RELIGION AS SWORD, BUT NOT AS SHIELD: RECTIFYING THE ESTRANGEMENT OF ENVIRONMENTALISM AND RELIGIOUS LIBERTY

Justin W. Aimonetti* & Christian Talley*

Abstract

Over the past thirty years, a remarkable but unacknowledged shift has occurred in the relationship between environmentalism and religious liberty. For a brief period in the latter half of the twentieth century, the two fields stood in legal alliance. Relying on pre-1990 case law under which plaintiffs could attain strict scrutiny for incidental burdens on religious practice, litigants once enjoyed occasional success in enjoining governmental development projects harmful to both the environment and religious free exercise. This Essay terms such religious liberty claims advanced to protect the environment "Track I" claims. In its 1990 decision *Employment Division v. Smith*, however, the Supreme Court abandoned application of strict scrutiny to incidental burdens upon religious practice. Reacting to the *Smith* decision, Congress passed statutes intended to overrule *Smith*'s holding and to restore strict scrutiny for incidental burdens. Yet a paradoxical result ensued. Plaintiffs began to invoke religious liberty to gain religious exemptions from generally applicable environmental law. This Essay terms such claims advanced to gain exemptions from environmental protection laws "Track II" claims. Despite the advent of Track II claims, Track I claims have remained non-viable. The consequence has been the systematic use of religious liberty to evade environmental regulations, with no countervailing use to secure protections for the environment. This Essay documents the historical reasons behind that shift and proposes solutions to rectify the present disparity between Track I and Track II claims. If religion is to be a sword that can harm the environment, religion should also be a shield that can protect it, or else it should exit the battlefield altogether.

* J.D., Virginia, 2020; M.A., Virginia, 2020; B.A., Columbia, 2017. Winner of the Vermont Journal of Environmental Law's White River Environmental Law Writing Competition. We dedicate this Essay to all members of the UVA Law community adversely affected by COVID-19. We thank Professor Scott Ballenger, Dana Raphael, and Anna Cecile Pepper for insightful comments. All views and any errors are our own.

* J.D., Virginia, 2020; M.St., Oxford, 2017; B.A., Vanderbilt, 2016.

Table of Contents

Introduction....2
I. Track I Claims Under the *Sherbert* Strict Scrutiny Regime....5
II. *Smith* and the Creation of Parity Between Track I & Track II Claims....12
III. The Paradoxical Resurgence of Track II Claims....15
IV. Rectifying the Disparity Between Track I and Track II Claims....22
Conclusion....25

INTRODUCTION

Environmentalism and religious liberty might appear at first blush to be natural allies. Many religions encourage their adherents to protect the environment. In 2015, for example, Pope Francis released a lengthy papal encyclical, subtitled *On Care for Our Common Home*, urging Christians to preserve the earth and confront pollution and climate change.[1] Similarly, there is a robust strain of Jewish environmentalism informed by traditional Judaic doctrines yet responsive to modern environmental degradation.[2] No less compelling are the religious precepts of America's indigenous peoples. Indigenous religions often distinctively emphasize natural locales[3] — "[u]ndisturbed, unaltered, and pristine"[4]—in which to conduct traditional religious rituals. Under these and yet further belief systems,[5] religious faith and environmentalism each inform and fortify the other.

Despite this intuitive union, modern American religious liberty doctrine has embraced a counterintuitive model of interaction between environmentalism and religion. Religious liberty claims advanced to protect

1. POPE FRANCIS, LAUDATO SI': ON CARE FOR OUR COMMON HOME 3 (Vatican Press, 2015).

2. Ruth Sonshine et al., *Liability for Environmental Damage: An American and Jewish Legal Perspective,* 19 TEMP. ENVT'L. L. & TECH. J. 77, 98 (2000).

3. Robert S. Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J. OF L. & RELIGION 47, 60 (1985) ("American Indian traditions . . . have long been associated with particular areas.").

4. Brief for Respondent State of California at 22, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013), 1987 WL 880350, at *22.

5. *See*, *e.g.*, *Buddhism*, YALE FORUM ON RELIGION AND ECOLOGY, https://fore.yale.edu/World-Religions/Buddhism (last visited Dec. 8, 2020) (summarizing Buddhist concepts that engage with ecology, such as do no harm); Zainal Abidin Bagir & Najiyah Martiam, *Islam: Norms and Practices*, YALE FORUM ON RELIGION AND ECOLOGY, https://fore.yale.edu/World-Religions/Islam/Overview-Essay (last visited Dec. 8, 2020) (noting that local Muslim practice is "deeply and uniquely rooted in its own land"); *see generally* Mary Evelyn Tucker & John A. Grim, *Introduction: The Emerging Alliance of World Religions and Ecology*, 130 DAEDALUS n.4 (Fall 2001), https://www.jstor.org/stable/20027715 (discussing various religious tradition and attitudes toward nature).

the environment—what this Essay terms Track I claims—generally have failed, sometimes spectacularly, leading to new doctrinal restrictions on religious liberty.[6] The Supreme Court and lower courts have been unreceptive to claims employing religion as a shield against government intrusions upon the environment.[7] Conversely, claimants seeking religious exemptions *from* environmental regulations—what this Essay terms Track II claims—have proven more successful.[8] Alleging that certain environmental regulations unduly burden their religious exercise, Track II claimants have threatened litigation and evaded environmental protections nationwide.[9] Religion's primary utility in the field of environmental law has emerged, ironically, not as a shield, but as a sword.[10]

The historical arc that produced this estrangement of environmentalism and religious liberty was not inevitable. Rather, it hinged on specific decisions of Congress and the Supreme Court in the last thirty years. This Essay is the first to trace that historical path, from the natural alliance between environmentalism and religion to the present disunion.[11] In so doing, it proposes potential legislative and judicial reforms—reforms of particular relevance as the Court considers this term whether to overhaul its free exercise jurisprudence.[12] To set out this historical arc and the possible reforms it suggests, this Essay proceeds in four distinct parts.

Part I describes the Court's religious liberty jurisprudence as bookended by two watershed cases: *Sherbert v. Verner*,[13] decided in 1963, and *Lyng v.*

---

6. *See* Lyng v. Nw. Indian Protective Cemetery Ass'n, 485 U.S. 439, 451 (1988) (applying a novel and circumscribed test for infringement of religious free exercise to deny a tribal free exercise claim despite potentially "devastating effects" on tribal religious practice); *see also infra* Part I (exploring Track I claims' failure and describing various circuits' rejection of Native Americans' Track I claims).

7. *See, e.g.*, *Lyng*, 485 U.S. at 450, 452.

8. *See infra* Part III (examining Track II claims' success).

9. *Lyng*, 485 U.S. at 451.

10. Kevin M. Powers, *The Sword and the Shield: RLUIPA and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB. INT. L J. 145, 146 (2004) (declaring RLUIPA a "potent weapon in the quiver of religious groups").

11. *See infra* note 50 and accompanying text. Some scholars have explored the history behind RLUIPA, RFRA, and the *Sherbert* regime, but by and large they have done so in a vacuum, without reference to the intersection between environmentalism and religious liberty. *See also* Matthew Baker, *RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection*, 2008 B.Y.U. L. REV. 1213 (2008) (exploring RLUIPA's scope, but not the historical development); Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 10 (2009) (advocating for minimal application of RLUIPA); *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2178–79 (2007) (describing the use of RLUIPA as a litigation tool); *see generally* Whitney Travis*, The Religious Freedom Restoration Act and* Smith*: Dueling Levels of Constitutional Scrutiny,* 64 WASH. & LEE L. REV. 1701, 1704 (2007) (exploring the different standards under RFRA and *Smith*, but not in the environmental context).

12. *See* Petition for Writ of Certiorari at i, Fulton v. City of Philadelphia*,* No. 19-123 (2019) ("Whether *Employment Division* v. *Smith* should be revisited?"), *cert. granted*, 140 S. Ct. 1104 (U.S. argued Nov. 4, 2020).

