

THE CONSTITUTIONAL LIMITATIONS ON CONGRESS'S POWER OVER LOCAL LAND USE: WHY THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS UNCONSTITUTIONAL

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It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large.

1 A. de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961).

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INTRODUCTION

There is nothing more local than land, and state and local communities have been entitled to significant autonomy in crafting their land use priorities. This principle of deference has been stated repeatedly in Supreme Court decisions across a large swath of settled doctrine addressing takings, telecommunications, environmental law, and fair housing.¹ In the absence of intentional discrimination, constitutionally mandated deference to local governments reaching land use determinations has been applied in cases involving any and all landowners, religious or otherwise. Without taking heed of this constitutional doctrine, in 1993 and 2000, members of Congress chose to impose federal control over local land use to benefit one category of land owners. With the Religious Freedom Restoration Act of 1993,² which applied to every law in the country, and the Religious Land Use and Institutionalized Persons Act of 2000,³ which targeted state and local land use laws, Congress negated the constitutional rule of federal deference to local land use law and created a privileged class of landowners and developers – those that are religious. It did so by giving them the extraordinary benefit of strict scrutiny against neutral, generally applicable local and state land use laws whenever the land use applicant is religious.⁴

Congress enacted RFRA and RLUIPA without any apparent awareness or acknowledgment that the federal government is constitutionally constrained to treat local land use principles and decision-makers with respect and deference. Rather, the relevant hearings indicate a narrow focus on the complaints of religious entities about local land use processes and principles without reference to the settled constitutional framework. Because the members ignored that doctrine, they pushed beyond the parameters of their power relative to local land use determinations. There are elements of RLUIPA that, if interpreted correctly, reflect constitutional principles and

¹ Each of these fields is addressed in later sections of this Article.

² Religious Freedom and Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4 (1993).

³ Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

⁴ 42 U.S.C. § 2000cc-(a) (2000).

therefore are largely unremarkable,⁵ but section 2(a) of RLUIPA, which imposes the most searching standard of constitutional review—strict scrutiny—on generally applicable land use laws, is the most reckless federal intervention in local land use law and community decision-making in history.

The Supreme Court invalidated RLUIPA's predecessor statute, the Religious Freedom Restoration Act, because Congress transgressed the inherent limits of federalism that undergird the constitutional arrangement.⁶ RFRA's breadth was extraordinary – it applied to every law in the country from any source. It was impossible for Congress to comprehend the infinite number of religious claims that might be brought under its banner. The result was a thoughtless statute that swept away federalism, separation of powers, and constitutional amendment requirements.⁷

Section 2(a) of RLUIPA arguably is even more constitutionally suspect, because it specifically devalues local and state land use law in the face of the Court's settled doctrine of deference in this one arena. Despite the long and entrenched history of mandated deference to local land use decision-making, section 2(a) takes over local land use priorities and decisions by trivializing all land use interests except those that are "compelling" and that are the least restrictive means to be applied to the particular religious claimant. The federal government thereby muted the voices of the neighbors of religious projects at public hearings and inserted itself on the hearing bench to judge what uses a local community will or will not permit. Further, section 2(a) displaced the state courts' long and independent jurisdiction over appeals of standard, local land use determinations.

No longer can communities be assured that their united efforts to create a certain character will be respected. Suburbs, cities, and towns seeking to curb growth, save open space, or secure the residential character of their neighborhoods have learned that those interests can be set aside by federal fiat to enable a religious developer to insert schools, dormitories, catering halls, and large worship centers into community land use plans and neighborhoods. When homeowners raise otherwise legitimate

⁵ See 42 U.S.C. §§ 2000cc (b)(1-3) (2000).

⁶ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁷ *Boerne*, 521 U.S. at 532, 536 (noting RFRA's unlimited intrusion into every level of government and every body of law and holding that the RFRA exceeded Congress's authority and endangered principles of federalism and the separation of powers).

concerns about noise, traffic, aesthetics, views, and residential character, they are often told that the federal government has demoted those priorities below the demands of ambitious religious land development. Indeed, all landowners need to be on notice that neighboring uses can change at the drop of a federal lawsuit, so long as a religious developer finds the location attractive.

The constitutional defect underneath section 2(a) of RLUIPA is Congress's crass failure to consider the constitutional constraints on the federal government vis-à-vis state and local land use law. There is no excuse for the amount of federal constitutional law Congress ignored. A manifest symptom of Congress's belligerence lies in its extraordinary failure to invite to the hearings those who are most knowledgeable about local land use—mayors, governors, and local land use officials.⁸ Despite suggestions, planning experts were not invited so that Congress might educate itself about this arena of the law it has never decided to take before.⁹ Instead, the hearings demonized land use decision-makers as bigoted, discriminatory, and hopelessly subjective. Section 2(a)'s heavy-handed interference with local and state law—whether made by local or state officials or state court judges—combined with the displacement of local citizen involvement in their communities, renders section 2(a) of RLUIPA unconstitutional.

⁸ See *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998) (listing the various witnesses and contributors to the hearings, including Congressmen, attorneys, and law professors, but failing to include any governors, mayors, or other local political leaders); see also *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 145 (1999)

The testimony regarding whether this is a good law can be found by listening to people who deal with these kinds of laws [zoning laws] all the time – groups that Congress has never asked to testify on either a RFRA or a RLPA – the municipal attorneys, the attorneys general. These individuals have never been asked to testify, and they could tell you exactly how these laws operate.

Id.; see generally Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2002).

⁹ See *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998) (listing the various witnesses and contributors to the hearings, including Congressmen, attorneys, and law professors, but failing to include any governors, mayors, or other local political leaders); see also *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999).

The purpose of this Article is to bring to the forefront of discussion bedrock principles of land use law, which have been ignored to date, and to place RLUIPA analysis on a more constitutionally sound base. The Article is divided into three main sections. Section I recounts the history of land use principles from the drive to ordering urban centers in the seventeenth and eighteenth centuries to the development of the rich amalgam of modern practices that now constitute local land development and planning. Section II examines the Supreme Court's constitutional doctrine of land use law and describes the federal laws that directly or incidentally affect local land uses and shows that these few are cabined within narrowly circumscribed arenas or in fields in which federal coordination of the states is necessary. These laws are readily distinguishable from the sweeping effect of RLUIPA on local land use determinations. Section III then looks closely at section 2(a), to show how it impacts local decision-making and operates as a radical and careless interference with settled constitutional principles. In addition, it points out that state courts have a history of rooting out invidious discrimination against religious landowners and invalidating discriminatory or arbitrary zoning and permitting decisions.

Section 2(a) is a departure from Supreme Court jurisprudence and, like RFRA, represents a significant infringement on local prerogatives by Congress. RLUIPA creates an advantaged class of religious landowners to the detriment of their neighbors – whether secular or not – and statutorily amends the Constitution by adding to the Free Exercise Clause an additional set of rights and considerations unavailable to other landowners. At the same time, RLUIPA represents a sharp turn away from the Supreme Court's federalism jurisprudence. RLUIPA is not a constitutional exercise of congressional power under Section 5 of the Fourteenth Amendment. Further, it violates the Establishment Clause by lifting certain landowners above settled law simply because they are religious.

Section 2(a) is a careless interference in local land use decisions that ignores the history and application of land use law principles and Supreme Court jurisprudence. Local land use law historically has developed as a method of enhancing communities and creating a municipality that is better for everyone. If cases of discrimination do arise, state and federal courts have both proved quite capable of removing it by invalidating arbitrary zoning decisions without ever needing the blunt instrument of section

2(a) of RLUIPA.

I. LAND USE PRINCIPLES

Land use regulation and planning have a long pedigree, dating at least as far back as the seventeenth century in England. London's Great Fire of 1666, which lasted four days, devastated the vast majority of inhabitants' homes and has been attributed in part to urban overcrowding;¹⁰ it led King Charles II and Parliament to craft what is considered to be the first rudimentary "modern building code: the Act for Rebuilding London of 1667."¹¹ The Act, although not effectively implemented across its wide breadth of coverage, was detailed and set out the height and construction of dwellings, the sizes of buildings allowable at important or public locations, and even architectural and building details—including the mandate that all exterior walls were to be constructed from brick or stone.¹² Foreshadowing modern land use principles, the Act also included "regulations regarding the banishment of smoky or noxious activities to specified locations."¹³ The British Public Health Act of 1848, addressing congestion, inadequate sanitation, and unhealthy conditions, then laid the groundwork for the modern era in which land use and environmental regulations have become commonplace.¹⁴

When in their infancy in the United States, land use planning and local zoning were not enthusiastically embraced by the courts, which were more comfortable protecting individual rights to determine property use.¹⁵ It became increasingly clear, however, that cities and their inhabitants suffered from a failure to regulate land use, and thus, zoning became the primary means by which local governments instituted planning. In 1916, New York enacted its Zoning Resolution, which "established height

¹⁰ The fire burned from the early morning hours of Sunday, September 2 until Wednesday, September 5, 1666, and destroyed approximately 13,200 houses within 373 acres, including 80 percent of the area within London's walls. The fire left some 70,000 to 80,000 Londoners homeless. ADRIAN TINNISWOOD, *BY PERMISSION OF HEAVEN: THE TRUE STORY OF THE GREAT FIRE OF LONDON* 127 (2003).

¹¹ RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 82 (rev. ed. 2004) (1996) (describing how the Great Fire of 1666 led to the first building code).

¹² *Id.* at 86.

¹³ *Id.*

¹⁴ *Id.* at 96.

¹⁵ *See generally* E.C. YOKLEY, *ZONING LAW AND PRACTICE* § 21-1 (D.S. MacGregor rev., 4th ed. 2002 & Supp. 2008).

and setback controls, and designated residential districts that excluded perceived incompatible uses.”¹⁶ The federal government also became involved: when Herbert Hoover was Secretary of Commerce during the Harding Administration, he appointed an advisory committee in 1921 to spur local zoning legislation, which resulted in the drafting of the “Standard State Zoning Enabling Act” (SZEa) and which provided the blueprint for states to delegate the power to regulate land use to localities.¹⁷ Hoover’s Advisory Committee on Zoning (which included three members of the New York urban reform movement) sent SZEa to the fifty states as a model for the state legislatures.¹⁸ This was done in part because some state courts had invalidated zoning ordinances on the ground that the cities and counties “had not been granted [the] specific power to do that which zoning implies.”¹⁹

Furthermore, Hoover had been influenced by the Better Homes in America and the Scientific Management movements of 1910-1919, and sought to implement order and efficiency in local organization²⁰ through uniform national practices that could survive federal and state constitutional challenges.²¹ The model proved so successful that most states adopted zoning enabling legislation modeled on the SZEa within five years.²² Some states have gone farther and mandated that local governments adopt “master plans.” These state mandates were imposed in part to tackle environmental concerns and curb urban sprawl.²³

¹⁶ 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 1:3 (5th ed. 2008).

¹⁷ STANDARD STATE ZONING ENABLING ACT, §§ 1-6 (Dep’t of Commerce 1926).

¹⁸ J.B. CULLINGWORTH, THE POLITICAL CULTURE OF PLANNING: AMERICAN LAND USE PLANNING IN COMPARATIVE PERSPECTIVE 28 (1993).

¹⁹ *Comment*, XI NAT’L MUN. REV. 305, 307 (1922).

²⁰ Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 3 (1996). See also CULLINGWORTH, *supra* note 18, at 28.

²¹ SALKIN, *supra* note 16, at § 2:11 (quoting EDWARD MURRAY BASSETT, ZONING 29 (1940)). “[W]hile the power to zone may, in some [s]tates, be derived from constitutional as distinguished from statutory home rule . . . still it is seldom that the home-rule powers will cover all the necessary provisions for successful zoning.” Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, in 1 MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 1, 2 (1996), available at <http://myapa.planning.org/growingsmart/pdf/PAS462.pdf> (quoting ADVISORY COMMITTEE ON PLANNING AND ZONING, U.S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (SZEa) 1 (rev. ed. 1926)).

²² CULLINGWORTH, *supra* note 18, at 28-29.

²³ See, e.g., Patricia E. 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, 118 (2002) (some states even regulate the content of such plans). See also FLA. STAT. § 163.3177(4)(a),

At that time, though, the federal government did no more than create the model for state enabling statutes; specific land use policies and choices were left to local control following state delegation of power. This arrangement reflected the principle that “land use law is one of the bastions of local control, largely free of federal intervention.”²⁴

The chief tool for local land use planning has been zoning, which is now employed in virtually every major American city²⁵ and thousands of smaller localities,²⁶ and which is traditionally defined as the “use of the public regulatory power (also called the *police power*) to specify how private land may be developed and used.”²⁷ From the very beginning, zoning was given the job of shielding residential neighborhoods from incompatible uses.²⁸

Today, cities and local governments typically divide uses according to the principal categories of “residential,”

(4)(b) (West 2003) (which, among other things, mandates that localities coordinate their comprehensive plans with those of their counties, as well as adjacent municipalities and counties); Raymond J. Burby et al., *Is State-Mandated Planning Effective?*, 45 LAND USE L. & ZONING DIG. 9 (1993) (after conducting an empirical study, a team of professors at planning schools concluded that local plans tend to be of higher quality in states that mandate planning); Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019, 1022 (2001) (discussing the different techniques that smart growth entails).

