia asserted that the zoning regulations did not burden the church.[187] The court reasoned that "[o]nce the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct."[188] Worship, whether it includes prayer or holiday celebrations, cannot be regulated by the city's zoning laws absent a compelling state interest, and the religiously motivated feeding of the needy was a form of worship.[189] Thus, the city was prohibited from restricting the feeding program just as it would be restricted from forbidding a religious group to pray in its building.

Critics could try to undermine *Western Presbyterian* by differentiating worship from religiously motivated accessory uses by focusing on externalized costs. Just as certain forms of religious worship that impose costs on others can be regulated,[190] so too, should any

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471 U.S. 290 (1985) (separating commercial activities from religious aspects of foundation and denying exemption from labor laws).

[181] 862 F. Supp. 538 (D.D.C. 1994).

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

[183] *Id.* 862 F. Supp. 538, 542 (D.D.C. 1994).

[184] *Id.*

[185] *Id.* at 544.

[186] *Id.* at 545.

[187] *Id.*

[188] *Id.*

[189] *Id.* 862 F. Supp at 546.

[190] *See* State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (enjoining the handling of snakes).

accessory use that imposes costs on the surrounding community. Feeding homeless people at a church could be viewed as imposing costs on the community, such as additional pedestrian traffic or other burdens on the area's infrastructure.

The court's statement included a caveat, "absent extraordinary circumstances,"[191] which recognizes the compelling interest standard. Classifying accessory uses like feeding the homeless with activities that are perceived as dangerous to the health and safety of a community overlooks the elements of the *Sherbert-Yoder* test. If the government can show that it has a compelling state interest in regulating the activity and that such regulation is narrowly tailored to accomplish its purpose, then the regulation stands. The Texas Senate hearings on RFRA addressed the issue of dangerous forms of worship, and the committee acknowledged that the state would have a compelling interest in prohibiting worship that threatened the health and safety of others.[192] By extension, only accessory uses connected to worship that impose significant third party costs threatening the health and safety of the community could be regulated. A homeless feeding program would not fall into that category, because it provides a valuable social service.

Western Presbyterian is important because it demonstrates that there is no clear line between action and belief. The continuum of protection offered in *Smith* is insufficient to protect religious land use. *Smith* attempts to separate beliefs from actions, asserting that beliefs are protected but actions can be regulated by generally applicable laws.[193] In *Western Presbyterian*, religious belief motivated the feeding of the homeless; action and worship were connected in a way that violated the District of Columbia's zoning regulations. Zoning can impact worship, and the level of protection *Smith* provides from such impact is insufficient. The *Sherbert-Yoder* standard recognizes that the continuum from belief to conduct is blurry, and that all claims, including zoning claims, should be weighed by the compelling interest test.

3. Cam – *Changing Uses*

Cam v. Marion County adds a twist to the interplay between zoning and religion because it involves a building that was approved for farm use that was later used for religious services.[194] The case was decided after *Boerne v. Flores*[195] invalidated Federal RFRA's application to such cases. It evaluated the religious claim against zoning by applying

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[191] *Western Presbyterian Church*, 862 F. Supp. at 546.
[192] Texas Senate Hearings, *supra* note 35. Whether snake handling is such a form of worship that threatens the health and safety of others is another issue.
[193] Employment Div. v. Smith, 494 U.S. 872, 879 (1990).
[194] 987 F. Supp. 854 (D. Or. 1997) (decided September 25, 1997).
[195] *Flores*, 521 U.S. 507 (decided June 25, 1997).

a deferential rational basis standard of review. *Cam* has a direct bearing on the pre-*Smith* standard because if a religious claim wins under rational basis review, it will also prevail under the *Sherbert-Yoder* standard and all other pre-*Smith* standards.