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

Northwest Indian Cemetery Protective Association,[14] decided in 1988. *Sherbert* established an exemption era[15] with its holding that generally applicable laws that substantially burdened religious practice—even if doing so incidentally—could receive strict scrutiny.[16] Though religious exemptions were rare,[17] this strict scrutiny regime struck many as naturally congruent with free exercise challenges to environmentally harmful government action that burdened religious practice.[18] *Lyng*, however, dispelled these perceptions. In rejecting Native Americans' challenge to the government's proposed construction of a logging road through a tribal sacred site, the Court sharply clamped down on religious liberty claims altogether.[19] *Lyng* thus closed the courthouse doors to religious adherents advancing Track I environmental protection claims.

Part II documents the Court's rejection of the *Sherbert* exemption model in its 1990 decision *Employment Division v. Smith*.[20] Curtailing *Sherbert*, the *Smith* Court held that neutral and generally applicable laws that incidentally burden religion are subject only to rational basis review.[21] Grounding its decision in rule of law concerns, the *Smith* Court worried that religious challenges against neutral and general laws could undermine government objectives and promote "anarchy."[22] In the context of environmental concerns, the *Smith* Court specifically criticized Track II religious liberty claims being used to undermine generally applicable regulations protecting the environment.[23] Cabining *Sherbert*, in the Court's view, would block the possibility of religious exemptions eroding environmental regulations.[24]

Part III describes Congress's reaction to the *Smith* decision and a consequence of that reaction overlooked until now—the resurgence of Track

---

14. 485 U.S. 439 (1988).

15. Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1180 (2005) (discussing *Sherbert*'s exemption regime as, at least theoretically, "highly protective of religious liberty").

16. *Sherbert*, 375 U.S. at 403.

17. Duncan, *supra* note 15, at 1180–81 (discussing *Sherbert*-era courts' reluctance to grant exemptions and the various theories used to deny them).

18. The *Lyng* amici represent an interesting cross-section of groups that apparently subscribed to this view. They included the Christian Legal Society, the American Civil Liberties Union, Concerned Women for America, and the American Jewish Congress. *Lyng*, 485 U.S. at 441.

19. *See infra* Part I (examining *Lyng*'s amplification of the requirements for claims to receive strict scrutiny).

20. Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

21. *See id.* at 884–85 (declining to apply *Sherbert* test to free exercise challenges); Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1184 (2015) (stating that *Smith* "changed the level of scrutiny for free exercise claims back to the lowest level of scrutiny, rational basis review").

22. *Smith*, 494 U.S. at 888.

23. *See id.* at 886, 889 (criticizing track II-type claims as a "constitutional anomaly").

24. *See id.* at 888–89 (stating that respondent's rule would allow religious exemptions to environmental protection).

II religious liberty claims. In the wake of *Smith*, Congress attempted to overrule *Smith*'s central holding by passing two religious liberty statutes: the Religious Freedom Restoration Act (RFRA)[25] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[26] Both statutes restored *Sherbert*'s strict scrutiny analysis for religious claims made against government action, RFRA generally and RLUIPA specifically in the context of land use.[27] Though RLUIPA aimed to codify non-discrimination principles against religious entities, an odd result has ensued: Religious entities now may wield RLUIPA-based challenges to gain exemptions from local zoning and land use regulations intended to protect the environment.[28] Yet as these Track II claims against regulations have succeeded—as forewarned by *Smith*—Track I claims intended to *halt* environmentally harmful government action have failed. Part III explores the doctrinal reasons for, and normative consequences of, this discrepancy.

Part IV proposes congressional changes to RFRA and RLUIPA and judicial reform of the relevant case law to rectify the estrangement of environmentalism and religious liberty. In short, religious liberty doctrine should either recognize both Track I and Track II claims as cognizable, or it should disallow both. But there is no persuasive justification for the latter's success and the former's concurrent failure. If religion is to be a sword, religion should also be a shield, or else it should exit the battlefield altogether.

I. TRACK I CLAIMS UNDER THE *SHERBERT* STRICT SCRUTINY REGIME

The roots of both Track I and Track II claims can be traced to the Court's mid-century religious liberty jurisprudence. The Court's initial encounters with religious liberty claims reflected doctrinal instability. In *Gobitis*, the Court held that the free exercise clause was not violated even when the government *directly* compelled behavior antithetical to religious beliefs.[29] Three years later, the Court reversed its decision on indistinguishable facts, but under a free speech rationale.[30] The doctrine exhibited similar instability as the Court decided the level of scrutiny that should apply to state action *incidentally* harming religious practice. In cases like *Braunfeld v. Brown*, the Court first held that claims of incidental burden—asserted harms to religious

25. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

26. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, 2000cc-1-5 (2000).

27. Additionally, RLUIPA permits strict scrutiny for prisoners' religious claims. *See infra* Part III.

28. *See* 42 U.S.C. § 2000cc(a)–(b) (granting local land use zoning exemption for religious exercise); s*ee also infra* notes 127, 185–89 and accompanying text (explaining RLUIPA's original non-discrimination purpose).

29. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 607 (1940) (holding minority religious belief does not outweigh state's interest in school discipline).

30. W. Va. State Bd. of Educ. v. Barnette, 391 U.S. 624, 630, 642 (1943).

practice without a showing of discriminatory intent—were not cognizable under the free exercise clause.[31] Yet Justice Brennan, dissenting in *Braunfeld*, thought the majority's approach undercut the "preservation of personal liberty."[32] Irrespective of their neutrality and general applicability, laws could be potentially unconstitutional, in his view, so long as "their effect" was to substantially burden religion.[33]

A mere two years after penning his *Braunfeld* dissent, Justice Brennan wrote his views into law with his majority opinion in *Sherbert v. Verner*.[34] Speaking for the Court, Justice Brennan held that substantial burdens upon religious free exercise—even if such burdens were merely incidental—may trigger strict scrutiny.[35] In deciding in favor of a Seventh-Day Adventist who had been denied unemployment benefits after refusing to work on Saturdays, the Court set out a two-part framework that would govern religious liberty claims for the next twenty-seven years.[36] The first part of this analysis involved a three-prong threshold showing under which courts would determine whether a claim warranted strict scrutiny. Courts were to ask whether (1) the claimant was asserting a religious belief, (2) whether that religious belief was sincere, and (3) whether the government had imposed a "substantial burden" upon the asserted religious practice.[37] This third "substantial burden" prong had two constituent inquiries: (a) the "subjective" burden—whether the religious adherent perceived her beliefs were burdened—and (b) the "objective" burden—whether the government was indeed forcing the adherent into a tough choice between practicing religion or receiving secular benefits.[38] The Court held that Adele Sherbert's claim had satisfied all elements of this threshold showing.[39] Under standards that were initially deferential to claimants, it determined that she was both

31. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."); *see also id.* at 605–06, 608 (mentioning two other cases where individuals' religious practices conflicted with the public interest and distinguishing *Braunfeld* since the law at issue "simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive").

32. *Id.* at 610 (Brennan, J., concurring and dissenting).

33. *Id.* at 613, 615.

34. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that states' denial of public benefits based on individuals' religious practice is subject to strict scrutiny).

35. *Id.* at 403.

36. *Id*. at 403, 406, 408–09; Duncan, *supra* note 15, at 1179.

37. William D. Lay, *Free Exercise and the Resurgence of the Religious Freedom Restoration Act*, SAGE OPEN 1, 4 (2016).

38. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (restating the *Sherbert* test's operative inquiries).