²⁴ *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002) (finding no equal protection violation when township distinguished between plaintiff congregation and named exceptions to the ordinance disallowing certain incompatible uses in a low-density residential zone). *See also* *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 1001 (7th Cir. 2006) (citing positively *Congregation Kol Ami* in finding no equal protection violation in village’s denial of Vision Church’s special use permit), *cert. denied*, 128 S. Ct. 77 (2007).

²⁵ The one exception is Houston. Despite having no formal zoning code, Houston utilizes a system of ordinances, deed restrictions, and other regulations to limit the use of property within its jurisdiction. Since Houston is not a zoned city, development is governed by codes that address how property can be subdivided, but city codes do not speak to the land use. CITY OF HOUSTON PLANNING AND DEV. DEP’T, http://www.houstontx.gov/planning/Development/Regs/dev_regs_links.htm (last visited Apr. 10, 2009). Houston’s citizens have turned down zoning in past referenda, the most recent in 1993, but another referendum to institute some form of zoning looks to be on the horizon. *See, e.g.*, Mike Snyder, *Guiding Growth Will be a Key Issue in ‘09 Mayoral Tilt*, HOUS. CHRON., Apr. 19, 2008 (zoning has become an issue in the 2009 mayoral election as two-thirds of respondents to the 2008 Houston Area Survey claimed that more land-use planning was needed, and over half of the respondents claimed to support zoning).

²⁶ PLATT, *supra* note 11, at 261-62.

²⁷ *Id.* at 263 (emphasis in original).

²⁸ *Id.* at 265.

“commercial,” and “industrial,” with several sub-classes.²⁹ Cities are by no means limited to these categories and many municipalities have adopted zones for other uses such as “agricultural” or “institutional” as a means of reaching their public policy goals in the context of their geographical features and limits. Modern zoning, thus, has woven a rich and complex tapestry of best practices and procedures in combinations unique to the fulfillment of each community’s particular needs and goals.

A. *Separating Uses by Category*

The foundation of modern local land use law is built on the fact that grouping like uses together will result in fewer conflicts between uses. The ultimate goal is to map out uses so that those close to each other are compatible, and incompatible uses are spread apart. The Court in *Arlington Heights* expressly approved this approach to zoning.³⁰ As stated above, from the beginning, the protection of residential neighborhoods from other more intense uses has been a high priority, and it is a principle that the Supreme Court explained and approved in *Village of Belle Terre v. Boraas*:

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.³¹

The division of land use plans into zones designated for compatible uses and for excluding incompatible uses makes it possible to achieve the residential neighborhood values described approvingly in *Village of Belle Terre*. Without division according to use, it is impossible for residential neighborhoods to sustain their residential character or for communities to preserve natural resources.

²⁹ *Id.*

³⁰ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269-70 (1977).

³¹ *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (internal citation omitted).

B. Fundamental Principles Employed to Create Master Plans

The fundamental precepts of modern land use law are often traced back to Ebenezer Howard's *Tomorrow: A Peaceful Path to Real Reform*, which proposed resettling people in planned "Garden Cities" that would preserve suburban and small-town qualities.³² Howard based his idyllic construction, which was crafted in reaction to the scattered chaos of urbanized London, on four basic principles: "(1) separation of uses, (2) protection of the single-family home, (3) low-rise development, and (4) medium-density of population."³³

These principles have endured, with some modern adjustments, as embodied in the SZEA,³⁴ the model statute that laid out the contours of municipal zoning powers.³⁵ Originally developed by an advisory committee under then-Secretary of Commerce Herbert Hoover, the model act, which has been adopted at some point by nearly every state and is still in effect in many of them,³⁶ empowers municipalities to regulate the "height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes."³⁷ Further, to "prevent haphazard or piecemeal zoning,"³⁸ the SZEA suggested a requirement that zoning regulations be made "in accordance with a comprehensive plan" that is:

designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. . . [and] made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and

³² DUKEMINIER ET AL., PROPERTY 822 (6th ed. 2006).

³³ *Id.*

³⁴ STANDARD STATE ZONING ENABLING ACT (Dep't of Commerce 1926).

³⁵ See generally Knack et al., *supra* note 20 (providing additional analysis of the SZEA).

³⁶ DUKEMINIER ET AL., *supra* note 32, at 838; James C. Nicholas, *State and Regional Land Use Planning: The Evolving Role of the State*, 73 ST. JOHN'S L. REV. 1069, 1072 (1999).

³⁷ STANDARD STATE ZONING ENABLING ACT, § 1 (Dep't of Commerce 1926).

³⁸ *Id.* § 3 n.22.

encouraging the most appropriate use of land throughout such municipality.³⁹

Predicating zoning efforts on comprehensive plans “reflects the view that zoning itself is but a means of giving effect to a larger planning enterprise that has led to formulation of the comprehensive plan.”⁴⁰

C. Special Use Permits, Conditional Use Permits, and Variances

Land use plans divide a local government’s land within its parameters according to use, but the general land use plan cannot anticipate every proposal a developer or landowner might present. To keep the process flexible, two mechanisms have been fashioned. The first is used in circumstances where a use is “permitted” in the zone, but needs to be conditioned so that it is compatible. Many land use plans across the country include a requirement that more intense or incompatible uses must obtain a conditional use or special use permit to locate in the zone. In other words, a use can be permitted in general, but require a permit in order to ensure this particular proposal will fit within the zone. Houses of worship frequently fall into this category, because their scope and impact varies and they impose sufficient negative externalities on neighbors that local governments need to consider to ensure compatibility.

If a use is not permitted, however, the applicant must apply for a variance. A variance is a request to the local government to permit a use not otherwise permitted in the zone. Variances are more difficult to obtain than conditional or special use permits, but they still create an opportunity for a use to be included in a zone where it would otherwise be forbidden, because of a likely conflict with neighboring uses.

1. Conditional and Special Use Permits: Tailoring Permitted Uses to Fit Within a Desired Zone

Communities found relatively quickly that assigning uses to designated zones did not meet every reasonable or desirable request for developers and other land owners. There were uses that they wanted to permit, but they needed to ensure that the uses were kept compatible with the surrounding zone. For

³⁹ *Id.* § 3.

⁴⁰ DUKEMINIER ET AL., *supra* note 32, at 839. See Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155 (1955).

example, a school might be appropriate in a residential neighborhood, but only if its traffic, noise, and other impacts are minimized to keep the neighborhood's residential character. The same goes for churches, swimming pools, and other potentially intense uses. In many, if not most, jurisdictions, a religious use must obtain specific permission in the form of a conditional or special use permit to ensure compatibility. A conditional or special use permit allows a landowner to introduce a use that is enumerated within a local ordinance and permitted in that zone, but is of a kind that requires fact-based, close analysis to protect the combination of uses from becoming mutual irritants.⁴¹

The theory is that certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community and its citizenry or substantial segments of it, are entirely appropriate and not essentially incompatible with the basic uses in any zone (or in certain particular zones), but not at every or any location therein or without restrictions or conditions being imposed by reason of special problems the use or its particular location in relation to neighboring properties presents from a zoning standpoint, such as traffic congestion, safety, health, noise, and the like. The enabling act therefore permits the local ordinance to require approval of the local administrative agency as to the location of such use within the zone.⁴²

Though some ordinances outline only general standards, e.g., compatibility with neighboring land uses, most have very detailed requirements to guide such approvals.⁴³ The standards to be applied are statutorily mandated, but the board must exercise limited discretion and judgment in order to fit uses together to serve the public interest in zoning and effect the community's vision and goals. "The board's decision-making process is confined by standards, but within those limits the board carries out a discretionary rather than a ministerial task . . . [it] has authority to determine the facts that warrant the issuance of a special permit."⁴⁴

Among the great many concerns for local planning, boards are driven by considerations of public safety, increased or decreased

⁴¹ "The terms special exception, conditional use and special use are synonymous, although there may be some local differences." YOKLEY, *supra* note 15, § 21-1. Since such boards lack legislative powers, they cannot grant other kinds of conditional use permits not mentioned in the ordinance. SALKIN, *supra* note 16, § 14:17.

⁴² *Tullo v. Twp. of Millburn*, 149 A.2d 620, 624-25 (N.J. Super. Ct. App. Div. 1959).

⁴³ YOKLEY, *supra* note 15, § 21-1.

⁴⁴ SALKIN, *supra* note 16, § 14:17.

traffic, and the adequacy of local services, among others.⁴⁵

In general, a conditional use application will be judged according to the following criteria, which are intended to ensure that the newly introduced use is consistent with the pre-existing uses and the community's land use goals. The following is a typical set of criteria and rules governing conditional use permit applications:

The Planning Commission and Township Board shall review the particular circumstances and facts of each proposed use in terms of the following standards and required findings, and shall find and record adequate data, information and evidence showing that such a use on the proposed site, lot or parcel meets the following standards:

A. Will be harmonious, and in accordance with the objectives and regulations of this Ordinance.

B. Will be designed, constructed, operated, maintained, and managed so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity.

C. That the proposed use will be served adequately by essential public facilities and services such as highways, streets, police and fire protection, drainage ways, refuse disposal, or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such service.

D. That the proposed use will not be detrimental, hazardous, or disturbing to existing or future neighboring uses, persons, property or the public welfare.

E. That the proposed use will not create additional requirements at public cost for public facilities and services that will be detrimental to the economic welfare of the community.⁴⁶

In addition to applying these principles, zoning boards must observe proper procedures,⁴⁷ must engage in fact-finding and usually state the reasons for their actions, and may grant the permit if all of the ordinance's enumerated requirements have been satisfied and the applicant is willing to comply with any reasonable conditions the board proposes. The land use board's

⁴⁵ For additional information in these concerns, see generally *id.* § 14.

⁴⁶ YOKLEY, *supra* note 15, § 21-1.

⁴⁷ "Statutes may set forth minimal rules of procedure or require that procedures for hearings be adopted by ordinance or rule. Where no method of procedure is provided, the general rule is that board hearings are governed by rules applicable to hearings before administrative boards. Two basic and general rules are that the validity of a zoning resolution cannot be raised in a proceeding before a board, and that an applicant for a variance has the burden of establishing that the application is fair and reasonable." *Id.* § 18-9 (internal citations omitted).

power to impose limitations on use in order to make uses complementary typically is granted to the board by state statute.⁴⁸

Decisions by zoning boards, in general, are subject to review in the state courts, which ask whether the local authority has reached a decision that is arbitrary or capricious.⁴⁹ The meaning given to the ordinance's terms by the zoning board is treated with deference by state reviewing courts, which apply an arbitrary and capricious standard of review to board decisions. "Denial would be arbitrary, for example, if it was established that all of the standards specified by the ordinance as a condition to granting the permit have been met. Denial may not be based on general objections or conclusory findings that the use itself is undesirable."⁵⁰

The state courts have refused to permit zoning boards to exercise complete and standard-less discretion. For example, when a board is created but no municipal plan is completed, the board may have too much discretion.⁵¹ If a board designates an entire municipality as residential and requires discretionary approval for all non-residential uses, the courts will overturn such decisions and force them to create appropriate zoning districts.⁵² "These cases are a hostile judicial reaction to the conversion of zoning into a process that is entirely discretionary."⁵³

Modern land use planning principles and law have developed standards that are intended to circumscribe and guide decision making toward the larger community good. The notion promoted at the hearings about RLUIPA that land use determinations are typically standard-less and unreviewable demonstrates a profound lack of knowledge about modern land use law.

Zoning officials are constrained and made accountable in three ways. First, as discussed above, their decisions are cabined by recognized, neutral principles of land use law. They are further restrained by constitutional law, including state and federal free exercise and equal protection guarantees.

Second, their decisions can be appealed in state courts, which

⁴⁸ *Id.* § 21-1.

⁴⁹ SALKIN, *supra* note 16, § 14:18.

⁵⁰ YOKLEY, *supra* note 15, § 21-1(citing *Zylka v. City of Crystal*, 283 Minn. 192, 167 N.W.2d 45 (1969); *Holbrook Assocs. Dev. Co. v. McGowan*, 261 A.D.2d 620 (1999)).

⁵¹ See YOKLEY, *supra* note 15, § 5-1.

⁵² DANIEL R. MANDELKER, *LAND USE LAW* § 6.61 (5th ed. 2003 & Supp. 2008).