Members of the Russian Old World Believers Church fled the Soviet Union because of religious persecution, moving to Turkey, then to Brazil, and finally finding freedom in the United States in 1965.[196] The group purchased land in Oregon, establishing a village with a church; the community flourished.[197] Church attendance, central to the community's life, included frequent and regular services and Sunday services lasting as long as seven and one half hours.[198] In 1994, about one hundred members of the village church began attending services inside an agricultural building.[199]

The local zoning authority discovered that the agricultural building was being used for church services and issued a cease and desist order.[200] According to the local zoning authority, the use constituted a new church, requiring a building permit, but the authority would not issue a permit because the use of the agricultural building as a church was not a customary use of farming land.[201] In fact, the zoning authority implied that the building would have to be torn down if not returned to an agricultural use.[202] This pitted the religious use of the building against the state's interest in regulating agricultural land.[203] The "ultimate question posed is whether the state may prohibit people from praying inside a farm building, where the act of praying does not impact upon any secular state interest."[204]

No secular state interest beyond the general interest in land use regulation was present in the case. The zoning authority found that using the building as a church would not create any environmental or noise problems and that adequate fire protection was available.[205] The state did not contest the use of the building on issues of health or safety but only on the grounds that the use deviated from its interpretation of traditional farming uses. The court could find no good reason for this position,

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[196] *Cam*, 987 F. Supp. at 855.
[197] *Id.*
[198] *Id.*
[199] *Id.* The parties to the case presented differing explanations for the separate services. The original village church claimed it was due to a schism, but Mr. Cam, who led the services in the agricultural building, stated the original church was overcrowded. The internal church conflict complicated the case because the zoning authority stated it would have allowed the use of the agricultural building under a theory that the original village church expanded. However, the zoning authority found that the acrimony between the two groups prevented it from viewing the situation as an expansion. *Id.* at 857. Putting aside the question of government favoring a particular sect, the issue was really over the changing use of the building. *Id.* at 860.
[200] *Id.* at 855.
[201] *Id.* at 860, 862.
[202] *Cam*, 987 F. Supp. at 860.
[203] *Id.* at 855.
[204] *Id.* at 860.
[205] *Id.* at 857-58.

stating that "it cannot be fairly said that any legitimate or rational, much less compelling, state interest has been advanced by such application of the Oregon Land Use Regulations."[206] The court reasoned on the zoning authority's definition of traditional farming uses:

> If the Cams and some of their neighbors congregated inside the barn to discuss farming practices, or gathered every Saturday evening for square dancing, no additional permit would appear to be necessary. But because they meet to worship, and because the barn has been blessed as a church, they are now required by state regulation to obtain a permit for a church.[207]

The court proceeded to analyze the case in light of *Lukumi* and found that the regulation was neither neutral nor of general applicability.[208] Quoting from *Lukumi*, the court continued, "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"[209] No compelling interest was served by allowing square dances and secular meetings in agricultural buildings but disallowing religious meetings.[210] "In this case, the state's application of the regulation to the Cams' barn is not rationally related to the legitimate interests for which the regulation is intended to promote. . . . Thus, even under the lower level of scrutiny, defendants' application of the regulations cannot pass constitutional muster."[211]

Grosz, *Christian Gospel Church*, and another case were considered in *Cam*'s analysis. The Court distinguished *Cam* from *Grosz* because *Grosz* involved misrepresentation in obtaining a permit for the accessory structure.[212] In this case, the barn had been built with state permission,[213] and the use changed because of the needs of the religious community. However, the distinction is tenuous. The original structure in *Grosz* had been approved; the misrepresentation occurred in applying for a remodel permit.[214] The court distinguished *Christian Gospel Church* from the facts of the case based on the lack of legitimate state

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[206] *Id.* at 859.
[207] *Id.* at 861.
[208] *Cam*, 987 F. Supp. at 862.
[209] *Id.* at 861.
[210] *Id.* at 863.
[211] *Id.* at 864.
[212] *Id.* at 862. Mr. Grosz "applied for permits for internal modifications to the accessory structure, stating that the building would be remodeled for 'playroom use.' They [the Grosz's] were specifically informed by the City that the structure could not be remodeled as a religious institution." Grosz v. City of Miami Beach Florida, 721 F.2d 729, 731 (11th Cir. 1983).
[213] *Cam*, 987 F. Supp. at 862.
[214] *Grosz*, 721 F.2d at 731.

interests. San Francisco had legitimate concerns over traffic and parking, whereas the zoning authority in this case conceded that using the building as a church would not impact the state's interest in environmental, health, or safety matters.[215] Finally, the *Cam* court harmonized the case with *Islamic Center of Mississippi v. City of Starkville*.[216] *Islamic Center* is a case applying the *Sherbert-Yoder* test in a zoning dispute that found in favor of the religious claimants. It will be considered in the next section.