39. *Sherbert*, 374 U.S. at 404.

asserting a religious belief and that her belief was sincere.[40] Moreover, the Court concluded, she perceived her free exercise to be burdened, as the government had forced her either to work and violate her religious beliefs or not work, preserve her beliefs, and go destitute.[41]

With this threshold showing satisfied, the burden then shifted to the government to justify its actions under a robust formulation of strict scrutiny. Under that inquiry, courts would ask, first, whether the incidental burden could be justified by a "compelling state interest."[42] And second, even if the government could point to some harm it sought to mitigate by curtailing religious practice, it would next have "to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[43] In *Sherbert* itself, the Court rejected South Carolina's admonitions about fraudulent claims upon the welfare system as insufficiently compelling to justify the burden imposed.[44] The Court, therefore, held that Sherbert was entitled to an exemption from the general rule that those voluntarily choosing not to work were ineligible for benefits.[45]

In the years following *Sherbert*, religious claimants employed that decision's two-step framework to seek exemptions from a wide variety of governmental regulations—from the assignment of social security numbers[46] to compulsory education.[47] Less studied has been religious adherents' use of the *Sherbert* framework to assert environmental religious liberty claims.[48] In practice, indigenous peoples were those who usually asserted Track I claims, as their spiritual practices often emphasize unaltered natural places in which to conduct religious ceremonies.[49] Government-sponsored development projects like logging, mining, and pipelines occasionally posed existential threats to these traditional belief systems.

The results of early Track I challenges that sought to enjoin such projects were mixed. On the one hand, though acknowledging that the free exercise

---

40. *Id.* at 404 (noting that the state ruled petitioner ineligible for benefits based solely on her religion).

41. *Id.*

42. *Id.* at 403.

43. *Id*. at 407.

44. *Id.*

45. *Id.* at 408–09.

46. Bowen v. Roy, 476 U.S. 693, 693–94 (1986).

47. Wisconsin v. Yoder, 406 U.S. 205, 205 (1972).

48. *See*, *e.g.*, Timothy A. Wiseman, *Why the Religious Freedom Restoration Act Cannot Protect Sacred Sites*, 5 AM. INDIAN L.J. 139, 141 (2017) (explaining that "the substantial burden test was not enough to protect Native American religions and their sacred places, either before or after the RFRA was passed"); *see generally* Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, *in* INDIAN LAW STORIES (Carole E. Goldberg, ed., 2011) (providing historical background on the case, but not discussing the historical arc's development).

49. Michaelsen, *supra* note 3, at 59–61.

clause constrained the government's ability to dispose of public lands, several circuits had rejected such claims.[50] The District of Columbia,[51] Sixth,[52] and Tenth Circuits[53] had held either that indigenous peoples suffered no substantial burden on their religious practice, failing the first step of the *Sherbert* test, or that a compelling interest backed the government's projects, failing the second step. On the other hand, the Ninth Circuit[54] and some district courts[55] determined that Native tribes had asserted meritorious Track I claims. Foremost among these were the Yurok, Karok, and Tolowa tribes' long-running resistance to the government's proposed construction of a commercial logging road in California's Six Rivers National Forest.[56] "For generations," members of those tribes had "traveled to the high country to communicate with the 'great creator,' to perform rituals, and to prepare for specific religious and medicinal ceremonies."[57] The significance of this location "to the Indian plaintiffs' religion [made it] central and indispensable" to their religious practice.[58]

The government's proposed development project, in turn, threatened to degrade the "pristine environment and [the] opportunity for [religious] solicitude" found in Six Rivers National Forest.[59] In the Tribes' view, the ensuing "environmental degradation of the high country . . . would erode the religious significance of the areas."[60] Specifically, constructing the logging road would cause a number of adverse environmental effects. The government conceded that its project would cause erosion, resulting in rock and debris slides that threatened to pollute nearby waterways, increasing sedimentation and endangering native marine life.[61] And after the road's construction, its use for commercial logging projects would generate noise

50. Wilson v. Block, 708 F.2d 735, 744 n.5 (D.C. Cir. 1983) ("The government must manage its land in accordance with the Constitution . . . which nowhere suggests that the Free Exercise Clause is inapplicable to government land.").

51. *See id*. at 741 (concluding a development project would not burden indigenous religious beliefs).

52. Sequoyah v. Tenn. Valley Authority, 620 F.2d 1159, 1164–65 (6th Cir. 1980) (dismissing the importance of a development site to Native American religious practices).

53. Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980) (holding the state's interest in a dam project compelling).

54. *See* Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 692 (9th Cir. 1986) (stating that Native Americans provided enough evidence to support their religious use claim).

55. *See* Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594–95 (N.D. Cal. 1983) (stating that Native Americans' communication with their creator would be disrupted by the Forest Service's proposal and concluding that the government's actions violated plaintiffs' free exercise of religion).

56. *Id.* at 594 (explaining the tribes' land use dates back generations).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 592.

61. *Id.* at 600.

and emissions from the heavy rigs used to haul harvested timber.[62] Given that the project "would seriously damage the salient visual, aural, and environmental qualities of the high country," the district court found the "intrusion . . . destructive of the very core of [Native American] religious beliefs and practices."[63]

On review, the Ninth Circuit endorsed the district court's conclusion that the logging road would substantially burden the indigenous peoples' religious exercise. Not mincing words, the panel explained that it "agree[d] with the district court that the proposed operations would interfere with the Indian plaintiffs' free exercise rights."[64] In the court's view, the land at issue was indeed central to the Tribes' longstanding and sincere religious practice.[65] Not only had the government failed to adequately account for the project's environmental impact,[66] but the Ninth Circuit disagreed that there was even a compelling interest in building the road.[67]

Recognizing this nascent circuit split, the Supreme Court granted the government's petition for certiorari on what ultimately became *Lyng v. Northwest Indian Cemetery Protective Association*. As the lower courts had progressively fractured, *Lyng* forced the Justices to confront uncertainties in *Sherbert*'s two-step framework. First among these was the showing required to establish a substantial burden on religious practice—one of the key threshold inquiries claimants had to satisfy before reaching strict scrutiny. In the years leading up to *Lyng*, courts generally had accepted claimants' assertions of "subjective" burden.[68] Courts also tended to defer on the questions whether claimants' beliefs were truly "religious" and whether those beliefs were sincere, under the longstanding principle that courts would not interrogate whether claimants had correctly interpreted their own religious creeds.[69] The courts' deference on those questions turned the "objective" component of the substantial burden prong into the last gatekeeper before plaintiffs could attain strict scrutiny.

In other Track I cases, lower courts had escaped invalidating governmental development projects under strict scrutiny by determining that

---

62. Brief for Respondent State of California, *supra* note 4, at 9–12.

63. *Peterson*, 565 F. Supp. at 594–95 (N.D. Cal. 1983).

64. Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 692 (9th Cir. 1986).

65. *Id.*

66. *Id.* at 696–97.

67. *Id.* at 695 (disclaiming that the government had "the compelling interest required to justify its proposed interference with the Indian plaintiffs' free exercise rights").

68. *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

69. *See Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."); United States v. Ballard, 322 U.S. 78, 86 (1944) (permitting inquiry into litigants' sincerity, but not whether beliefs were well-reasoned or true).

compelling governmental interests supported such projects.[70] The Supreme Court, similarly, had refused to grant exemptions by pointing to the importance of various governmental interests at stake, such as the smooth functioning of the nation's tax system.[71] But in *Lyng*, there was a serious question whether the government had a compelling interest in constructing a logging road in a remote corner of a national forest. The Ninth Circuit below had directly repudiated the government's assertion that its purported interest was compelling.[72]

To avoid the ramifications of declaring the government's interest *un*compelling, the *Lyng* Court instead revised the *Sherbert* framework. It heightened the showing needed to satisfy the "objective" burden, thus amplifying the requirements to receive strict scrutiny. Plaintiffs' accusations that the government was *harming* their religious beliefs, even profoundly so, would no longer be sufficient. Rather, under the *Lyng* formulation, claimants would have to show that the government's actions coerced them "into violating their religious beliefs" or "penaliz[ed]" believers for adhering to their religious practice.[73] Under this modified standard, the government's construction of the logging road would not *itself* coerce the indigenous believers into violating their religion.[74] Thus, despite the Court's concession that "the logging and roadbuilding projects at issue . . . could have devastating effects on traditional Indian religious practices," the Court concluded that the Tribes' claims were not cognizable First Amendment violations.[75]

Lyng's significance to free exercise doctrine was immediately apparent. One commentator, criticizing the Court's augmented strict scrutiny trigger, called it "the most troublesome decision on freedom of religion in more than 25 years." [76] What time has tended to obscure, however, is *Lyng*'s significance not merely as a religious liberty case, but also as an environmental rights case. The Tribes' assertion of a Track I claim was intended to protect not only their religious practice but the environment as well, as each interest was inextricably intertwined. Indeed, in addition to their free exercise claim, the Tribes pursued alternative theories under various

70. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980).