⁵³ *Id.*

have created an entire jurisprudence governing the process of land use applications. In keeping with federalism principles, different states have instituted distinctive land use regimes through their state courts that reflect their individual features and needs, from issues involving natural resources and topography to urban overcrowding and safety. Moreover, state courts have been able to root out invidious discrimination through the widespread promulgation of standards of judicial review. Review is often based both on whether the local decision-making body followed its own ordinance or permitting process and, more importantly for the purpose of rooting out discrimination, whether the decision is arbitrary or an abuse of discretion.⁵⁴

⁵⁴ It is well-settled that courts can review local decisions for arbitrariness, capriciousness, unreasonableness, or a general abuse of discretion. Discriminatory ordinances or zoning decisions can be and are exposed by the application of these standards of review. *See generally* 83 Am. Jur. 2d *Zoning and Planning* § 35 (2008)

Zoning decisions must not be arbitrary and capricious so as to amount to an abuse of governmental power, but an ordinance is valid if it has any real, substantial relation to the public health, comfort, safety, and welfare. Accordingly, to establish the invalidity of a zoning ordinance, a challenger must show that an ordinance is unreasonable, arbitrary, capricious or discriminatory, with no reasonable relationship to the promotion of the public health, safety or welfare.

Id. at § 39 (Discrimination; equal protection of the laws).

Discrimination in zoning decisions is impermissible if it is unjustified. The imposition, by means of zoning, of restrictions that do not bear alike on all persons living in the same territory under similar conditions and circumstances is discriminatory and will not be upheld. To sustain a claim of impermissible zoning discrimination, the party contesting the zoning action must show that a land use permitted to one landowner is restricted to another similarly situated, and thereafter, the governing body must show that there is a rational basis for the action alleged to be discriminatory.

PATRICK J. ROHAN, 8 ZONING AND LAND USE CONTROLS § 52.05[2] (2008) (“Courts will generally reverse the decision of the lower tribunal where it finds that decision to be arbitrary and capricious, constituting an abuse of discretion.”); PATRICIA E. SALKIN, 4 AMERICAN LAW OF ZONING § 42:16 (5th ed. 2008) (“A reviewing court will disturb a decision of a board of adjustment only if it is found to be illegal, fraudulent, clearly erroneous, unreasonable, arbitrary and capricious, or an abuse of discretion.”); YOKLEY, *supra* note 15, § 25-4 (“The general rule is that the decision of a board of adjustment or appeals will not be set aside unless the board’s acts are arbitrary, illegal, or in excess of the jurisdiction lawfully conferred on the board by statute.”); *Id.* at § 31-6 (“Ordinances considered to be discriminatory have been struck down.”). *See also* YOKLEY, *supra* note 15, § 25-4 n.27 (listing state court cases supporting proposition that the standard for reversing local decisions is arbitrariness); *Bd. of Supervisors v. McDonald’s Corp.*, 544 S.E.2d 334, 339 (Va. 2001) (“A

Third, land use decision-makers typically are elected or appointed through the political process.⁵⁵ Zoning boards thus play an integral role in the preservation of local autonomy and in the accountability of local representatives.

2. Variances: Vehicles to Fit Non-permitted Uses into a Desired Zone

When a landowner seeks to insert a use that is not permitted in the zone, even with a conditional use permit, a variance is usually required. Variances are the vehicle by which local communities can permit uses they had not yet contemplated as being compatible with a particular district. Thus, they expand the opportunities for landowners. “A reasonable amount of discretion is delegated to the zoning boards of appeal [to grant variances], because it is impractical for a town board to adopt zoning law that is completely definitive and all encompassing for every scenario.”⁵⁶ However, while boards are granted a modicum of discretion, “they are usually directed by statute or judicial construction to grant the minimum variance necessary and adequate to readdress the [petitioner’s] complained-of ‘hardship’ while observing the spirit of the ordinance.”⁵⁷

State statutes generally impose particular tests to be applied to variance applications. In keeping with the tradition of deference to local land use decisions, the standard of review employed by state courts for board variance decisions is “rational basis [analysis] supported by substantial evidence, and variance decisions will not be set aside absent illegality, arbitrariness, or

discriminatory action is an arbitrary and a capricious action, and bears no reasonable or substantial relation to the public health, safety, morals or general welfare. ... Discrimination in zoning decisions is impermissible if it is unjustified and any such discriminatory decision will not be upheld by judicial review.”).

⁵⁵ PLATT, *supra* note 11, at 264:

Two local institutions of U.S. zoning practice that originated in the model acts are the *planning board* (or plan commission) and the *zoning board of appeals*. The former assimilates the opinions of planning staff, hired consultants, and community opinion to formulate recommendations to the local elected body on zoning matters. The latter is a quasi-judicial panel that is authorized to grant exceptions from the strict rules of the zoning ordinance to individual property owners. Both of these boards consist of lay citizens elected or appointed from the local community.

Id.

⁵⁶ SALKIN, *supra* note 16, § 13:27.

⁵⁷ *Id.*

abuse of discretion.”⁵⁸ Thus, while limited and guided discretion is built into the zoning process, it is limited through judicial review, which employs familiar standards of review from administrative law.⁵⁹

D. Citizen Involvement in the Land Use Decision-making Process

Public notice and participation are mandatory components for public land use determinations. All fifty states now have open meeting laws for zoning boards, also known as “sunshine laws,” and most states have meeting notice requirements for the public, or at least for potentially affected or interested parties.⁶⁰ Mandatory open meetings are defined as “a gathering of a quorum of the members of the public body in order to transact public business.”⁶¹ Failure to comply with open meeting requirements can lead to judicial voiding of board action, but may also allow for rectification through subsequent meetings.⁶²

Neighbor input is an especially important and integral part of the process. Boards must hear complaints from neighbors as part of the decision-making process.

Every important step in the zoning process is taken after notice and hearing. Thus, notice and hearing are essential prerequisites to the adoption or amendment of a zoning ordinance, and the granting or denial of a variance or special permit must be preceded by notice and public hearing. It is the clear policy of most zoning legislation that persons who desire particular action, as well as those who oppose it, shall have a full and fair opportunity publicly

⁵⁸ *Id.* § 13:28.

⁵⁹ See 3 CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 10.4 (2d ed. 1997 & Supp. 2008) (describing the general definition and application of the arbitrariness standard for judicial review).

⁶⁰ PATRICK J. ROHAN, 8 ZONING AND LAND USE CONTROLS § 51.04[1] (2008); MANDELKER, *supra* note 52, § 6.76. Some states statutorily require local governments to hold open meetings as a condition of receiving state funding. There are some circumstances where neighbors’ participation is essential even before the landowner’s application process can begin. ‘Consent ordinances’ empower neighbors to create additional hurdles in order for a landowner implement his desired use. Additionally:

Such ordinances either prohibit the use in question — unless a certain percent of the owners within a specified distance of the proposed use consent to the use - or deprives the board of zoning appeals the jurisdiction to issue a special permit for the proposed use until written consents have been filed by the applicant.

SALKIN, *supra* note 16, § 14:15 (internal citations omitted).

⁶¹ MANDELKER, *supra* note 52, § 6.76 (“Most state statutes exclude social and chance gatherings from the definition of meeting.”).

⁶² *Id.*

to express their views.⁶³

The venue therefore serves the important function of affording “persons who own land which will be affected by the proposed ordinance an opportunity formally to protest, and to appear and present testimony and argument against the adoption of the proposed measure.”⁶⁴ In some cases, failure to provide notice and hearing to affected property owners has been held by the courts as constituting a deprivation of property without due process of law.⁶⁵

State laws are often constructed to support the local process protecting the interests of neighbors and other citizens of the community. In *League of Residential Neighborhood Advocates v. City of Los Angeles*,⁶⁶ Los Angeles denied a conditional use permit (CUP) for a synagogue in the nicest residential neighborhood in the city, and that decision was appealed up to the highest court of the state which affirmed the City’s denial.⁶⁷ After RLUIPA went into effect, and under its threat, Los Angeles unilaterally reversed itself, and granted a CUP through secret negotiations. Thus, there was no notification to neighbors and no public hearings. The United States Court of Appeals for the Ninth Circuit invalidated the resulting settlement agreement between Los Angeles and the congregation on state law grounds. In reversing the district court’s validation of the settlement, the Ninth Circuit noted that “[b]y placing its imprimatur on the Settlement Agreement, the district court effectively authorized the City to disregard its local ordinances in the name of RLUIPA,” and to avoid having to “litigate over RLUIPA’s uncertain legal landscape,” which would involve “long and expensive litigation” over a federal law which “might or might not

⁶³ SALKIN, *supra* note 16, § 14:28:

[P]ublic notice of the hearing of an application for exception . . . is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant’s property, is reasonably necessary . . .

Id. (quoting *Sundlun v. Zoning Bd. of Review of City of Pawtucket*, 145 A. 451, 455 (R.I. 1929).

⁶⁴ SALKIN, *supra* note 16, § 8:11 (5th ed. 2008) (internal citations omitted).

⁶⁵ *Id.* (citing *Masters v. Pruce*, 274 So. 2d 33, 39 (Ala. 1973); *Dahman v. City of Baldwin*, 483 S.W.2d 605, 608-09 (Mo. Ct. App. 1972)).

⁶⁶ *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052 (9th Cir. 2007).

⁶⁷ *Id.* at 1053.

be held valid.”⁶⁸ The district court’s logic was “critical[ly] flaw[ed],” said the Ninth Circuit; “Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public.”⁶⁹

Importantly, the system of neighborhood notice and hearing does not allow for a tyranny of the majority, and there are significant state judicial checks to prevent it:

Zoning boards often react to neighborhood opposition, either in approving or rejecting a land use application. [State c]ourts may set aside a zoning decision if they believe that a favorable response to neighborhood opposition tainted the zoning action with an improper motive or purpose. *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, states the typical judicial concern that denial of a zoning approval must be based “on something more than neighborhood opposition and expressions of concern for public safety and welfare.” These decisions are often based on substantive due process concerns.⁷⁰

Thus, over the decades that modern local zoning practices have developed, they have been shaped and limited by substantial state oversight through state judicial review that forbids arbitrariness, requires the application of neutral principles when limited discretion is engaged, and checks the potential for overreaching by neighbors and other citizens.

None of these integral elements of land use law were matters of discussion at the relevant hearings or permitted to be made part of the record that would be used to justify RLUIPA. Part of the reason for this oversight must be that members of Congress do not deal with local land use regulations and principles on a regular basis and, therefore, were uninformed of these settled legal principles. This is an arena that, in fact, has belonged to state and local governments. It was not until religious lobbyists demanded RFRA, RLPA, and then RLUIPA that members contemplated altering ordinary local land use outcomes. To put it another way, the members were never focused on the laws they sought to dilute with RFRA, RLPA, or RLUIPA, but rather were solely focused on the religious lobbyists. Like the law held unconstitutional in *United States v. Lopez*, RLUIPA “plows thoroughly new ground and represents a sharp break with the long standing pattern of federal . . . legislation.”⁷¹

⁶⁸ *Id.* at 1058.

⁶⁹ *Id.* at 1056, 1058.

⁷⁰ MANDELKER, *supra* note 52, § 6.75 (quoting *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, 342 N.W.2d 335 (Minn. 1984)).

⁷¹ *United States v. Lopez*, 514 U.S. 549, 563 (1995).

The Court in *Boerne* stated, “When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”⁷² The members of both Houses of Congress profoundly failed their obligation to take responsibility for the constitutionality of RLUIPA, as they moved headlong into appeasing one set of interests. While they did hold hearings on congressional power, at which I was the only person strongly critical, they failed to look beyond *Boerne* to the Court’s doctrine surrounding land use.⁷³ For that reason alone, the judicial branch owes no deference to Congress’s assumption of its power to enact RLUIPA.

II. LAND USE LAW AND THE FEDERAL GOVERNMENT

The United States Supreme Court explained in its most recent eminent domain decision that settled law requires the protection of local priorities affecting land use:

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs. See *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-607, 28 S.Ct. 331, 52 L.Ed. 637 (1908) (noting that these needs were likely to vary depending on a State’s “resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people”).⁷⁴

The prime forces creating communities are local citizens, families, and organizations, whose values, goals, and needs set priorities that call into play a wide array of considerations from density levels to health and safety concerns to aesthetics and optimal development. Policy choices about land use determine the character, economic health, and success or failure of towns,

⁷² *Boerne*, 521 U.S. at 535.

⁷³ See *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999).

⁷⁴ *Kelo v. City of New London*, 545 U.S. 469, 482-83 (2005).

cities, and counties.⁷⁵ Thus, they directly affect the lives of the local residents.

The nature of land itself also requires that local planning not be subjected to abstract requirements created by individuals and governments removed from the land. Real property is immovable and its use is necessarily limited by geographical constraints. For example, the Rocky Mountains that are relevant to land use planning in the Denver suburbs are irrelevant to land use in New York City, where the Hudson River, the East River, and the Harlem River, among other waterways, necessarily affect city planning.