Land use advocates might try to limit *Cam*'s holding. *Cam* could be construed as state involvement in an internal church dispute with a subsidiary zoning claim.[217] Although the state's position aligned with the original village church's interests, the issue was not controlling. Even if the state consciously sided with the original church, the controlling issue was the role zoning played in opposing the faction meeting in the barn. Read either as a free exercise claim or as a case where the government favored one side of a divided church over the other, the state's application of zoning is the key factor. The court acknowledged the dual nature of the case in its analysis and classified the case as a free exercise claim.[218]

Additionally, one might argue that a religious claimant should only win when the community has no interests at stake and that rational basis review is the appropriate level of review for all religious land use claims. The facts of *Cam* present an unusual situation, where the community was not impacted. The court makes explicit that the zoning authorities "may only consider plaintiffs' conditional use application insofar as the proposed use impacts on public safety issues, farming practices, or other legitimate secular concerns. . . ."[219] The fact that the *Cam* court limited its holding demonstrates that the court recognized that *Smith* was controlling law in that jurisdiction. The only way for the religious claimants to prevail was under existing law. Rational basis review under *Smith* is the legal standard to be applied in Oregon land use cases, but Texas RFRA employs a pre-*Smith* standard. Had there been rational state interests involved, the case would have turned out differently.

This highlights the inadequacy of rational basis review, because the balancing component of the *Sherbert-Yoder* standard is absent. For example, had the state based its action on parking concerns, the religious

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[215] *Cam*, 987 F. Supp. at 865.
[216] 840 F.2d 293 (5th Cir. 1988).
[217] *See supra* note 199.
[218] *Cam*, 987 F. Supp. at 860. "What this case really involves is a far deeper issue than the simplistic one offered by the state. While the state may apply zoning laws and building regulations in a neutral fashion to churches as well as homeowners, businesses, farmers, golf courses, schools, and so forth, it is a much different task to discern whether a structure that is allowed to be built by the state for agricultural purposes must be dismantled because people thereafter begin meeting in it to pray." *Id.*
[219] *Id.* at 865.

claimants would have lost. The point of the *Sherbert-Yoder* test is not to give either side an automatic victory. Taking into consideration the interests of both sides is the critical difference. Under rational basis review, if the state noted potential parking problems, this would likely have been sufficient for the state to prevail. Rational basis review provides an automatic win for the state without considering the other side's interests. Under the *Sherbert-Yoder* standard, if the state noted potential parking problems, the burden would be shifted to the religious claimant.

Although the religious interest in *Cam* prevailed, rational basis review generally provides insufficient protection to religious claims because it ignores the burden analysis of the *Sherbert-Yoder* test. This note analyzes *Cam* not only to show that this case can be useful in considering RFRA land use claims, but also to show that rational basis review is far too deferential to government interests. *Cam* prevailed because of the absolute absurdity of the regulation, allowing political rallies, square dances, and other uses but prohibiting worship services. Zoning laws affect religion, and the burden on the religious claimant should be considered. The *Sherbert-Yoder* test provides a balanced, workable vehicle for taking all interests into consideration.

C. *Limits of the* Sherbert-Yoder *Standard*

The *Sherbert-Yoder* standard offers a balanced approach to free exercise claims, in and out of the zoning context. It does not offer the religious claimant an easy win. On the contrary, both sides to the dispute have to make a showing. A major hurdle for some religious claimants is showing a burden. The test this note advocates does not relieve the religious claimant from showing a burden. For example, in *Lyng v. Northwest Indian Cemetery Protective Association*,[220] the claimant sought to enjoin the U.S. government from building a road through a sacred site of worship in a National Forest. The Native American religious group claimed that building the road close to their worship site would substantially harm their worship.[221] The Supreme Court held that the burden was insufficient, differentiating *Sherbert*.[222] The court said that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[223] *Lyng* is analogous to a church complaining of a nearby noisy activity, like a business that makes noise disturbing worship services.[224] Although there would be

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[220] 485 U.S. 439 (1987).
[221] *Id.* at 442.
[222] *Id.* at 450-51.
[223] *Id.* at 452.
[224] This scenario assumes that the noise does not rise to the level of a nuisance.

some interference with worship in this case, *Lyng* might control such a case, finding that no sufficient burden on free exercise existed.