71. United States v. Lee, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

72. *Peterson*, 795 F.2d at 695 (9th Cir. 1986).

73. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

74. *Id.*

75. *Id.* at 451.

76. Stuart Taylor, Jr., *Justices Rule Religious Rights Can't Block Road: Other Religious Groups Fear the Ruling's Effects*, N.Y. TIMES (Apr. 20, 1988), https://www.nytimes.com/1988/04/20/us/supreme-court-roundup-justices-rule-religious-rights-can-t-block-road.html.

federal environmental statutes,[77] and several environmental interest groups served as co-plaintiffs.[78] And at the same time, private industry recognized the case as a nominal dispute about religious liberty, but centrally a conflict between environmental preservation and the economic stakes of resource development.

The clearest illustration of that point came from an amicus brief filed in *Lyng* by special interest groups representing the mineral and coal mining industries.[79] Their brief explained that "federal lands contain 85% of the nation's crude oil, 40% of the natural gas, 40% of the uranium, and 35% of the coal reserves."[80] It was over these lands that Native Americans had asserted a series of free exercise claims, seeking to block development projects that interfered with their religious practice. The industries explained that the lower courts' affirmation of Native religious rights would have to be rejected, or else "mineral exploration and development on public lands may be significantly impaired."[81]

The brief side-stepped the government's apparent lack of a compelling interest in *Lyng* itself by asking the Court to consider the issues presented in the case at a higher level of generality.[82] It claimed that the Ninth Circuit had erred by examining the merits of only "one particular proposal."[83] The proper inquiry, in the industries' view, was instead the government's general interest in "producing natural resources from public lands," which it submitted was "compelling."[84] Conceding that "freedom to believe is at the foundation of fundamental rights," the industries nonetheless argued that sincere religious beliefs "should not limit the government's use of its resources."[85] Rather, such claims of "spiritual disquiet"[86] would have to fall upon the altar of governmentally sponsored resource extraction.

Whatever persuasive weight the Court afforded the industries' request for retrenchment, that was precisely the effect the majority's opinion had. Clamping down on the threshold showing required for plaintiffs to receive strict scrutiny amounted to a functional foreclosure of Track I religious

77. *Lyng*, 485 U.S. at 443.

78. *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 590 (N.D. Cal. 1983). These included the Sierra Club, the Audubon Society, and the Northcoast Environmental Center.

79. *See generally* Brief of Colorado Mining Association et al. as Amici Curiae in Support of the Appellants, *Lyng*, 485 U.S. 439 (No. 86-1013), 1987 WL 880344 (stating the lower court's ruling "raises issues of paramount importance to those involved in the production of natural resources").

80. *Id.* at *2.

81. *Id.*

82. *Id.* at *15.

83. *Id.*

84. *Id.*

85. *Id.* at *17.

86. *Id.* at *14–15.

liberty claims.[87] Future claimants asserting non-'coercive,' incidental burdens were now entitled only to rational basis review, under which the government, as in *Lyng*, could easily justify its development projects. Yet for all the criticism *Lyng* attracted, the reaction was ultimately muted compared to the Court's forthcoming doctrinal revisions.

II. *SMITH* AND THE CREATION OF PARITY BETWEEN TRACK I & TRACK II CLAIMS

Just two years after the *Lyng* decision, the Court conducted yet another overhaul of its free exercise jurisprudence. In *Employment Division v. Smith*, the Court was asked to invalidate the denial of unemployment benefits for two drug rehabilitation clinic employees fired for ingesting peyote.[88] The respondents took the drug during a Native American religious ceremony, and they alleged that the resulting denial of unemployment benefits unduly burdened their religious free exercise.[89] Writing for the Court in *Smith*, Justice Scalia effectively overruled *Sherbert*.[90] Rather than portray the *Sherbert* framework as the baseline inquiry for free exercise analysis, he recast that framework as relevant only to "individualized governmental assessments," like South Carolina's adjudication of Adele Sherbert's benefits.[91] But neutral and generally applicable laws that incidentally burdened religion—even substantially so—would now receive only rational basis review under *Smith*.[92] Further, Justice Scalia reasoned that the respondents had not been fired because of their religious *beliefs*, but because their ingestion of an illegal drug constituted workplace misconduct.[93] And because those laws and regulations were neutral and generally applicable, rather than targeted at religious exercise, the respondents' claim for relief failed.

The *Smith* majority proffered several justifications for its holding. One was the view that the free exercise clause codifies a distinction between belief

87. *Lyng*'s objective burden threshold was so high "that few free exercise claimants could overcome" it. James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1415–16 (1992). *Lyng* thus did implicitly what *Smith*, two years later, did explicitly: terminate the exemption era. *See id.* at 1416 ("After *Lyng* it seemed the only sure way of demonstrating a burden would be to show that the particular religious practice in question was criminally prohibited.").

88. Emp't Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 874 (1990).

89. *Id.*

90. *Id*. at 874, 878–88.

91. *Id.* at 884.

92. *Id.*; *see also* Rummage, *supra* note 23, at 1184 (explaining such claims would receive only rational basis review).

93. *Smith*, 494 U.S. at 874, 876.

and conduct.[94] Though the government may not target conduct *solely* for its religious nature, it may pass neutral and generally applicable regulations that incidentally burden religious conduct.[95] Indeed, Justice Scalia disavowed the conclusion that the Court had ever held that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[96] A second rationale was the potential "anarchy" that might result if a religious claimant could obtain an exemption from generally applicable laws; were such exemptions available, a successful religious claimant could become "a law unto himself."[97] That "anarchy" had not resulted under *Sherbert* was not, in his view, a reason to retain that regime, but was instead an indication that the Supreme Court had never taken *Sherbert* seriously.[98] Whether by finding the government's interests compelling or by framing claimants' religious burdens as insubstantial, the Court had recognized only a handful of exemptions during *Sherbert*'s quarter-century reign.[99]

Justice Scalia also invited readers to envision the "parade of horribles"[100] that might ensue if the Court were to strictly adhere to *Sherbert*.[101] If religious claims were valid grounds for exemption from generally applicable laws, it might lead to the erosion of laws regulating taxation, mandatory vaccinations, drugs (as in *Smith* itself), the minimum wage, child labor, civil rights, and—most relevant for our purposes—"*environmental protection laws*."[102] The rule of law, in Justice Scalia's view, was incompatible with a theory of religious liberty that would make Swiss cheese of such a panoply of socially important regulations.

Though typically not considered in the vanguard of environmental defenders, Justice Scalia revealed a deep insight about the interaction of environmentalism and religious liberty.[103] His point concerned the normative undesirability of Track II religious liberty claims—how religious liberty might be used as a sword to evade environmental protections. The case he

---

94. *Id.* at 879, 882.

95. *Id.* at 877–78.

96. *Id.* at 878–79.

97. *Id.* at 879, 888.

98. *See id.* at 883 ("Although we have sometimes purported to apply the *Sherbert* test in contexts other than [unemployment benefits], we have always found the test satisfied.").

99. *See id.* at 883–84.

100. *Id.* at 902 (O'Connor, J., concurring in the judgment) (so labeling the majority's list of generally applicable laws that might be evaded with religious exemptions).

101. *Id.* at 889.

102. *Id.* (emphasis added).