[T]he *legal* framework of rules, policies, and incentives to influence “good” land use practices is informed by the *geographical* context of the physical and socioeconomic systems in which land use operates. In other words, the effectiveness and validity of legal measures to control harmful externalities depend upon understanding of the geographical context in which such effects arise. *Law based on sound geography yields beneficial land use policy.*⁷⁶

A. *Land Use Law at the United States Supreme Court*

There is a well-established principle of Supreme Court deference to local and state lawmakers on matters involving land use planning. It is a matter of federalism, respect for dual sovereignty, and practicalities. Planning necessarily requires the consideration of a diverse set of factors tied to local geography, community needs, and the area’s history and vision. Federal courts consequently have been reluctant to interfere with local decisions and have, in many cases, emphasized both the efficacy and appropriateness of deferring to local governments to make various land use and zoning decisions.⁷⁷ As the Court explained

⁷⁵ For one example of the use of planning tools including zoning, each year the American Planning Association recognizes a number of cities, towns, and even neighborhoods which have succeeded in achieving their unique and individual development goals. Whether the goal was to maintain the aura of the idyllic wooded hamlet of Mariemont, Ohio, preserve the historic appeal of the Echo Park area of Los Angeles, revitalize the Charles Village neighborhood of Baltimore, Maryland, or leverage connectivity and revitalization for economic development in Syracuse, New York, each recognized entity used the tools of planning including zoning overlays, ordinances, and development codes to achieve their community goals. *See* Great Places in America, American Planning Ass’n, <http://www.planning.org/greatplaces> (last visited Apr. 10, 2009).

⁷⁶ PLATT, *supra* note 11, at 419.

⁷⁷ This deferential approach to zoning and land use decisions undergirds the Supreme Court’s jurisprudence on ripeness in land use cases. By preventing

in 1977: “it is because legislators and administrators are properly concerned with balancing numerous competing considerations [in zoning decisions] that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.”⁷⁸ The Court went on to state that courts should cease to defer only when “a discriminatory purpose has been a

federal court interference before local and state laws have been permitted to operate, the finality requirement serves important federalism concerns by avoiding undue and premature removal of jurisdiction from local authorities to make decisions on matters of uniquely local concern. Indeed, this precept is a staple in federal doctrine. *See, e.g.*, *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187-91 (1985) (requiring a final decision from the local authority before a claim was ripe; the Court specified that such a decision would fully develop the record from which a court could properly adjudicate, gives a court information on how an ordinance would be applied to the property in question, and enhances the ability of a court to decide a case without having to reach constitutional issues); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005) (“[S]ince *Williamson County*, courts have recognized that federalism principles also buttress the finality requirement. Requiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary’s appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.”); *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1291 (3d Cir. 1993) (holding that claims disputing a zoning ordinance were not ripe when the plaintiff refused to follow zoning appeals procedures and expounding upon the idea that “local political bodies are better able than federal courts” to address such disputes (quoting *Rogin v. Bensalem Twp.*, 616 F.2d 680, 698 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981)); *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989) (“We stress that federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions.”); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (1989) (“We also emphasize that ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land-use decisions. The Supreme Court has erected imposing barriers in [*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986)], and [*Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)], to guard against the federal courts becoming the Grand Mufti of local zoning boards.”); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) (“We are concerned that federal courts not sit as zoning boards of appeals ‘when presented with claims which, although couched in constitutional language, at bottom amount only to ‘the run of the mill dispute between a developer and a town planning agency.’” (quoting *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983)); *Cornell Cos., Inc. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 256 (E.D. Pa. 2007) (“The Third Circuit has stressed the importance of the finality rule in the as-applied context because of its ‘reluctance to allow the courts to become super land-use boards of appeals. Land-use decisions concern a variety of interests and persons, and local authorities are in a better position than the courts to assess the burdens and benefits of those varying interests.’” (quoting *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 598 (3d Cir. 1998)).

⁷⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

motivating factor in the decision.”⁷⁹

Before zoning and planning laws were in place, there was an amalgam of common law rules of nuisance, eminent domain, and restrictive covenants employed to reduce friction between neighbors and effect community goals. Eventually, though, they were found to be insufficient in the face of the demands imposed by modern communal living.⁸⁰ Zoning and planning were needed if communities were to grow in ways that were mutually satisfactory to multiple uses and landowners and in the service of the larger public good. With the introduction of zoning principles, constitutional challenges were raised.

From the earliest cases, the Supreme Court built into the constitutional jurisprudence of land use law a now entrenched principle of deference to local authorities and local concerns. For example, in 1926, with its landmark decision in *Village of Euclid v. Ambler Realty Co.*,⁸¹ the Court determined that decisions governing the construction of a particular building, the introduction of a particular use, or whether a land use is a nuisance must be addressed in “connection with the circumstances and the locality.”⁸² As a corollary, when the zoning or land use determination is open to different policy conclusions, or “fairly debatable,” the Court mandated that the local legislative judgment should control.⁸³ The Court further identified particular use limitations that were obviously valid, including reasonable building height restrictions, rules regarding materials and methods of construction, spacing between buildings, or regulations preventing the “evils of overcrowding.”⁸⁴ Moreover, there was no question that it was appropriate to “exclud[e] from residential sections offensive trades, industries, and structures likely to create nuisances.”⁸⁵

Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a

⁷⁹ *Id.* at 265-66.

⁸⁰ See *infra* Part II.B(3). See SALKIN, *supra* note 16., §§ 1:7, 1:12-1:15; YOKLEY, *supra* note 15, § 21-1.

⁸¹ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁸² *Id.* at 388.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.⁸⁶

The Court further held that the zoning power could legitimately be extended to exclude all industrial establishments as a class, even though "it may thereby happen that not only offensive and dangerous industries" will be affected,⁸⁷ and zoning regulations in general would survive scrutiny so long as they were not arbitrary and had "no substantial relation to the public health, safety, morals, or general welfare."⁸⁸ Following the decision, municipalities across the country adopted zoning ordinances, which came to be known as "Euclidean zoning."⁸⁹

The *Village of Euclid* decision presaged decades of decisions in which the Court established a constitutional principle of federal government deference to local land use decisions.⁹⁰ Recent cases

⁸⁶ *Vill. of Euclid*, 272 U.S. at 388 (internal citations omitted).

⁸⁷ *Id.*

⁸⁸ *Id.* at 395.

⁸⁹ Platt, *supra* note 11, at 261.

⁹⁰ See, e.g., *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) ("[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities."); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (upholding Congress's police power over District of Columbia to enact redevelopment project to improve public health and safety). In addition to these cases dealing with the constitutionality of zoning regulations, the Court also has given state and local government broad latitude in the land use arena by interpreting the Takings Clause narrowly. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992) (where a state seeks to sustain a regulation that deprives land of all economically beneficial use, it may resist compensation only if it can be proven that the owner's proscribed use interests were not part of his or her title to begin with); *Yee v. City of Escondido*, 503 U.S. 519, 539 (1992) (city's rent control ordinance, allowing mobile park landowners to terminate a tenant's lease only when the landowner wanted to change the use of his or her land or upon nonpayment of rent -- which effectively transferred wealth from the more affluent landowners to the tenants -- did not amount to a per se taking); *Nordlinger v. Hahn*, 505 U.S. 1, 12-13 (1992) (a state law providing for strict limits on real property taxes and assessments rationally furthered legitimate purposes, and exemptions that resulted in unequal assessments did not violate federal constitutional law); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act was justified and, therefore, constitutional); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) (respondent bank did not apply to the appellate board for variances from the zoning ordinance at issue, and did not seek compensation through state procedures, and therefore its takings claim was not yet ripe for review); *Sporhase v. Nebraska*, 458 U.S. 941, 954, 957-58 (1982) (The reciprocity provision in the state's water statute

confirm the Court's deferential calculus, which preserves local control and autonomy over land use and restricts congressional and federal judicial power to interfere with such decisions.⁹¹ According to Justice Scalia, speaking for a plurality of the Court, it is the "quintessential state and local power."⁹²

With *Rapanos v. United States*, the Court was faced with interpreting the meaning of "the waters of the United States" as used in the Clean Water Act,⁹³ and crafted its interpretation in light of the doctrinal history of limiting federal intervention in

impermissibly burdened interstate commerce. The unexercised federal regulatory power did not foreclose state regulation of water resources, of the uses of water within the state, or of interstate commerce in water); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) *overruled by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005) (zoning ordinances that placed appellants' property in a zone where property may only be devoted to single-family dwellings, accessory buildings, and open-space uses, which effectively prevented appellants from erecting multiple-dwelling residences, did not constitute a taking at all); *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104, 132-34 (1978) (Landmarks Preservation Commission's refusal to permit owner to erect a building on top of Grand Central Terminal did not constitute a taking).

⁹¹ *E.g.*, *Kelo v. City of New London*, 545 U.S. 469, 484 (2005) (recognizing the deference owed to local officials in exercises in urban planning and development); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 343 (2001) (mere enactment of regulations implementing moratoria against all viable economic use of petitioners' property did not constitute a per se taking under the Fifth Amendment); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (because legislators and administrators are properly concerned with balancing numerous competing considerations [in zoning decisions], courts should refrain from reviewing the merits of their decisions, absent a showing of arbitrariness, irrationality, or proof of discriminatory purpose); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (exercise of discretion in zoning decisions is a legislative, not a judicial, function); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928) (reviewing zoning restrictions under low level scrutiny); *Gorieb v. Fox*, 274 U.S. 603, 608-609 (1927) (upholding local setback requirement as "[s]tate Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require[.]"); *Zahn v. Bd. of Pub. Works of City of L.A.*, 274 U.S. 325, 328 (1927) (upholding zoning ordinance prohibiting construction of business buildings).

⁹² *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) (referring to issuance of state development permits for the filling of wetlands). *See also* *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) [hereinafter *SWANCC*] (noting that States hold traditional and primary power over land and water use); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."); *FERC*, 456 U.S. at 767, n.30 ("[R]egulation of land use is perhaps the quintessential state activity."); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) ("The regulation of land use is traditionally a function performed by local governments.").

⁹³ Clean Water Act, 33 U.S.C. § 1362(7) (2000).

the land use arena. In a previous Clean Water Act case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court had rejected the Army Corps' authority to regulate small, intrastate ponds partly because it "would result in a significant impingement of the States' traditional and primary power over land and water use."⁹⁴ The Army Corps argued for broad regulatory powers, relying primarily⁹⁵ on *United States v. Riverside Bayview Homes, Inc.*,⁹⁶ in which the Court held that the Corps had jurisdiction over wetlands that actually abutted on a navigable waterway.⁹⁷ Rejecting the federal government's demand to "readjust the federal-state balance" in its favor, the Court found instead that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .'" and thus read the statute as written to avoid the significant constitutional and federalism questions.⁹⁸

The same principles were brought to bear in *Rapanos*, where the Army Corps of Engineers had "deliberately sought to extend the definition of 'the waters of the United States' to the outer limits of Congress's commerce power[.]" adopting "increasingly broad interpretations of its own regulations."⁹⁹ The plurality, in an opinion by Justice Scalia, rejected the Corps' interpretation as an impermissible impingement in the area of land use regulation, which was an area of traditional state authority; it was inappropriate for the federal government to insert itself into local land use prerogatives.¹⁰⁰ The plurality disapproved of the fact that the federal government had come to act like a "local zoning board": "[t]he extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board."¹⁰¹ Consistent with the reasoning of the *Solid Waste Agency* case, the plurality of the *Rapanos* Court noted that the Corps'

⁹⁴ *SWANCC*, 531 U.S. at 174.

⁹⁵ *See id.* at 167.

⁹⁶ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁹⁷ *Id.* at 133.

⁹⁸ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (citing 33 U.S.C. § 1251(b)).

⁹⁹ *Rapanos v. United States*, 547 U.S. 715, 724-25 (2006) (citing 33 U.S.C. § 1362(7) (2006)).

¹⁰⁰ *Id.* at 737.