The *Lyng* court relied on another pre-*Smith* case that failed the burden prong of the *Sherbert-Yoder* test, *Bowen v. Roy*.[225] The Roys claimed that the government's use of their daughter's social security number spiritually harmed her. In *Roy*, the Supreme Court said that "[n]ot all burdens on religion are unconstitutional."[226] These cases stand for the proposition that the *Sherbert-Yoder* test is a real test that requires a showing of harm and can be applied to a variety of religious claims, including religious land use.

Not only does the *Sherbert-Yoder* test require a burden, but it also allows a narrowly tailored compelling government interest to outweigh a person's free exercise claim.[227] *Miller v. Commissioner of Internal Revenue*,[228] another case involving the use of social security numbers, involved a federal RFRA claim by a Christian family who objected to using social security numbers to identify their children as dependents on their income tax return. The Tax Court conceded that "[Miller's] argument that the SSN requirement imposes a cognizable burden on their freedom of religion may find some support under First Amendment case law."[229] However, the court concluded that the government's interest in an efficient and fair tax collection system was a narrowly tailored compelling interest that overrode the Millers' claim for an exemption from the generally applicable regulation requiring disclosure of social security numbers.[230]

A hypothetical example will further illustrate the point that a narrowly tailored compelling government interest may outweigh a burden on religion. If a pagan religion required worship outdoors in the nude, as some pagan religions require, certain restrictions on such worship would likely be valid under the *Sherbert-Yoder* test.[231] The government has a compelling interest, especially in protecting children, and regulation of adult entertainment and nudist colonies is widely acknowledged to be acceptable. General applicability could be ensured by, for example, regulating all nudity in public. Hence, zoning requirements like privacy fences, setbacks, and other measures applied to outdoor nude-worshiping religions would likely be upheld under the *Sherbert-Yoder* test. This illustrates that the *Sherbert-Yoder* test is a

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[225] 476 U.S. 693 (1986).
[226] *Id.* at 702.
[227] *See generally* United States v. Lee, 455 U.S. 252 (1982) (holding that the government's interest in the Social Security system overrode an Amish employer's claim for an exemption from collecting Social Security taxes).
[228] 114 T.C. 511 (2000).
[229] *Id.* at 516.
[230] *Id.* at 516-18.
[231] Complete prohibition of such worship would likely not be upheld. *See generally* Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

workable, reasonable test that has been applied to the general body of free exercise law prior to *Smith* and is workable in the land use context.

If the *Sherbert-Yoder* standard is not accepted for religious land use cases, the implications are far-reaching and harmful to religion. An illustration will make this point. Returning to the opening vignette, home worship in groups could be prohibited or severely restricted. Certain religions require that groups worship in homes.[232] Without the *Sherbert-Yoder* standard, religious meetings in homes would be subject to the general standards found in zoning regulations. If zoning regulations prohibited more than three visiting cars per day to every house, perhaps in an effort to regulate commercial activity in residential areas, a home Bible study group that had four visiting cars on a particular evening could be prohibited. At some point, traffic and parking concerns should prevail over the interests of a home Bible study group, but that point must be determined by considering all factors. Using a standard lower than the *Sherbert-Yoder* test could result in restricting home worship without a compelling government reason. On the other hand, the *Sherbert-Yoder* test is equitable because it forces the religious claimant to show a burden and then requires the government to show a narrowly tailored compelling interest.