103. *Id.* at 891; *see, e.g.*, Dan Farber, *Justice Scalia and Environmental Law*, BERKELEY BLOG (Feb. 17, 2016), https://blogs.berkeley.edu/2016/02/17/justice-scalia-and-environmental-law/ ("Justice Scalia did much to shape environmental law, nearly always in a conservative direction . . . If Scalia had lived, he clearly would have pushed to expand on these precedents, further weakening environmental protection.").

cited as illustrative of this pitfall was the Montana federal district court case *United States v. Little*.[104] In *Little*, the federal government had charged the defendant, Swede Little, with illegally harvesting trees for firewood in a National Forest.[105] Tried and convicted before a magistrate, Little sought review in the district court.[106] Though conceding that he had taken the timber, the gravamen of his defense was that prosecuting him violated his free exercise rights.[107] According to Little, "in all scriptural references pertaining to the gathering and using of firewood, God never implies that a king, ruler[,] or any individual has ownership over it."[108] Little thus contended that "the permits and fees required by the U.S. Forest Service are a violation of our God-given rights guaranteed by the U.S. Constitution."[109] The district court ultimately rejected his religious claim, finding him guilty of violating the regulations.[110] Yet the potential that the district court might have reached a different result under *Sherbert* apparently struck Justice Scalia as a latent danger of that regime.

Smith's implications for the relationship between environmentalism and religious liberty were thus double-edged. *Smith*, it is true, disallowed Track I claims intended to protect the environment from damaging governmental intrusions that incidentally burdened religious practice. But the *Smith* Court also rejected Track II claims because of such claims' potential to confound environmental regulations. *Smith* was thus an exercise in taking the bitter with the sweet. Much like it promoted "equal liberty" by refusing to elevate religious claims above weighty claims of secular conscience,[111] *Smith* leveled Track I and Track II claims by making each non-cognizable.

Whatever *Smith*'s merits, though, the backlash was fierce. Scholars and pundits labeled the decision "a sweeping repudiation of nearly a century of humane and enlightened legal precedent,"[112] "an affront to our society's hard-won pluralism,"[113] and "the most dangerous attack on our civil rights in this country since the Dred Scott decision."[114] The significance of *Smith* was

---

104. *Smith*, 494 U.S. at 889 (citing United States v. Little, 638 F. Supp. 337 (D. Mont. 1986)).

105. *Little*, 638 F. Supp. at 338.

106. *Id.*

107. *Id.* at 338–39.

108. *Id.* at 339.

109. *Id.*

110. *Id.* at 340.

111. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION, 52–53 (Harvard Univ. Press 2007).

112. *The Necessity of Religion: High Court Says Religious Freedom is a Luxury—Wrong*, L.A. TIMES (Apr. 19, 1990), at B6; *see also* Ryan, *supra* note 87, at 1409–12 (cataloguing the backlash in the wake of the *Smith* decision).

113. L.A. TIMES, *supra* note 112.

114. Ed Briggs, *Rabbi Deplores Supreme Court Trend on Freedom of Worship*, WASH. POST (Oct. 26, 1991), https://www.washingtonpost.com/archive/local/1991/10/26/rabbi-deplores-supreme-court-trend-on-freedom-of-worship/2a5235d9-30a1-420a-8284-f85d31d06881/.

not lost upon Congress either. Reacting to the abandonment of *Sherbert*, it soon passed the Religious Freedom Restoration Act of 1993. RFRA, as it became known, rejected *Smith* by name and purported to re-establish *Sherbert*'s strict scrutiny framework against both federal and state action incidentally burdening religious practice.[115] After the Court's invalidation of RFRA in 1997 as applied to the states,[116] Congress responded with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). RLUIPA again codified *Sherbert*'s standard against the states,[117] yet its scope was limited to land use laws and prisoners' free exercise rights.[118] It was this legislative assault on *Smith* that produced the paradoxical result catalogued in Part III—the resurgence of Track II religious liberty claims.

III. THE PARADOXICAL RESURGENCE OF TRACK II CLAIMS

The rise of successful Track II religious liberty claims—and the concomitant lack of successful Track I claims—is tethered to the disuniform patchwork of scrutiny applied to religious liberty challenges after the last thirty years of doctrinal churn. Though RFRA purported to resurrect strict scrutiny for incidental burdens against government action at both the federal and state levels, the Court in *City of Boerne v. Flores* concluded that RFRA was inapplicable to the states.[119] In a reassertion of judicial supremacy, the Court held that RFRA exceeded Congressional power under Section V of the Fourteenth Amendment.[120] Congress's failure to compile a factual record justifying the federal government's intrusion on state prerogatives led the Court to conclude that RFRA lacked "congruence and proportionality" with the asserted state-level harms.[121] In some applications, RFRA may still apply a *Sherbert*-like test to *federal* action, but the law remains unenforceable against the states.

At the same time, *City of Boerne* gave Congress a roadmap for a second shot at re-instituting strict scrutiny for at least certain classes of claims. Congress did so three years later in RLUIPA, subjecting state and local land use decisions that burden religious liberty to strict scrutiny.[122] Congress's detailed record about the purported need for the renewal of strict scrutiny in

115. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb(a)(4), 2000bb(b)(1) (1993) (rejecting the holding in *Smith* by name).

116. City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997) (holding RFRA inapplicable to states).

117. Protection of Land Use as Religious Exercise, 42 U.S.C. §§ 2000cc, cc-1 (2000).

118. *Id.* §§ 2000cc(a)(1), cc-1.

119. *City of Boerne*, 521 U.S. at 534, 535.

120. *Id.* at 519.

121. *Id.* at 530.

122. 42 U.S.C. § 2000cc(a)(2).

this area [123] has allowed RLUIPA to survive various constitutional challenges.[124] And therein lies the first of several key reasons for Track II claims' resurgence: given RFRA's inapplicability to the states—where the vast majority of cases are filed[125]—Track I incidental burden claims are subject only to rational basis review under the *Smith* regime. Yet Track II claims to *avoid* land use regulations under RLUIPA can often receive strict scrutiny. Thus, in states that have neither passed their own state RFRAs nor interpreted their constitutions as codifying a *Sherbert*-like standard,[126] land use decisions represent a central battleground where religious plaintiffs may attain heightened review.

Despite RLUIPA's original purpose as an anti-discrimination statute,[127] courts have interpreted its provisions as reflecting a legislative mandate that religious concerns are to be prioritized over environmental protections.[128] In the words of one federal judge, religious uses "are favored property uses," requiring state authorities "to weigh their needs heavily against environmental concerns."[129] Unlike RFRA's general command to restore *Sherbert*, a case that had systematically failed to produce broad exemptions, RLUIPA's hyper-specific mandate has emboldened plaintiffs and jurists. RLUIPA—as the *Smith* Court prophesied—has created a pathway for religious litigants to assert Track II claims against generally applicable land use regulations put in place to protect the environment.

---

123. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 943 (2001) (noting that RLUIPA "narrowed the sweep of the legislation to those areas of law where the congressional record . . . was the strongest.").

124. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 725 (2005) (upholding RLUIPA's institutionalized persons provisions). The constitutionality of RLUIPA's land use provisions remains an open question. *See* Zachary Bray, *RLUIPA and the Limits of Religious Institutionalism*, 2016 UTAH L. REV. 41, 62 (2016) ("[T]he Supreme Court . . . has not directly addressed the constitutionality of RLUIPA's land use provisions."); Kellen Zale, *God's Green Earth? The Environmental Impacts of Religious Land Use*, 64 ME. L. REV. 207, 227 (2011) (same).

125. *See* NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, at v (2015).

126. And nineteen states, including some of the nation's most populous and economically important, such as California and New York, have not. *See* Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/?arc404=true.

127. Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (justifying RLUIPA's "substantial burden" test as a protection against intentional discrimination); *see also* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1025 (2012) (concluding that "twelve years of precedent show that RLUIPA was and is needed" to address the "hostility and discrimination" that churches face).