¹⁰¹ *Id.* at 738 (citing 33 CFR § 320.4(a)(1) (2004)).

interpretation “stretches the outer limits of Congress’s commerce power and raises difficult questions about the ultimate scope of that power[.]” and thus had to be rejected as an impermissible construction of the statute.¹⁰² Justice Kennedy’s concurrence in the judgment, on the other hand, addresses just this federalism issue. Kennedy asserted that the “significant nexus” test of *SWANCC*, which he wished to utilize in *Rapanos*, “avoided applications – those involving waters without a significant nexus – that appeared likely, as a category, to raise constitutional difficulties and federalism concerns.”¹⁰³ Kennedy believed that the even plurality’s interpretation gave the federal government too much power and “would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute’s reach[.]” posing a difficult Commerce Clause issue.¹⁰⁴

The principle of federal deference has permeated the Court’s Takings Clause¹⁰⁵ decisions as well, including its most recent decision in *Kelo v. City of New London*, in which the Court held that there was no improper taking when a town utilized eminent domain to secure the final properties of an approved development plan designed to foster economic rejuvenation.¹⁰⁶ The *Kelo* Court deferred to the local authority its determination of the appropriate boundary for the development area. The decision was politically unpopular, but it did not significantly depart from prior case law and developments, which were consistent with the settled federal/state divide on land use power. In general, local and state governments have been given wide latitude to invoke eminent domain so long as the “fair compensation” required by the Constitution is paid and some public purpose is articulated.¹⁰⁷

¹⁰² *Id.*

¹⁰³ *Id.* at 776.

¹⁰⁴ *Rapanos v. United States*, 547 U.S. 715, at 776-77.

¹⁰⁵ See U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation.”).

¹⁰⁶ *Kelo v. City of New London*, 545 U.S. 469, 490 (2005).

¹⁰⁷ See *e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1054 (1992) (compensation required if regulation of beach property effects “deprivation of all economically valuable use”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 839 (1987) (Commission could not condition a building permit on the property owner granting a public easement across his beachfront property); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) (where government requires an owner to suffer a permanent physical invasion of her property, however minor, it must provide just compensation); *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (“[O]ne person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid[.]”); *cf.* *City of Monterey v. Del*

The Court has never decided a land use case involving animus by local land use officials against a religious group and has rarely invalidated a local land use decision outside the takings and fair housing arenas. It did invalidate race-based restrictive covenants on land in *Shelley v. Kraemer* on the principle that the courts may not enforce racially discriminatory private contracts.¹⁰⁸

B. The Limited Congressional Interference with State and Local Land Use Determinations

There are relatively few federal laws that interfere with local land use decisions. The primary body of federal law in this arena has been prompted by the need to coordinate state and local actions and the impossibility of serving the national good without coordination of state and local efforts.¹⁰⁹ Environmental and

Monte Dunes at Monterey, Ltd., 526 U.S. 687, 694 (1999) (affirming jury verdict finding city's repeated rejections of owner's proposals for development of property violated equal protection and due process and effected regulatory taking). Because of the political response to *Kelo*, some states subsequently enacted laws that limit local governments' ability to invoke eminent domain to the detriment of individual landowners. See, e.g., Ethan K. Friedman, *Redevelopment Redefined: State Legislative Responses to the Kelo Decision*, 17 MILLER & STARR, REAL ESTATE NEWSALERT 185 (March 2007) ("The face of [SB 1206] leaves no doubt that it is an unequivocal response to *Kelo*. Joining 34 other states which have added restrictions on redevelopment through legislative action or referendums, California significantly modifies the Community Redevelopment Law in considerable detail as set forth in SB 1206.") (citing S.F. CHRON., Jan. 12, 2007, at A6).

¹⁰⁸ *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

¹⁰⁹ Much of the federal legislation enacted in this arena works by providing incentives for local governments to regulate land consistent with federal priorities. See, e.g., Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121(b) (2000):

It is the intent of the Congress, by this chapter, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by—

- (1) revising and broadening the scope of existing disaster relief programs;
- (2) encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments;
- (3) achieving greater coordination and responsiveness of disaster preparedness and relief programs;
- (4) encouraging individuals, States, and local governments to protect themselves by obtaining insurance coverage to supplement or replace governmental assistance;
- (5) encouraging hazard mitigation measures to reduce losses from

telecommunication laws have been justified on this basis.

In contrast, the Fair Housing Act does not fit this model. Instead, it is aimed at eliminating implacable housing discrimination based on race, color, religion, sex, handicap, familial status, or national origin¹¹⁰ behind the decisions of state and local governments and individual landowners and landlords. In the absence of discrimination, though, it leaves local governments and communities to choose their plans, priorities, and development (or anti-development) goals.

Then there is Section 2(a) of RLUIPA, which puts federal courts in the position of second-guessing nondiscriminatory local land use determinations and undermines core planning principles and policies, interferes with run-of-the-mill land use decisions, and fits neither of these models.

1. The Federal Environmental Laws

Environmental laws, like the Clean Water Act¹¹¹ and Clean Air Act,¹¹² are generally justified on the ground that ensuring clean air and water cannot be accomplished by states acting independently. Rather, there is a need for federal oversight that coordinates the separate actions of the states and local governments affecting air and water existing within and

disasters, including development of land use and construction regulations.

National Flood Insurance Program Enhanced Borrowing Authority Act of 2006, 42 U.S.C. § 4001(e) (2000).

It is the further purpose of this chapter to (1) encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses, (2) guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards, (3) encourage lending and credit institutions, as a matter of national policy, to assist in furthering the objectives of the flood insurance program, (4) assure that any Federal assistance provided under the program will be related closely to all flood-related programs and activities of the Federal Government, and (5) authorize continuing studies of flood hazards in order to provide for a constant reappraisal of the flood insurance program and its effect on land use requirements.

Water Resources Planning Act, 42 U.S.C. § 1962 (2000) (funding made available to states to encourage their participation in water and related land resources planning).

¹¹⁰ 42 U.S.C. §§ 3601-3631 (2000).

¹¹¹ 33 U.S.C. §§ 1251-1387 (2000).

¹¹² 42 U.S.C. §§ 7401-7671q (2000).

extending beyond their boundaries. As *Rapanos* makes clear, the need for federal oversight has not meant that the federal government may take over all local and state power over land use.

2. The Telecommunications Act

The Telecommunications Act (TCA), which was an amendment to the Communications Act of 1934, is justified on the same theory of needed coordination. Congress determined that a national approach to deregulation of the telecommunications sector was needed to increase competition, fuel investment and innovation, and to encourage open access to service for all Americans.¹¹³ While the Supreme Court has not weighed in as of yet regarding the Telecommunications Act's constitutionality, a congruity may be found in the Supreme Court jurisprudence involving similar acts.

To begin, the Public Utility Regulatory Policies Act (PURPA) of 1978 was upheld in *FERC v. Mississippi* on the theory that "federal regulation of intrastate power transmission may be proper because of the interstate nature of the generation and supply of electric power."¹¹⁴ Moreover, the Court found that the legislative history of PURPA provided an ample and rational basis to support Congress's decision to permit federal legislation to displace state authority over utility regulation.¹¹⁵ The Court found that PURPA contained essentially three requirements: that the States enforce standards set by the Federal Energy Regulatory Commission (FERC), consider specified ratemaking standards, and adopt certain procedures in state commissions.¹¹⁶ These three requirements were valid exercises of Congress's power because the first requirement was valid under the Commerce Clause¹¹⁷ and the second two "simply establish[ed]

¹¹³ S. REP. NO. 104-23, at 1 (1995).

¹¹⁴ *FERC v. Mississippi*, 456 U.S. 742, 755 (1982).

¹¹⁵ *See id.* at 756-57. The Court did not, however, address whether Congress considered federalism concerns and simply found that the legislative history provided enough to support a rational basis for the exercise of federal authority in this area.

¹¹⁶ *Id.* at 759.

¹¹⁷ *Id.* at 757. The Court described how PURPA fits within Congress's power over interstate commerce:

[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect . . . The intrastate activities of

requirements for continued state activity in an otherwise preemptible field.”¹¹⁸ The dissent, however, spelled out the principle, reflected in the *Rapanos* decision, that the consideration of federalism must always be taken into account and should have counseled against the TCA. Justice O’Connor’s dissent in *FERC* reasoned that the challenged Titles of PURPA challenged “attribute[s] of state sovereignty”¹¹⁹ and was “antithetical to the values of federalism.”¹²⁰ Justice O’Connor went further to spell out the necessity for consideration of and protection of the principles of federalism. She claimed that the majority’s decision “undermine[d] the most valuable aspects of our federalism . . . that the 50 States serve as laboratories for the development of new social, economic, and political ideas.”¹²¹ She also pointed out that an abrogation of the principles of federalism would weaken the opportunity for citizens to participate in representative government.¹²²

Her reasoning was then adopted by a majority of the Court in *New York v. United States*,¹²³ where the Court addressed the Low-Level Radioactive Waste Policy Amendments Act of 1985¹²⁴ and held that the federal government could provide monetary or access incentives to the States to persuade them to join a regional compact, develop an in-state disposal facility or dispose the waste at existing approved sites but could not compel States to take title and possession of low-level radioactive waste.¹²⁵ The Court essentially found that, “while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders,

these utilities, although regulated by the Mississippi Public Service Commission, bring them within the reach of Congress’ power over interstate commerce.

Id.

¹¹⁸ *Id.* at 769.

¹¹⁹ *FERC*, 456 U.S. at 779 (O’Connor, J., dissenting).

¹²⁰ *Id.* at 775.

¹²¹ *Id.* at 788.

¹²² *Id.* at 790

Citizens, however, cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway national legislature. If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.

Id.

¹²³ *New York v. United States*, 505 U.S. 144 (1992).

¹²⁴ 42 U.S.C. § 2021b (2000).

¹²⁵ *New York*, 505 U.S. at 188.

the Constitution does not confer upon Congress the ability simply to compel the States to do so.”¹²⁶

Based on these principles, some provisions of the TCA have been found to violate the constitutional limits of federalism by the lower federal courts. For example, the Fourth Circuit, relying on *New York v. United States*, found that the imposition of a “substantial evidence” standard on zoning board decision-making processes would result in overruling the county’s zoning decisions, and explained: “this provision of the Act, 47 U.S.C. § 332(c)(7)(B)(iii), ‘commandeer[s]’ the County’s legislative process and is therefore unconstitutional under the Tenth Amendment.”¹²⁷ At the same time, the Second Circuit has found neither a facial nor an as-applied violation of the Tenth Amendment in a different provision of the Act, which required state and local governments to refrain from regulating telecommunications facilities solely on the basis of radiation concerns when the facilities otherwise met FCC guidelines,¹²⁸ because it “does not commandeer local authorities to administer a federal program in violation of the federalism principles embodied in the Tenth Amendment . . .” as set out in *New York* and *Printz v. United States*.¹²⁹

3. The National Historic Preservation Act

While affecting some properties, the National Historic Preservation Act (NHPA)¹³⁰ does not directly affect local land use decision makers or planning officials. Generally speaking, federal preservation laws, in contrast with state and local counterparts, give rise to very few constitutional concerns because they impose such a limited substantive effect upon an owner’s use of

¹²⁶ *Id.* at 149.

¹²⁷ *Petersburg Cellular P’ship. v. Bd. of Supervisors*, 205 F.3d 688, 705 (4th Cir. 2000) (The courts have disagreed over the constitutionality of this provision). *Compare id.* (one judge of per curiam opinion finding 47 U.S.C. § 332(c)(7)(B)(iii) a Tenth Amendment violation), *with* *USCOC of Va. RSA # 3, Inc. v. Montgomery County Bd. of Supervisors*, 245 F. Supp. 2d 817, 834 (W.D. Va. 2003) (finding 47 U.S.C. § 332(c)(7)(B)(iii) constitutional), *and* *USOC of Greater Iowa, Inc. v. City of Bellevue*, 279 F. Supp. 2d 1080, 1087 (D. Neb. 2003) (same holding), *and* *SBA Commc’ns, Inc. v. Zoning Comm’n*, 164 F. Supp. 2d 280, 288 (D. Conn. 2001) (same holding).

¹²⁸ *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (holding that 47 U.S.C. § 332(c)(7)(B)(iv) does not violate the Tenth Amendment facially or as-applied and is within Congress’s Commerce Clause authority), *cert. denied*, 531 U.S. 1070 (2001).

¹²⁹ *Printz v. United States*, 521 U.S. 898 (1997).

¹³⁰ National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2000).

property.¹³¹ American historical preservation began with a private group rescuing George Washington's dilapidated estate on Mount Vernon in the 1850s.¹³² In the nineteenth century, Congress enacted legislation to preserve Civil War battlefields as military parks, while the 1896 Supreme Court decision in *United States v. Gettysburg Electric Railway Co.*¹³³ upheld the federal government's eminent domain power to acquire historic property, is considered an important basis for all subsequent federal preservation activity.¹³⁴

The National Historic Preservation Act has two major twentieth century legislative antecedents. First, the Antiquities Act of 1906¹³⁵ created constitutional controversy, but primarily separation of powers concerns: the act gave the President the power to declare national monuments by executive order (and impose criminal sanctions to prevent unauthorized excavation, injury or destruction), which aroused anger in Congress for bypassing the need for its approval. Second, Congress enacted the Historic Sites Act in 1935,¹³⁶ which asserted a "national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States."¹³⁷ This latter act sparked few federalism controversies probably because it was narrowly interpreted to minimize the categories of "historical" properties to which it could apply¹³⁸ and because it usually could not compel compliance.¹³⁹

¹³¹ PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 31.03 (2008).