D. Conclusion on the Argument for the Sherbert-Yoder *Standard as the Appropriate Pre-*Smith *Standard for Religious Land Use*

A common theme runs through the cases favoring religious claimants: land use regulation should not be allowed to touch religion in a manner detrimental to the Constitutional guarantee of free exercise. *Airmont* illustrates not only the extreme of zoning motivated by bigotry but also the sensitivity of home worship. The implications drawn from *Western Presbyterian* lend credence for providing religiously motivated accessory uses the same deference as worship. Finally, the conflict over changing uses in *Cam* highlights the tension between a static regulation of general interest and a dynamic religious community. These cases commonly hold that zoning is not an end in itself to be unquestionably followed at the expense of civil rights.

The cases ruling against religious claimants skirted established free exercise jurisprudence by paying lip service to *Sherbert*, *Yoder*, and other cases but not following their spirit. *Sherbert* and *Yoder* recognize that pervasive government regulation can hurt religion. When this occurs, government must justify its actions by providing a compelling

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[232] In *Christian Gospel Church*, the religious claimants stated that meeting in their homes was part of their beliefs. Christian Gospel Church v. San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990). Some Protestant denominations base this on the precedent recorded at Philemon 2, which reads in the King James Version: "And to our beloved Apphia, and Archippus our fellowsoldier, and *to the church in thy house* . . . ." (emphasis added).

reason and ensure that its regulation is narrowly tailored to do the least harm. In the cases discussed, the harm to the religious claimants was denied,[233] ignored,[234] or reframed.[235] One may argue that the line of cases changed the standard of review, but not recognizing a burden is more consistent with misapplication of the *Sherbert-Yoder* test. Refusing to recognize harm to a claimant is vastly different from implementing a special standard for religious land use. The *Sherbert-Yoder* test has limits and is workable in land use cases. It provides a balanced approach requiring all parties to make a showing. Religious claims over zoning should be afforded the same rigorous protection as general pre-*Smith* free exercise claims, the *Sherbert-Yoder* standard.

IV. The Direct Argument

Texas RFRA states that municipalities have no less zoning authority than they had on April 17, 1990.[236] The controlling case in the Fifth Circuit dealing with religious land use prior to 1990 is *Islamic Center of Mississippi v. City of Starkville.*[237] This section will outline how *Islamic Center* applied the *Sherbert-Yoder* standard and what that means for future free exercise claims under Texas RFRA.

A. Islamic Center—*Application of the* Sherbert-Yoder *Standard*

Islamic Center presents a common zoning problem the difficulty of obtaining special use exemptions. Many cities, as a general rule, prohibit places of worship in residential areas but provide exemptions. The Islamic Center was denied an exemption for a mosque in a residential area.[238] Twenty-five Christian churches were located in comparably zoned areas; sixteen had been grandfathered under prior zoning ordinances and nine had been granted exemptions under the ordinance applied to the Islamic Center.[239] The Islamic Center's application was the only one ever denied an exemption.[240] Starkville purported to base the denial on parking and traffic problems.[241]

The court applied the traditional *Sherbert-Yoder* compelling interest test. The first step of the *Sherbert-Yoder* test was met because the city's actions burdened free exercise by effectively excluding the

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[233] Corporation of the Presiding Bishop v. City of Porterville, 338 U.S. 805 (1949).
[234] Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983).
[235] Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983); Christian Gospel Church v. San Francisco, 896 F.2d 1221 (9th Cir. 1990).
[236] TEX. CIV. PRAC. & REM. CODE ANN. § 110.010 (Vernon 2000).
[237] 840 F.2d 293 (5th Cir. 1988).
[238] *Id.* at 294.
[239] *Id.*
[240] *Id.*
[241] *Id.* at 298.

mosque from the town.[242] The court determined that "by making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion."[243] The city could not rely on the argument that the activity could be conducted elsewhere,[244] because "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[245]

The court combined its analysis of the government's interest in zoning and whether the restriction was of the least restrictive means. Acknowledging the legitimate government interests in zoning, the court found that zoning was only a pretense for denying the exemption because the city failed to show the denial was based on a compelling interest.[246] The denial was not based on traffic control or public safety concerns[247] because the city had no compelling interest to deny the exemption. Traffic and public safety were not found to be compelling state interests in this case because the group would not be producing much traffic or creating safety concerns. The city pointed to heavy traffic and congestion as possible problems the Center would cause, but few of the Muslims who would be traveling to the Islamic Center owned cars.[248] The city's enforcement against the Islamic Center was held unconstitutional.[249]