128. *See* Bray, *supra* note 124, at 45 ("[C]ourts' increasing willingness to accord special solicitude to religious institutions has . . . threatened to subvert many legitimate aims of local government in the land use context.").

129. Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 572 (S.D.N.Y. 2006), *aff'd*, 504 F.3d 338 (2d Cir. 2007).

Understanding that RLUIPA challenges might lead to costly and protracted litigation—with the possibility of having to pay attorney's fees should they lose[130]—localities tread lightly when enforcing their land use restrictions against religious entities. Indeed, "megachurches and other expanding religious institutions" have evaded environmental laws and secured exemptions from "environmental land use regulations that otherwise ought to apply, based on little more than the institutions' allegedly distinctive religious nature."[131] Such exemptions are particularly problematic when considering that "the environmental impact of religious land development has steadily grown in recent years, to the point where it now approximates or exceeds the environmental impact of large-scale commercial land development."[132]

RLUIPA's expansive text has bolstered the resurgence of Track II claims. RLUIPA broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[133] Religious plaintiffs are able to frame their "religious exercise" in general terms, and current doctrine prohibits courts from questioning the validity of claimants' beliefs.[134] RLUIPA also imprecisely defines a "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land . . .."[135] Courts have thus been left with "the daunting challenge of determining the boundaries of RLUIPA's application and force."[136]

Responding to this challenge, courts have broadly construed RLUIPA's language to sweep under its purview a wide array of environmental regulations,[137] which are often intertwined with zoning laws. Zoning laws

---

130. *See* 42 U.S.C. § 1988(b) (2012) (permitting award of attorney's fees to prevailing religious claimants); *see also* Bray, *supra* note 124, at 67 ("[T]he most practically significant aspect of the statute may be the discretion it affords courts to award prevailing religious claimants their attorneys' fees.").

131. Bray, *supra* note 127, at 84.

132. *Id.* at 65.

133. 42 U.S.C. § 2000cc-5(7)(A) (2000).

134. *See* Bray, *supra* note 127, at 83 ("[C]ourts tend to eschew any close examination of the sincerity or the centrality of the religious beliefs at issue . . ..").

135. 42 U.S.C. § 2000cc-5(5), 5(7)(B) (defining religious exercise to include "[t]he use, building, or conversion of real property for the purpose of religious exercise"); *see also* Patricia Salkin & Amy Lavine, *God and the Land: A Holy War Between Religious Exercise and Community Planning and Development*, 2 ALB. GOV. L. REV. 8, 10 (2009). Congress inadvertently muddied the statutory waters even further by instructing courts to construe RLUIPA's provisions "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. § 2000cc-3(g).

136. Baker, *supra* note 11, at 1215.

137. *See* Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806 (2006) (arguing that RLUIPA's overly broad statutory language has made churches effectively "immune from local zoning laws").

often take indirect aim at environmental concerns,[138] and "local land use laws are increasingly being used to accomplish a wide range of environmental objectives."[139] Recently, zoning laws have been "implemented with the sole, not incidental, goal of protecting environmental interests."[140] Erosion control measures, riparian setbacks, storm water management protocols, and tree mitigation requirements all serve the principal goal of ensuring "that land users control use of their property and limit damage to natural resources and ecosystems."[141] Some scholars' assertions that "environmental justice goes to the core of traditional land use decisions,"[142] as "local land use laws have morphed into local *environmental* land use laws,"[143] are thus unsurprising.

Despite the upswing in environmentally conscious zoning efforts, RLUIPA presents new challenges for local governments defending such regulations.[144] When the government fails to show either a compelling interest or narrow tailoring, a religious plaintiff can evade an environmental zoning regulation "without ever having to prove that its religious exercise was thwarted because of discrimination."[145] RLUIPA thus "provides a powerful legal tool to congregations that wish to . . . build a parking lot or expand their buildings in defiance of municipal restrictions."[146] As one commentator put it, "[a]ny time a church is denied permission to use its land for any church-related purpose—including the construction of a high-rise business building, a towering tabernacle or a radio antenna—RLUIPA intervenes."[147] Some have even argued that "by allowing religious entities to use their property in ways that no other land users can, [RLUIPA] threatens to undermine local environmental protection efforts nationwide."[148]

---

138. Bray, *supra* note 124, at 65 ("[L]arge parking lots lead to increased mobile source air pollution, storm water runoff, and erosion.").

139. Zale, *supra* note 124, at 222; *see* John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 23 PACE ENVTL. L. REV. 705, 706 (2006) (exploring the authority of local governments to protect the environment); DANIEL P. SELMI ET AL., LAND USE REGULATION: CASES AND MATERIALS 3 (4th ed. 2012) ("[T]he fields of environmental law and land use law are converging.").

140. Zale, *supra* note 124, at 213; *see* Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 B.U. L. REV. 227, 239 (2011) (noting that zoning laws in an increasing number of states now require environmental review).

141. Zale, *supra* note 124, at 213–14.

142. Patricia Salkin, *Environmental Justice and Land Use Planning and Zoning,* 32 REAL EST. L.J. 429, 429 (2004).

143. Patricia Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 127–28 (2003) (emphasis added).

144. Serkin & Tebbe, *supra* note 11, at 4, 15.

145. *Id.* at 11, 23 n.81.

146. *Id.* at 2.

147. Lawrence G. Sager, *Panel One Commentary*, 57 N.Y.U. ANN. SURV. AM. L., July 2001, at 14; *see also* Bray, *supra* note 124, at 64 (documenting RLUIPA's intervention when religious entities are prevented from using their own land as they see fit).

148. Zale, *supra* note 124, at 210 ("RLUIPA's message to churches is that they can expand without regard to the detrimental impact of their development.").

Westchester Day School v. Village of Mamaroneck illustrates the renewed success of Track II claims.[149] In that case, a private Orthodox Jewish day school sought a modification from its existing special permit to construct a 44,000-square-foot building and to make related improvements to its campus.[150] Under the village zoning ordinance, the school's request required approval from the Village administrative body empowered to consider applications for special permits.[151] After a public hearing, the Village permitted the project to proceed,[152] despite environmental concerns about the proposed parking lot and the need to "preserv[e] the existing mature trees on site."[153] After public outcry, and upon reconsideration of the environmental impact, the Village rescinded the decision and instead required the school to undertake additional environmental studies.[154]

The school sued, arguing in part that the Village's rescission of its permit violated RLUIPA.[155] After protracted litigation, the district court concluded that there were less restrictive means available to address the environmental concerns, as "the evidence indicates that any adverse environmental impact of the size of the building and the set-back . . . could have been mitigated . . . through imposition of conditions," instead of outright rejection.[156] The court then concluded that under RLUIPA, "religious schools are favored property uses[,] and zoning boards are adjured to weigh their needs heavily against environmental concerns."[157] A weighing of the school's "pressing need against the relatively minor adverse environmental impacts" compelled a finding that the Village's rescission of the special permit contravened RLUIPA.[158]

Another example of renewed Track II success involved a Boulder, Colorado megachurch's objection to several neutral, environmental regulations. Boulder maintains "a comprehensive system of land use regulations designed to mitigate the slow chokehold of ever-encroaching development on wetlands and open space, on groundwater and soils, and on wildlife and native species."[159] The Boulder-based Rocky Mountain Christian Church proposed building a 6,500-square-foot chapel and

149. Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 572–73 (S.D.N.Y. 2006), *aff'd*, 504 F.3d 338 (2d Cir. 2007) (holding defendants "substantially burdened WDS's religious exercise without a compelling governmental interest exercised in the least restrictive means, in violation of the Religious Land Use and Institutionalized Persons Act").

150. *Id.* at 483.

151. *Id.* at 483, 505.

152. *Id.* at 509–10.

153. *Id.* at 510.

154. *Id.* at 512.

155. *Id.* at 482–83.

156. *Id.* at 553.

157. *Id.* at 572.