¹³² *Id.* § 31.01 n.13.

¹³³ *United States v. Gettysburg Electric Rwy. Co.*, 160 U.S. 668 (1896).

¹³⁴ ROHAN, *supra* note 131, § 31.02[1]; Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2006).

¹³⁵ 16 U.S.C. §§ 431-433. The Act was created to prevent further looting of pre-historic sites. ROHAN, *supra* note 131, § 31.02[1]. However, "[c]oncerns regarding the constitutionality of the Antiquities Act of 1906 and the efficacy of its protection mechanisms led to the passage of the Archeological Resources Protection Act of 1979." *Id.*

¹³⁶ Historic Sites Act, 16 U.S.C. §§ 461-467 (2006).

¹³⁷ 16 U.S.C. § 461.

¹³⁸ SHERRY HUTT ET AL., CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES 23 (2004).

¹³⁹ The Act's language seemingly limited the means for procuring land:

For the purpose of sections 461 to 467 of this title, acquire in the name of the United States *by gift, purchase, or otherwise* any property, personal or real, or any interest or estate therein, title to any real property to be satisfactory to the Secretary: Provided, That no such property which is owned by any religious or educational institution, or which is owned or administered for the benefit of the public shall be so acquired *without the consent of the owner*.

Furthermore, both acts concerned (what was or would become) only federal land.¹⁴⁰

The National Historic Preservation Act expands the scope of its 1935 predecessor. It requires federal agencies to minimize harm to historical landmarks via the Act's most important provision, Section 106, which creates a review process for all federally funded or permitted projects, requiring federal agencies to consider the effects of their projects on historically significant properties.¹⁴¹ The NHPA also created the National Register of Historic Places:¹⁴² the Act is invoked only when the federal government acts concerning items explicitly enumerated in the register or those eligible for registration. The Act further provides for the designation of a State Historic Preservation Officer, who surveys and identifies potential properties for the register. It also created the Advisory Council on Historic Preservation, an independent Federal agency, composed of twenty members from both the public and private sectors to advise Congress and the President on preservation issues, and to participate in Section 106 review.¹⁴³ The NHPA also supports state and local government efforts to spark their own preservation initiatives.

16 U.S.C. § 462(d) (1935) (emphasis added). However, in a case raising the Act's constitutionality, the Eighth Circuit held that the federal government may constitutionally utilize its eminent domain power to condemn private land for the act's purposes (interpreting the word "otherwise" in the statutory language above to include eminent domain). *Barnidge v. United States*, 101 F.2d 295, 299 (8th Cir. 1939) (internal citations omitted). In 1949, Congress created the National Trust for Historic Preservation: a charitable non-profit organization established to further facilitate the goals of the 1935 Historic Sites Act. 16 U.S.C. § 468 – 468e.

¹⁴⁰ Joe A. Shull & Carol D. Shull, *New Inroads for Historic Preservation*, 26 ADMIN. L. REV. 357, 358 (1974).

¹⁴¹ 16 U.S.C. § 470f.

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Id.

¹⁴² 16 U.S.C. § 470a(a)(1)(A).

¹⁴³ 16 U.S.C. § 470i.

The NHPA institutes significant constitutional safeguards through its procedures.¹⁴⁴ For example, owners can object to having their property listed as historical landmarks.¹⁴⁵ However, the property may receive the designation without the owner's consent if a majority of property owners in the district vote for the designation.¹⁴⁶ In other words, the issue is kept local.¹⁴⁷

4. The Fair Housing Act

Beyond these instances of the need for federal coordination and oversight, only intentional housing discrimination has justified federal intervention in local land use decisions.¹⁴⁸ The Fair

¹⁴⁴ ROHAN, *supra* note 131, § 31.02[5].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Another federal law affecting land use, but not local land use decisions, is the National American Graves Protection and Repatriation Act (NAGPRA), which requires the return of cultural items and bodies to Native Alaskan, Hawaiian, and Indian groups. 25 U.S.C. § 3001-3013 (2000). The law applies to every federal agency and all other institutions (having a legal interest in the items) receiving federal funds, excepting the Smithsonian which is governed by the National Museum of the American Indian Act of 1989 (20 U.S.C. § 80q). Each of these agencies or institutions must create inventories and summaries of the items in their possession. 25 U.S.C. § 3003 (2000). As pertaining to land use, NAGPRA bifurcates regulations based on whether discovery of cultural items is inadvertent discovery or a planned excavation on federal or tribal land. 25 U.S.C. § 3002(a-d) (2000). The latter requires consultation with tribal leaders or linear descendants before engaging in such projects, while the former requires such consultation upon discovery if the federal agency believes it might have an impact on the artifacts. Interestingly, in the hearings considering NAGPRA, Congress – unlike in RLUIPA – took at least a marginal interest in the potential costs to local and state entities. Robert Reischauer, the former Director of the Congressional Budget Office remarked in his statement that “as operators of about one-third of all museums, state and local governments could face costs from enactment of H.R. 5237.” H.R. REP. NO. 101-877, at 22 (1990). He went on to dismiss this concern by “[a]ssuming the appropriation of adequate amounts by the federal government, however, these costs would be covered by federal grants made availbale [sic] under the bill.” *Id.* Moreover, the Department of Justice's Office of Legislative Affairs brought up concerns of running afoul of a takings challenge with respect to private museums being forced to repatriate property in which they maintained legal title or interest under NAGPRA. *See id.*, at 25-29 (statement of Bruce C. Navarro, Deputy Assistant Attorney General).

¹⁴⁸ The Americans with Disabilities Act (ADA) of 1990 also contains provisions which affect land usage and building construction. 42 U.S.C. § 1210 et seq. (1990). These typically center around public transportation and accommodation as contained within Titles II and III of the Act. 42 U.S.C. §§ 12131-12165; 42 U.S.C. §§ 12181-12189. The Supreme Court has addressed the ADA in the context of Title I of the Act (42 U.S.C. § 12111-12117) and found that it was an unconstitutional exercise of Congress's power under Section 5 of the

Housing Act (FHA)¹⁴⁹ was created to “provide, within constitutional limitations, for fair housing throughout the United States.”¹⁵⁰ The FHA seeks to remove discrimination in the housing market by creating a cause of action – enforced either administratively through the Secretary of Housing and Urban Development or the Attorney General or through a private action – for refusing to sell or rent housing, restrict conditions or services, or produce discriminatory advertising aimed at the protected class.¹⁵¹ The FHA came about originally as an amendment to a civil rights workers’ protection bill¹⁵² in the wake of desegregation and in light of evidence that racial discrimination was still endemic throughout the United States, creating de facto segregation despite prohibitions on government-sponsored segregation.¹⁵³ The ability of African-Americans to access employment in the new economy was closely tied to their ability to find housing. The Fair Housing Act became a mechanism with which to combat hidden discrimination and reverse the trend of de facto segregation – a function which it maintains today with its expanded class of protected persons.¹⁵⁴

Fourteenth Amendment, and it violated the Eleventh Amendment by waiving States’ immunity to suits by private citizens for money damages. *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367-74 (2001). The Supreme Court has upheld Title II of the ADA as applied to the fundamental right of access to courts as a valid prophylactic exercise of Congress’s Section 5 authority. *Tennessee v. Lane*, 541 U.S. 509, 521-22 (2004). In short, Congress must provide within its legislative history a showing of a pattern of persistent and widespread discrimination and craft a remedy that is both congruent and proportional to that violation.

¹⁴⁹ 42 U.S.C. § 3601 (2000).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² H.R. 2516, 90th Cong., 1st Sess. (1968).

¹⁵³ In the first half of the 1960s,

one-half to two-thirds of all new factories and stores in all areas of the country except the South were located outside the central cities and metropolitan areas. Although jobs moved to the suburbs, black people were prevented from following; eight percent of the nonwhite population of metropolitan areas in 1967 lived in central cities. These persons, the least able to afford the high cost of transportation from the city to the suburbs, sustained the highest rate of unemployment.

Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 153 (1969) (Jean Dubofsky was the former legislative assistant to Senator Walter Mondale, who proposed the amendment of the worker’s protection bill with the housing measures).

¹⁵⁴ The U.S. Department of Housing and Urban Development commissioned and published, in 2002, a comprehensive study comparing rates of discrimination between 1989 and 2000. The study found “that discrimination still persists in both rental and sales markets of large metropolitan areas

The Fair Housing Act explicitly forbids discrimination against any person on the basis of race, color, religion, sex, familial status, national origin, and, in some provisions, handicap.¹⁵⁵

The FHA forbids discrimination by private or public entities in the sale or rental of housing or advertising and providing for those transactions,¹⁵⁶ residential real-estate related transactions including the issuance of loans or appraisal services,¹⁵⁷ and the provision of brokerage services.¹⁵⁸ Additionally, the FHA applies to public entities including the federal government, states, and their political subdivisions that engage in discriminatory housing practices such as exclusionary zoning, applying different limits on the number of unrelated individuals who can live in a home between disabled persons and those outside the protected class, and adopting redevelopment plans which would discriminate against a protected class.¹⁵⁹ While the FHA doesn't include an explicit waiver of immunity, courts have held that both equitable and legal damages are authorized against state or local governments or their political subdivisions as well as against private entities.¹⁶⁰ The cooperation between the states and federal government regarding fair housing is set out in the statute itself.¹⁶¹ And the shared goals, in addition to the finding of the Act's constitutionality, seem to preclude a challenge on the grounds of sovereign immunity to an FHA claim.

nationwide, but that its incidence has generally declined since 1989." THE URBAN INST.: METRO. HOUS. AND COMMUNITIES POLICY CTR., DISCRIMINATION IN METRO. HOUS. MKTS.: NAT'L RESULTS FROM PHASE I HDS 2000, at iii, *available at* http://www.huduser.org/Publications/pdf/Phase1_Report.pdf.

¹⁵⁵ 42 U.S.C. § 3601 et seq. (2000).

¹⁵⁶ 42 U.S.C. § 3604 (2000).

¹⁵⁷ 42 U.S.C. § 3605(a) (2000).

¹⁵⁸ 42 U.S.C. § 3606 (2000) (the protected class may not be denied access, membership, or participation in multiple-listing services, real-estate brokers organizations, or similar services).

¹⁵⁹ 42 U.S.C. § 3615 (2000).

¹⁶⁰ *See, e.g., Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 825-26 (9th Cir. 2001) (upholding compensatory damages against defendant city along with attorney fees pursuant to 42 U.S.C. § 3613(c)(2)); *N.J. Coal. of Rooming & Boarding House Owners v. Mayor of Asbury Park*, 152 F.3d 217, 223-25 (3d Cir. 1998) (The Court concluded that the district court erroneously denied compensatory damages and failed to consider award of fees and costs against defendant cities, township and state. The Court also declared that if actual damages were proved, the compensatory damages under the statute were not discretionary but mandatory.); *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1039 (8th Cir. 1979) (even though plaintiffs had obtained compensatory damages and injunctive relief, the district court abused discretion in disallowing damages claim for increase in construction costs after zoning ordinance held in violation of FHA).

¹⁶¹ *See* 42 U.S.C. §§ 3610(f), 3616 (2000).

The FHA may be enforced through one of three means: (1) enforcement by the Secretary of Housing and Urban Development through an investigation and administrative proceeding,¹⁶² (2) enforcement by private persons in the form of a civil action,¹⁶³ or (3) enforcement by the Attorney General in cases where there are patterns or practices of discrimination.¹⁶⁴ In any case, plaintiffs must show that the discrimination occurred; this typically can occur through introduction of evidence that there was either disparate treatment or a disparate impact.¹⁶⁵ That is, they must show that they were discriminated against individually or that a policy or practice of an entity impacts a protected class to such a degree that an inference of discrimination is plausible.¹⁶⁶

¹⁶² 42 U.S.C. § 3612 (2000).

¹⁶³ 42 U.S.C. § 3613(a)(1)(A) (2000).

¹⁶⁴ 42 U.S.C. § 3614(a) (2000).

¹⁶⁵ See, e.g., *Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 18 (1988) (allowing use of disparate impact for a FHA claim since appellants had conceded the point regarding its application); *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008). For a disparate treatment claim under § 3604:

A disparate treatment claim requires a plaintiff to show that he has actually been treated differently than similarly situated non-handicapped people. [For the disparate impact claim, the plaintiff] presented *no* comparative data at all, relying instead on the bald assumption that because the halfway houses at issue in this case cannot be used for short-term group living, the occupancy-turnover rule must necessarily create a disparate impact on the handicapped. But simply showing that a few houses are affected by an ordinance does not come close to establishing disparate impact.