In reaching its conclusion, the *Islamic Center* court reviewed *Lakewood* and *Grosz*. It distinguished *Lakewood* by noting that the Sixth Circuit viewed the issue as a right to build and not a right to use case.[250] Additionally, the Lakewood Congregation only alleged a monetary burden,[251] whereas most Muslims in Starkville lived within walking distance of the proposed mosque and did not own cars.[252] The lack of transportation heightened the burden on the group. The Fifth Circuit paid special attention to the economic burden involved in procuring an alternate location[253] and recognized the hardship that it would cause in light of the group's socio-economic composition. *Grosz* was more difficult to distinguish, but the court pointed out that Mr. Grosz was not immobile and that a suitably zoned area to conduct religious services was

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[242] *Id.* at 298-99.
[243] *Islamic Ctr. of Miss.*, 840 F.2d at 299.
[244] *Id.* (citing Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981)) (negating city's argument in zoning case that live nude dancing could be conducted outside of the city limits).
[245] Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981) (quoting Schneider v. State, 308 U.S. 147, 163)) (responding to city's contention that leafleting could be conducted elsewhere).
[246] *Islamic Ctr. of Miss.*, 840 F.2d at 302-03.
[247] *Id.*
[248] *Id.* at 295.
[249] *Id.* at 303.
[250] *Id.* at 301.
[251] *Id.*
[252] *Islamic Ctr. of Miss.*, 840 F.2d at 295.
[253] *Id.* at 298-99.

only four blocks away.[254] The court concluded its analysis of *Grosz* by commenting that recent cases stand for limiting worship services in homes where the facts involve regular services, "incidental economic burden," and alternative opportunities for religious conduct are available.[255] One might contend that the court's conclusion on *Grosz* and summary of the recent cases carves out areas where the *Sherbert-Yoder* standard does not apply. On the contrary, implicit in its comments on recent cases is the Court's recognition that the *Sherbert-Yoder* standard must be applied.

Islamic Center provides precedent and guidance for considering religious land use claims under Texas RFRA. It applied the *Sherbert-Yoder* standard, and its analysis did not provide an automatic win for either side. The Muslim students established a bona fide burden on the free exercise of religion, but the city failed to show a compelling interest in denying the exemption for the mosque. *Islamic Center* demonstrates that the *Sherbert-Yoder* standard is a workable and fair standard in the land use arena.

VI. Conclusion

Without a place to worship the concept of religious liberty loses vitality. The conflict between zoning and religious land use presents a struggle to balance the government's power to regulate the health, safety, and welfare of a community with the desire of people to worship in groups.

This note's direct argument for adopting the *Sherbert-Yoder* standard to religious land-use cases under Texas RFRA shows that the Fifth Circuit has applied this standard to religious land use prior to *Smith.* The case on point provides a framework to follow because it clearly applied the *Sherbert-Yoder* standard, analyzing the religious claimant's burden and the government's interests. The case shows that the *Sherbert-Yoder* standard is workable and fair to both sides.

Other circuits have not set a clear standard for religious land use, so looking to them provides little guidance for religious land use cases under Texas RFRA. The Sixth Circuit dodged the issue by focusing on property rights rather than religious freedom. The Eleventh and Ninth Circuits found no burden on the religious claimants and then used a hodge-podge of cases to bring in lower standards of review from other areas of the law. The cases ruling against the religious claimants failed to enunciate the *Sherbert-Yoder* test and found no burden.

The line of cases favoring religious claimants recognizes that zoning is not an end in itself. These cases recognize that zoning can

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[254] *Id.* at 301.
[255] *Id.* at 302-03.

have a detrimental impact upon religion. The *Sherbert-Yoder* test is a fair and workable test that provides the proper construct for considering all interests in zoning cases. The interpretation of religious lands use cases under Texas RFRA should be no different from other religious claims. All religious claims under Texas RFRA should use the *Sherbert-Yoder* standard.