158. *Id.*

159. Zale, *supra* note 124, at 208.

expanding its school by 57,500 square feet.[160] County land use staff opposed the proposal because it would have harmed the surrounding environment.[161] The County denied the plan, and the Church sued under RLUIPA, arguing that the denial, which stemmed from environmental zoning law, substantially burdened its right to religious exercise.[162] The district court sided with the plaintiffs, finding the burden on religious practice substantial.[163] The Tenth Circuit affirmed, holding "that Boulder's zoning laws, limiting development in environmentally sensitive rural areas, violated the megachurch's right to religious exercise under . . . federal law."[164] The Tenth Circuit's decision, according to one commentator, "foreshadow[s] how RLUIPA could lead to a 'death by a thousand cuts' for environmental protection efforts across the nation."[165] Put differently, the decision represents the viability of Track II claims and the use of religious liberty as a sword to evade environmental regulations.[166]

Paradoxically, though religious institutions have successfully asserted Track II claims in the wake of RLUIPA, religious adherents asserting Track I claims under RFRA have fared poorly, despite each statute purporting to codify the same standard.[167] As mentioned, RFRA's invalidation as applied to the states necessarily forecloses many potential state-level claims under the *Smith* regime. And though courts have taken RLUIPA as a mandate to vigorously police land use regulations, RFRA's general codification of pre-*Smith* case law leaves Track I claims (when RFRA even applies to them) susceptible to all the same mechanisms by which courts traditionally declined to grant exemptions under *Sherbert*.

Take, for instance, *Navajo Nation*, a case in which a Native American group mounted a RFRA challenge to the Forest Service's approval of a plan to convert wastewater into artificial snow to establish a ski resort on a tribal sacred site.[168] A three-judge panel of the Ninth Circuit concluded that the

160. Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1234 (10th Cir. 2010).

161. *Id.* at 1234–35.

162. *Id.* at 1230, 1235.

163. Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty., 612 F. Supp. 2d 1163, 1163 (D. Colo. 2009).

164. Zale, *supra* note 124, at 209.

165. *Id.* at 222.

166. *Id*.

167. *See* Zale, *supra* note 124, at 217–18. Theoretically, nothing bars the assertion of an RLUIPA Track I claim. Religious entities could rely on the statute to challenge a local land use law that simultaneously harmed the environment *and* burdened religious practice; for instance, if a locality changed zoning laws to permit constructing smog-producing factories around a church that imposed a nuisance on parishioners. Historically speaking, however, given the convergence of zoning and environmental regulations, RLUIPA challenges have been of the Track II variety. *See supra* Part II (describing RLUIPA challenges to evade environmental regulations).

168. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1065 (9th Cir. 2008) (en banc).

Forest Service's approval "violates the RFRA."[169] On review of the panel's decision, the *en banc* Ninth Circuit agreed that "the Native Americans held sincere religious beliefs and were engaged in the exercise of religion on the Peaks."[170] Yet it concluded that the initial burden of proof was on the Native Americans to establish that the wastewater scheme "placed a substantial burden on their exercise of religion."[171] Under the court's threshold analysis, the wastewater "did not place a cognizable substantial burden upon them," and thus their claim failed to trigger strict scrutiny.[172] Echoing *Lyng*, the *en banc* court overrode the three-judge panel, disagreeing that the burden to religious practice was substantial despite "acknowledging that there may be a serious diminishment of the spiritual fulfillment of Native Americans who practice their religion on this peak," and that the project was "offensive to their religious sensibilities."[173] Compared to the success of Track II claims under RLUIPA, it is certainly "ironic that RFRA [has] failed to protect Native American[s], considering that it was enacted in response to [*Smith*], which centered on Native American religious beliefs."[174]

Other salient and recent Track I failures have reinforced the Track I-Track II disparity. In response to the Dakota Access Pipeline (DAPL) construction project—the genesis of a yearlong protest effort—the Standing Rock Sioux Tribe filed a RFRA challenge in 2017.[175] In its complaint, the Tribe asserted that "numerous . . . spiritual sites [exist] beneath the waters of the proposed DAPL pipeline crossing," and that the water from the lake "play[ed] a central role in the religious and cultural beliefs of the Tribe," as it was "used in numerous traditional ceremonies."[176] Allowing the construction of the pipeline would thus "negatively impact the Tribe's and its members' ability to conduct traditional medicinal and spiritual ceremonies and practices."[177]

---

169. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1029 (9th Cir. 2007), *overruled by* 535 F.3d 1058 (9th Cir. 2008) (en banc); Wiseman, *supra* note 52, at 152–53.

170. *Navajo Nation*, 535 F.3d at 1073 ("Plaintiffs in this case, despite their sincere belief that the use of recycled wastewater on the Peaks will spiritually desecrate a sacred mountain, cannot dictate the decisions that the government makes in managing 'what is, after all, *its* land.'"); Wiseman, s*upra* note 48 at 152.

171. *Navajo Nation*, 535 F.3d at 1068; Wiseman, s*upra* note 48, at 152.

172. Wiseman, s*upra* note 48, at 153; *see Navajo Nation,* 535 F.3d at 1070 ("Applying *Sherbert* and *Yoder*, there is no 'substantial burden' on the Plaintiffs' exercise of religion in this case.").

173. *Navajo Nation*, 535 F.3d at 1070; Wiseman, *supra* note 48, at 153.

174. Zale, *supra* note 124, at 216 n.62. Certainly, "[a] key underlying distinction between *Navajo Nation* and most RLUIPA cases is that the religious entity in *Navajo Nation* had no property interest in the subject land . . . RLUIPA requires that a religious entity must have a property interest in the land at issue." *Id.*

175. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 80 (D.D.C. 2017); Edward K. Olds, *Trespass and Vandalism or Protecting That Which Is Holy? The Missing Piece of Religious Liberty Land-Use Claims*, 119 COLUM. L. REV. ONLINE 18, 26–27 (2019).

176. *Standing Rock Sioux Tribe,* 239 F. Supp. 3d at 86.

177. *Id.*

Despite concluding that the Tribe was "likely to successfully establish a sincerely held belief that the presence of oil in the Dakota Access pipeline running under Lake Oahe interferes with its members' religious ceremonies,"[178] the district court nevertheless held the Tribe "unlikely to succeed on the merits of its RFRA claim."[179] It reasoned that "*Lyng* likely prevents the Tribe from showing that the Corps' decision to grant an easement to Dakota Access to operate an oil pipeline under Lake Oahe constitutes a substantial burden on its members' free exercise of religion."[180] Under *Lyng*'s heightened objective burden inquiry, tribes were once again blocked from reaching strict scrutiny.

This lack of success for Track I claimants extends beyond the rejection of just Native Americans' RFRA-based challenges. Most recently, the Supreme Court declined to review a case involving a group of Roman Catholic nuns, the Adorers of the Blood of Christ, who oppose the construction of a high-volume natural gas pipeline directly through their property.[181] Inspired by Pope Francis's 2015 encyclical, the Adorers embrace a sincere religious duty to protect and nurture the unaltered land.[182] After the Federal Energy Regulatory Commission issued a conditional certificate to build the pipeline, "the Adorers filed a claim pursuant to [RFRA] in district court to prospectively enjoin the construction and use of the pipeline on their property."[183] The lower courts ultimately dismissed their appeal in light of a complicated jurisdictional issue discovered during the litigation, and the Supreme Court declined to grant review.[184] But if history provides any insight, the Adorers' claim might have met a similar fate on the merits.