Id. at 1218; *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006) (“Typically, a disparate impact is demonstrated by statistics.”); *Tsombanidis v. West Haven Fire Dep’t*, 352 F.3d 565, 575 (2d Cir. 2003) (disparate impact claims are determined by statistical comparison between similarly situated groups).

¹⁶⁶ While RLUIPA’s Equal Terms provision, section 2(b)(1), acts as a simple version of a disparate treatment/impact test to root out discrimination, the substantial burden provision, section 2(a), falters under the same analysis that the Supreme Court used in invalidating RLUIPA’s predecessor, RFRA. To wit, the *Boerne* Court stated that

RFRA’s substantial-burden test, however, is not even a discriminatory effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement--a requirement that was not used in the pre-*Smith* jurisprudence RFRA

Following its passage, it was challenged on Commerce Clause and Fourteenth Amendment grounds in various jurisdictions but was universally upheld as a valid exercise of Congress's authority pursuant to section 2 of the Thirteenth Amendment.¹⁶⁷ Moreover, the amendments to the Act made by the Fair Housing Amendments Act of 1988, which – among other changes – added disabled persons to the protected class, modified definitions of discrimination and the time individuals had to bring complaints, expanded Department of Justice access to pattern and practice cases to individual acts of discrimination, and expanded the Department of Housing and Urban Development's reporting requirements, have also been upheld pursuant to both the Thirteenth Amendment and Congress's power over interstate commerce.¹⁶⁸ The members of Congress took into account the precepts of federalism with the passage of the Act.¹⁶⁹ Responding to Senator Mondale at a hearing on the bill that was to become the Fair Housing Act, Attorney General Clark confirmed that “[t]his legislation, however, would not in any way interfere with States and local governments in their efforts to enforce their laws.”¹⁷⁰ Although the Thirteenth Amendment was primarily used by courts as the constitutional basis for the FHA, the original committee hearings include many references to the

purported to codify--which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

521 U.S. at 535.

¹⁶⁷ “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, §§ 1-2. *See, e.g.*, *Hunter v. United States*, 459 F.2d 205, 214 (4th Cir. 1972) (holding the FHA to be within Congress's power under § 2 of the Thirteenth Amendment), *cert. denied*, 409 U.S. 934 (1972); *United States v. Parma*, 661 F.2d 562, 573 (6th Cir. 1981) (same holding); *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir. 1974) (same holding), *cert. denied*, 419 U.S. 1021 (1974); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 127 (5th Cir. 1973) (same holding), *cert. denied*, 414 U.S. 826 (1973).

¹⁶⁸ *See, e.g.*, *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 215 (5th Cir. 2000) (holding the Fair Housing Amendments Act of 1988 to be a valid exercise of Congress's Commerce Clause authority).

¹⁶⁹ Dubofsky, *supra* note 153, at 152-53 (“Opponents argued the equally familiar constitutional grounds of states' rights and the right of the individual to control the disposal of his property.”).

¹⁷⁰ *Fair Housing Act of 1967: Hearing on S.1358, S.2114, and S.2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. 15 (1967) (in the midst of conversation regarding the efficacy of state laws).

validity of the FHA under both the Commerce Clause and section five of the Fourteenth Amendment as well. Attorney General Ramsey Clark spoke in support of its constitutionality when he asserted that “[t]he 14th amendment provides a firm constitutional base for legislation eliminating discrimination in housing.”¹⁷¹ There was further evidence submitted that the States to that point were generally ineffective in alleviating discrimination in housing. Attorney General Clark spoke bluntly on the matter: “I don’t think you have to know much more than to have visited a few of our cities, though, to know that State laws have been inadequate and that one of the greatest needs that this country has is effective action toward open housing and the opportunity for every American to live in any part of any city.”¹⁷²

Opinions on the efficacy of the Fair Housing Act are generally positive although criticisms have been made – especially regarding its enforcement.¹⁷³ The consensus, as supported by the quantitative decrease in discrimination,¹⁷⁴ seems to be that “a review of data suggests some success, but certainly not full victory.”¹⁷⁵ Homeownership rates for the protected class are certainly rising, but the concern is that this has not necessarily resulted in the expected integration and decrease in de facto neighborhood segregation.¹⁷⁶ As above, many of the criticisms of the Act center on the enforcement mechanisms including the seeming lack of will in the Department of Justice in bringing about pattern or practice cases, identification of discrimination, and general shortcomings in the enforcement provisions of the Act.¹⁷⁷ Whatever the problems with the FHA, it is clear that it identifies a prevalent problem supported by quantifiable data both at its passage and today, provides a legislative history which

¹⁷¹ *Id.* at 6, 8-14 (statement of Attorney General Ramsey Clark; the Attorney General also submitted a memorandum on the constitutionality of the Act under the Fourteenth Amendment and the Commerce Clause).

¹⁷² *Id.* at 16.

¹⁷³ See, e.g., Symposium, *The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation*, 41 IND. L. REV. 507, 507-816 (2008) (providing an assortment of 11 articles discussing the efficacy and future of the Fair Housing Act).

¹⁷⁴ See THE URBAN INST., *supra* note 154 (examining housing discrimination of minorities).

¹⁷⁵ John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 608 (2008).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 616; Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 558-59 (2008); John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 630-31 (2008).

addresses federalism concerns and Congress's authority in the arena, and provides a prophylactic remedy that is "proportional and congruent" to the problem which it seeks to address.

5. The Religious Land Use and Institutionalized Persons Act

The land use provisions of RLUIPA¹⁷⁸ introduce an amalgam of measures to aid religious entities in the land use process. Three are similar to the FHA or settled constitutional law, but one has introduced novel federal micromanagement and disruption into generally applicable local land use law and community planning. There are four main land use provisions, which I will consider in reverse order. First, section 2(b)(3) bans the total exclusion of churches from a community and forbids unreasonable limitations on religious projects.¹⁷⁹ Second, section 2(b)(2) proscribes discrimination against religious entities in the land use process.¹⁸⁰ Third, section 2(b)(1) requires local governments to put religious entities on "equal terms" with nonreligious assemblies or institutions.¹⁸¹ Fourth, section 2(a) imposes strict scrutiny on land use decisions never subjected to anything more than rationality review before.¹⁸²

a. RLUIPA Provisions that Reflect Constitutional Standards

If interpreted correctly, section 2(b) is redundant to 42 U.S.C. section 1983, which provides a private right of action for constitutional violations.¹⁸³ Section 2(b) provides a number of constitutionally-familiar provisions related to discrimination and exclusion of a protected class.¹⁸⁴ The total exclusion and

¹⁷⁸ 42 U.S.C. § 2000cc (2000) (§ 2 of the enacted statute, § 1 is the short title).

¹⁷⁹ 42 U.S.C. § 2000cc(b)(3) (2000) ("Exclusions and limits: No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.").

¹⁸⁰ 42 U.S.C. § 2000cc(b)(2) ("Nondiscrimination: No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religious or religious denomination.").

¹⁸¹ 42 U.S.C. § 2000cc(b)(1) ("Equal Terms: No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.").

¹⁸² 42 U.S.C. § 2000cc(a).

¹⁸³ 42 U.S.C. § 1983 (1996). For the moment, I am setting aside the constitutional defects in the definition of "religious exercise," which I will discuss *infra*.

¹⁸⁴ While these provisions codify principles that have been applied in cases

reasonableness provision reflects settled, non-controversial constitutional principles.¹⁸⁵ The anti-discrimination provision is an echo of the Fair Housing Act and the well-established First Amendment rule prohibiting discrimination against religion.¹⁸⁶ If interpreted as most courts have, the equal terms provision also reflects settled constitutional law.¹⁸⁷

involving discrimination at some level, they have never been codified to apply solely to religious entities. Thus, they are likely subject to Establishment Clause challenge for creating a preference for religious entities solely based on their religious status. *See, e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (holding that a sales tax exemption given to religious periodicals had no basis other than for the promotion of religion and thus prohibited by the Establishment Clause); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (holding that a statute providing an absolute and unqualified right not to work on whichever day might be designated as their Sabbath by a religious individual violated the Establishment Clause as it essentially forced both employers and employees to conform their behavior and business practices to various religious practices); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that several statutes enacted to allow voluntary prayer in public schools acted in such a manner that conveyed a message of the approval of religion in the schools and so ran afoul of the Establishment Clause).

¹⁸⁵ *See* 42 U.S.C. § 2000cc(b)(3)(A-B); *see also* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540, 542 (1993) (invalidating city ordinances which functioned to suppress Santeria religious worship); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (cannot exclude protected First Amendment activity completely, even if low-value speech like pornography). Reasonableness is the default level of review for all constitutional claims and thus imposes no additional requirement on local governments not already in place.

¹⁸⁶ *Church of the Lukumi Babalu Aye*, 508 U.S. at 546 (holding that strict scrutiny applies to laws that are not neutral or generally applicable); *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990) (stating in dictum that laws discriminating against religion must be subject to strict scrutiny).

¹⁸⁷ Many courts have looked to the traditional “similarly situated” analysis to determine if there is a violation of RLUIPA’s section 2(b)(1) (should this state have “occurred” or “existed” etc.?). *See, e.g.*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007) (“[W]hat the Equal Terms provision does in fact require is a secular comparator that is *similarly situated* as to the regulatory purpose of the regulation in question -- similar to First Amendment Free Exercise jurisprudence.” (emphasis added)), *cert. denied*, 128 S. Ct. 2503 (2008); *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) (“The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses”); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 (11th Cir. 2006) (“A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation.”). *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County* is one of the leading cases on the matter and specified three types of Equal Terms violations, which track Free Exercise jurisprudence.

Based on a review of our case law construing the Equal Terms provision and reviewing closely related Supreme Court precedent arising under the Free

b. Section 2(a) of RLUIPA: A New Tool for Federal Interference with Local Land Use Decision-making

RLUIPA's predecessor, RFRA, was declared unconstitutional in part because there was no congressional power that could justify its heavy-handed federal intervention into all state and local laws.¹⁸⁸ In an attempt to find some constitutional basis on which Congress could mandate strict scrutiny of land use laws burdening religious entities, RLUIPA alleges three bases: the federal spending power, the commerce power, and (implicitly) the

Exercise Clause of the First Amendment, we can discern at least three distinct kinds of Equal Terms statutory violations: (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless "gerrymandered" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions.

450 F.3d at 1308.

At the same time, some courts seem to be limiting the analysis through a textual reading of RLUIPA itself to compare only religious and secular "assemblies and institutions." Nonetheless, the burden is on the plaintiff to point to one of these "assemblies" or "institutions." See also *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006) (citing positively *Primera Iglesia Bautista Hispana of Boca Raton, Inc.*, 450 F.3d at 1310, the Court claims that "under RLUIPA § 2(b)(1) a plaintiff need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects, as required under equal protection jurisdiction"), *cert. denied*, 128 S. Ct. 77 (2007); *Konikov v. Orange County*, 410 F.3d 1317, 1324 (11th Cir. 2005):

For purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence. Rather, the relevant 'natural perimeter' for comparison is the category of 'assemblies and institutions' as set forth by RLUIPA. In other words, the question is whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions.

Id. (citations omitted); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) ("A zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly."). The "Equal Terms" provision of RLUIPA purports to track the Free Exercise jurisprudence in existence before its passage. See *Church of the Lukumi Babalu Aye*, 508 U.S. at 542 (finding ordinances lacked narrow tailoring and thus were invalid because the City's proffered objectives were not pursued with respect to analogous non-religious conduct); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (finding employment practice violated Seventh-Day Adventist's religious exercise when it would have effectively forced her to work on the Sabbath).

¹⁸⁸ *Boerne*, 521 U.S. at 511, 532, 534.

enforcement power under Section 5 of the Fourteenth Amendment.¹⁸⁹

The spending and commerce powers of section 2(a)(2) are invoked against any land use decision, including those that constitute a “rule of general applicability,” and decidedly do not reflect existing constitutional guarantees.¹⁹⁰ The third base on which RLUIPA rests purportedly mimics the constitutional rule in *Smith*, but in fact misses the mark.¹⁹¹ Once one has determined the relevant constitutional basis in the particular case, section 2(a) of RLUIPA institutes strict scrutiny in the normal course of land use law application as follows:

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(A) is in furtherance of a compelling governmental interest; and

(B) is the *least restrictive means* of furthering that compelling governmental interest.¹⁹²

Section 2(a) is a successor to its parent statute, the Religious Freedom Restoration Act (RFRA), which was held unconstitutional (at least as applied to the states) in *Boerne v.*

¹⁸⁹ See RLUIPA, 42 U.S.C. § 2000cc(a)(2) (2000) (defining RLUIPA’s “Scope of Application”).