IV. RECTIFYING THE DISPARITY BETWEEN TRACK I AND TRACK II CLAIMS

The free exercise clause was framed some 230 years ago in recognition of the fact that "small minorit[ies]" would entertain "in good faith . . . religious belief[s]" that engendered "little toleration or concern" from society's most powerful interests.[185] The gu

arantee of free exercise, like the Bill of Rights itself, sought "to withdraw certain subjects from the vicissitudes of political controversy."[186] Yet the historical arc detailed in the preceding pages stands in contrast to those

178. *Id.* at 91.
179. *Id.* at 100.
180. *Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 100.
181. Adorers of the Blood of Christ v. Fed. Energy Regulatory Comm'n, 897 F.3d 187, 190 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1169 (2019).
182. *Id.* at 191.
183. Petition for Writ of Certiorari at 2, Adorers of the Blood of Christ v. F.E.R.C. (No. 18-548).
184. *Adorers of the Blood of Christ*, 897 F.3d at 190.
185. Minersville School Dist. v. Gobitis, 310 U.S. 586, 606 (1940) (Stone, J., dissenting).
186. W. Va. St. Bd. Of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

principles. Religious minorities—like the Sioux, the Yurok, and the Navajo—and the politically disenfranchised—like the Adorers—have found no refuge in their Track I claims. Large institutions like some megachurches, however, have benefitted from the Track II model, using religious liberty to gain exemptions from environmental protections. Whatever the independent merits of either Track, there is no persuasive justification for this Track I-Track II disparity. In response, this Essay now advocates three potential solutions.

The first is to alter the current interpretation of RLUIPA to principally target discriminatory governmental action. When RLUIPA was passed in response to the Court's invalidation of RFRA as applied to the states, Congress intended the Act to address the "nationwide problem" of discrimination against religious entities in the zoning process.[187] Congress did not aim to provide "a free pass" to religious entities that elevates religious land use above neutral environmental zoning laws.[188] Instead, RLUIPA was fashioned with a special concern for "[s]maller and less mainstream denominations"—entities that are particularly vulnerable to "discriminatory regulation" from local governments.[189]

Yet at present, RLUIPA is interpreted to grant religious entities "advantages that no other land users enjoy, as well as providing them with economic and legal incentives to intimidate local governments."[190] Rather than smoke out discrimination, RLUIPA "has instead extended sweeping exemptions and unnecessary leverage to powerful religious organizations regardless of whether they have faced or are facing discrimination."[191] The statute's imprecise language, broad judicial interpretations, and the threat of attorney's fees all combine to lend religious claimants "substantial leverage when disputes arise." [192] In some cases, claimants with substantively meritless claims can leverage the threat of litigation to garner favorable exemptions from neutral environmental zoning regulations. [193] As one commentator put it, "the prospect of having to [pay attorney's fees],

187. 106 CONG. REC. 16698, 16699 (2000) (statement of Sen. Hatch) ("[D]iscrimination against religious uses is a nationwide problem."); *see also id.* at 16698 (explaining the "massive evidence" of widespread discrimination against churches); Zale, *supra* note 124, at 229 (proposing that RLUIPA be "refocus[ed] . . . on its intended purpose of eliminating religious discrimination.").

188. Zale, *supra* note 124, at 236.

189. *See* H.R. REP. NO. 106-219, at 24 (1999); *see also* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1839 (2004) ("The charge is that localities enforce religious bigotry through the strategic use of often vague and standardless land-use ordinances and development processes.").

190. Zale, *supra* note 124, at 228.

191. Bray, *supra* note 124, at 102.

192. *Id.* at 67.

193. *Id.* at 102 ("[M]any religious organizations have been able to dictate the terms of their land use to local governments, impairing local governments' ability to plan for and control externalities arising out of a wide range of land uses not previously considered particularly religious.").

combined with the murky nature of the statute's substantive provisions, frequently creates substantial pressure on local governments to compromise or settle even relatively weak RLUIPA claims."[194] To arrest litigants from prevailing on such meritless Track II claims, Congress could revisit RLUIPA's text, clarifying its anti-discrimination purpose[195] and making attorney's fees available only when discrimination is readily apparent.[196]

Second, Congress could revisit RFRA's text and explicitly allow for Track I claims. Though the Court has foreclosed RFRA's application to the states, cases like *Navajo Nation* and *Standing Rock Sioux Tribe* reveal that it could still perform important work at the federal level.[197] Yet the central barrier remains the *Lyng* decision, which was incorporated into RFRA when Congress codified pre-*Smith* case law.[198] To circumvent *Lyng*, Congress could simply amend the statute to clarify that damage or destruction of religious sites is cognizable under the statute's strict scrutiny standard. Though the nearly unanimous coalition that passed RFRA in 1993 is today "fraying at the seams and is in danger of permanent disintegration,"[199] such a statutory modification would be circumscribed. It would also not engender the typical concerns about third-party harms, given Track I plaintiffs' sincerity and mere desire to preserve sacred religious sites.[200]

Third, the Supreme Court could revisit *Smith* and legitimize Track I claims. Though revision of precedent ordinarily would be an ambitious

---

194. *Id.* at 67–68.

195. This Essay, unlike others, contends that remedying the current disparity between Track I and Track II claims does not require RLUIPA's *repeal*. In fact, RLUIPA serves a valuable purpose in protecting religious entities from discriminatory governmental conduct, including the discriminatory use of environmental zoning regulations. *See* Roman P. Storzer & Blair Lazarus Storzer, *Christian Parking, Hindu Parking: Applying Established Civil Rights Principles to RLUIPA's Nondiscrimination Provision*, 16 RICH. J.L. & PUB. INT. 295, 295–96 (2013) ("While there is no question that local zoning boards and other regulatory bodies are often motivated by sincere concerns about matters such as . . . environmental protection, and adherence to building codes, it is also true that such reasons are often used as a façade for invidious discrimination.").

196. Courts engage in similar balancing under other statutes, such as the decision whether to award attorney's fees in copyright infringement cases. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994) (recognizing nonexclusive factors to consider in making awards of attorney's fees).

197. *See supra* Part III (describing compelling but unsuccessful federal RFRA claims).

198. *See supra* Parts I, II & III (describing pre-*Smith* case law and RFRA's codification of it).

199. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 Yale L.J. F. 416, 418 (2016).

200. And third-party harms are a concern only if one assumes that principle exists in free exercise analysis. *See, e.g.*, Christopher C. Lund, *Religious Exemptions, Third Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1376 (2016). A possible example is the use of religious exemptions to engage in behavior that some may label invidious discrimination; for instance, declining based on religious convictions to sell gay couples custom-made wedding cakes. *See also* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Anti-Discrimination Law in* Masterpiece Cakeshop, YALE L.J.F. 201 (2018). As in *Lyng*, the mere preservation of an isolated sacred site would not effect invidious discrimination or even a particularly significant third-party harm. The Tribes did not argue that the logging activity should be categorically barred, only that it should not occur upon their sacred site.

request, the Court has already agreed to reconsider *Smith* this term.[201] If the Court overrules that decision and re-institutes a *Sherbert*-like religious liberty regime, it should make clear that *Lyng* was wrongly decided. The *Lyng* Court adopted its demanding and novel substantial burden inquiry to avoid strict scrutiny in that case, likely having realized the government had no compelling interest in building its logging road. Instead, the government should have lost. Though the Court feared numerous religious attacks upon the government's central operations, the compelling interest prong of the strict scrutiny test had previously functioned as an adequate gatekeeper.[202] Challenging merely peripheral applications of governmental power—such as the construction of an isolated logging road that, in turn, destroyed central components of a religious system—should have been a core application of the *Sherbert* test.

CONCLUSION

Religious liberty doctrine should be forged into a shield for religious adherents, or it should lay down its arms altogether in the field of environmental law. But it should not function solely as a sword against these regulations. The solutions proposed above, separate or combined, are starting points in rectifying this Track I-Track II disparity. They would once again make environmentalism and religious liberty natural allies, providing the faithful new legal mechanisms to protect "Our Common Home."

201. *See* Petition for Writ of Certiorari at i, Fulton v. City of Philadelphia, No. 19-123 (2019) ("Whether *Employment Division* v. *Smith* should be revisited?"), *cert. granted*, 140 S. Ct. 1104 (U.S. argued Nov. 4, 2020).

202. *See, e.g.*, United States v. Lee, 455 U.S. 252, 259–61 (1982) (rejecting a religious exemption to taxation because of the government's compelling interest in a uniform tax system).