¹⁹⁰ 42 U.S.C. § 2000cc(a)(2)(A-B):

- (2) Scope of Application. This subsection applies in any case in which –
- (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
- (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability

¹⁹¹ RLUIPA, 42 U.S.C. § 2000cc(a)(2)(C):

- (2) Scope of Application. This subsection applies in any case in which –
-
- (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved

Id. (emphasis added).

¹⁹² 42 U.S.C. § 2000cc(a) (emphasis added).

Flores.¹⁹³ RFRA mandated the application of strict scrutiny to every law in the country, including land use law, which was at issue in that particular case. The Court held that RFRA violated the Constitution on many grounds, but importantly, because it did not redress unconstitutional discrimination. Rather, it undermined laws imposing only an incidental burden on religious conduct:

In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. RFRA's substantial-burden test . . . is not even a discriminatory effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue [in *Boerne*], impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.¹⁹⁴

The impact of this federal imposition of strict scrutiny has been extraordinary. Section 2(a) has created havoc in local land use governance related to religious entities, altered politics at the local level, and cost taxpayers millions.¹⁹⁵ It has been invoked to

¹⁹³ RFRA, 42 U.S.C. § 2000 bb (1993), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (with respect to its application to the states).

¹⁹⁴ *Boerne*, 521 U.S. at 535 (internal citation omitted).

¹⁹⁵ See generally Aman Ali, *Westchester Day Suit Settled*, THE J. NEWS, Jan. 15, 2008, at 1A (When the suit – *Westchester Day Sch. v. Vill. of Mamaroneck* – finally ended after approximately five years of litigation through the district and circuit courts, the village was left with \$900,000 in legal bills and a \$4.75 million dollar settlement. A financial obligation of \$5.65 million dollars is approximately 20% of the village's annual budget.); County of Rockland, County Legislature, News Releases, *Legislator Withers Demands Changes in Religious Land Use Law* (Jan. 11, 2007), available at <http://www.co.rockland.ny.us/Legislature/LNews/07/01-11-07a.htm> (Describing RLUIPA's effect on local decision-making, County Legislator Patrick Withers suggests that “[s]ome municipalities have begun to ‘rubber stamp’ approval of any development proposed by a religious organization for fear of litigation costs.” He also stated that “[m]unicipalities have shied away from giving certain proposals the scrutiny they deserve because of the potential legal bills.”); *ELECTION 2005 Church's Lawsuit Looms over New Berlin Mayoral Race; Wysocki, Chioatero Disagree on Next Step*, MILWAUKEE J. SENTINEL, Apr. 1, 2005, at B4 (Management of the RLUIPA suit - *Castle Hills First Baptist Church v. City of Castle Hills* – was a decisive factor in the mayoral election after 7th Circuit ruled against the City.); Sarah Larimer, *New Berlin Agrees to Church Settlement: City Will Pay \$370,000 After 4-year Legal Battle*, MILWAUKEE J. SENTINEL, Sept. 28, 2006, at B1 (The City of New Berlin settled a four year legal battle for \$370,000 dollars which included

challenge residential,¹⁹⁶ commercial,¹⁹⁷ industrial,¹⁹⁸ agricultural,¹⁹⁹ and institutional zoning²⁰⁰ in cases involving commercial day care centers,²⁰¹ schools,²⁰² parking lots and additional floors,²⁰³ dormitories,²⁰⁴ historic preservation districts,²⁰⁵ and hospitals.²⁰⁶

attorney's fees and construction delays.); Vianna Davila, *Six Candidates Vying for Three Castle Hills Posts; Resolution of a Federal Lawsuit with a Church Ranks as a Top Issue*, SAN ANTONIO EXPRESS NEWS, Apr. 28, 2004, at 1H (Ending a protracted RLUIPA suit - *Castle Hills First Baptist Church v. City of Castle Hills* - greatly shaped city council elections in Castle Hills, Texas.); County of Rockland, County Legislature, News Releases, *Legislator Joseph Meyers Introducing Resolution Requesting Congress to Review RLUIPA* (Jan. 15, 2008), available at <http://www.co.rockland.ny.us/Legislature/LNews/legisnews.html> (Urging Congress to review the local impacts of RLUIPA, Legislator Joseph Meyers insists that the ambiguity of RLUIPA causes the law to be impractical and difficult to administer. Local land use authorities face the difficult choice of amending their zoning laws or facing expensive litigation that leaves the local zoning laws in the hands of federal judges).

¹⁹⁶ See, e.g., *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1053 (9th Cir. 2007); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 984 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 77 (2007); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 647 (10th Cir. 2006); *Konikov v. Orange County*, 410 F.3d 1317, 1320 (11th Cir. 2005); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 345 (2d Cir. 2005); *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 124 (3d Cir. 2002); *Congregation Anshei Roosevelt v. Planning & Zoning Bd.*, Civ. No. 07-4109, 2008 WL 4003483, at *1 (D.N.J. Aug. 21, 2008); *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 311 (D. Mass. 2006); *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n*, 941 A.2d 868, 874 (Conn. 2008); *Greater Bible Way Temple v. City of Jackson*, 733 N.W.2d 734, 737 (Mich. 2007), *cert. denied*, 128 S. Ct. 1894 (2008).

¹⁹⁷ See, e.g., *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 256-57 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2503 (2008); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004).

¹⁹⁸ See, e.g., *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 847 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 914 (2008).

¹⁹⁹ See, e.g., *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 981 (9th Cir. 2006); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1300 (11th Cir. 2006); *Rocky Mountain Christian Church v. Bd. of County Comm'rs*, 481 F. Supp. 2d 1213, 1216 (D. Colo. 2007); *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1060 (D. Haw. 2002).

²⁰⁰ See, e.g., *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005).

²⁰¹ See, e.g., *Grace United Methodist Church*, 451 F.3d at 647.

²⁰² See, e.g., *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 344 (2d Cir. 2007).

²⁰³ See, e.g., *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669, at *11 (W.D. Tex. Mar. 17, 2004).

²⁰⁴ See, e.g., *Congregation Anshei Roosevelt v. Planning and Zoning Bd.*, No. 07-4109, 2008 U.S. Dist. LEXIS 63994, at * 3-*4 (D.N.J. Aug. 20, 2008).

²⁰⁵ See, e.g., *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 693 (E.D. Mich. 2004).

Because it mandates extraordinary intervention in conventional zoning decisions, section 2 is unlike existing federal constitutional law or the federal laws that have been permitted to interfere with local land use prerogatives. Like the Gun-Free School Zones Act,²⁰⁷ declared unconstitutional in *United States v. Lopez*, RLUIPA “plows thoroughly new ground and represents a sharp break with” previous federal legislation.²⁰⁸ Without RLUIPA, the courts were deferential to local government land use decisions even when they affected religious entities. There is even a question whether land use was religious exercise before RLUIPA. For example, in *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission*,²⁰⁹ the Connecticut Supreme Court held that RLUIPA did not apply since the special use permit process did not fall within the scope of RLUIPA’s individualized assessment provision. The Court observed that a number of earlier courts had agreed that “land use regulations, i.e., zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances.”²¹⁰ Reviewing the zoning board’s decision under the substantial evidence standard often used in zoning appeals, the Court found that the record contained evidence indicating that the proposed temple would have drawn more activity than would be in harmony with the character of the neighborhood, impairing neighboring property values, and creating a health and safety hazard due to unsatisfactory septic and water supply plans. In the absence of RLUIPA, the Connecticut Supreme Court considered the Society’s appeal with deference to the findings of the local authority, found no incidence of discrimination in the

²⁰⁶ See, e.g., *Sisters of St. Francis Health Serv., Inc. v. Morgan County*, 397 F. Supp. 2d 1032, 1036 (S.D. Ind. 2005).

²⁰⁷ Gun-Free School Zones Act, 18 U.S.C. § 922(q) (2000).

²⁰⁸ *United States v. Lopez*, 514 U.S. 549, 563 (1995) (quoting *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993)).

²⁰⁹ *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning and Zoning Comm’n*, 941 A.2d 868, 890 (Conn. 2008).

²¹⁰ *Id.* at 891 (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006). See also *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (relying on *Boerne*, 521 U.S. at 514, the 9th circuit contended that “the Supreme Court intimated that the ‘neutrality’ and ‘generally applicable’ inquiries are appropriate in cases involving zoning regulations.” Taking the analysis further, the Court stated that “[i]f the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion.”).

record, and found in favor of the local land use determination.

III. RLUIPA: A RADICAL AND CARELESS INTERFERENCE WITH SETTLED CONSTITUTIONAL PRINCIPLES

A. *Land Use and Free Exercise Before 1990*

As the foregoing makes clear, land use law is a creature of local and state government both legislatively and constitutionally. Moreover, state courts have decided the vast majority of land use cases, with the federal courts involved only in narrowly circumscribed circumstances. This is even true in the context of religious use, at least until Congress imposed RFRA and RLUIPA on state and local governments. As of 2009, the United States Supreme Court has never taken, let alone decided, a case in which it ruled on the application of local land use law as applied to a religious entity.²¹¹ Not a single free exercise case remotely touched on religious land use involving zoning, building, or otherwise.

The Connecticut Supreme Court has pointed out that before 1990, church building was not treated as religious exercise by the courts.²¹² Rather, religious landowners were treated like all other

²¹¹ The closest case would be *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), in which the Court held that RFRA violated federalism and separation of powers principles because the facts involved a church denied a demolition permit based on a local historic preservation ordinance. The Court has addressed one case involving federal lands, which found against the religious claimant despite the extraordinary burden on religious practices. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-42 (1988) (finding no free exercise violation from decision by federal government to build road on federal land on which were located Native American sacred grounds).

²¹² *Cambodian Buddhist Soc'y of Conn., Inc.*, 941 A.2d at 889 n.20. See, e.g., *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 825, 826 (10th Cir. 1988) (zoning regulations which made church unable to construct its house of worship on its property located within the A-2 zoning district did not in any way regulate the religious beliefs of the Church nor did the A-2 zoning regulations regulate any religious conduct of the church or its members); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983) ("[B]uilding and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs . . . [and a] zoning ordinance does not prevent the Congregation from practicing its faith through worship . . . [t]he ordinance prohibits the purely secular act of building anything other than a home in a residential district."). See also *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007) ("However, unlike RLUIPA, which explicitly defines as religious exercise: 'The use, building, or conversion of real property for the purpose of religious exercise [42 U.S.C. § 2000cc-5(7)(B)],' the Free Exercise Clause does not define land use as a religious exercise.").

landowners in the process, and subject to the same criteria, *e.g.*, zoning, environmental, traffic, noise, light, building size, and placement limits, to name a few.

[P]rior to *Smith*, no court had held, under the *Sherbert* balancing test, that erecting a place of worship on a particular property constitutes the exercise of religion for purposes of the first amendment. Indeed, the great weight of authority is to the contrary.²¹³

It follows also that religious entities are subject to zoning ordinances and procedures so long as they are generally applicable. “It is clear that the modern view is that churches and other religious institutions are subject to reasonable zoning regulations in most states, including even a state like New York that has long treated religious uses as favored uses.”²¹⁴ When faced with challenges — even to ordinances restricting religious uses — the courts have generally deferred to the local body by upholding the challenged ordinances in the absence of arbitrariness.²¹⁵

In the federal appellate courts before 1993, there were very few religious land use cases, with free exercise challenges deeply disfavored so long as the land use law served the public interest.²¹⁶ Only arbitrariness or intentional discrimination led

²¹³ *Cambodian Buddhist Soc’y of Conn., Inc.*, 941 A.2d at 895.

²¹⁴ PATRICK J. ROHAN, 7 ZONING AND LAND USE CONTROLS, § 40.03[5], 40-166 (2008).

²¹⁵ “From 1983 to 1993, when Congress made its first attempt to address the issue, the majority of federal courts that considered challenges to zoning ordinances that exclude or restrict religious uses have upheld those ordinances, applying either the *Grosz* or *Lakewood* analysis.” *Id.* § 40.03[2][b], 40-88.

²¹⁶ *See, e.g.*, *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning and Zoning Comm’n*, 941 A.2d 868, 899 n.20 (Conn. 2008) (listing cases supporting the proposition that pre-*Smith* construction and use of a place of worship did not constitute per se religious exercise); *Christian Gospel Church, Inc. v. City of S.F.*, 896 F.2d 1221, 1223 (9th Cir. 1990) (the Court claimed that “[t]he question of whether a zoning provision violates the free exercise clause is one of first impression for this circuit” before finding that there was no Free Exercise Clause violation); *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306-07 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983) (no substantial burden imposed on religious exercise by location restrictions as ordinance does not prevent Congregation from worshipping in other locations); *Grosz v. City of Miami Beach*, 721 F.2d 729, 740 (11th Cir. 1983) (no free exercise violation resulting from denial of permission to use garage in a single-family residential neighborhood where half of city was available for religious use); *Congregation Kol Ami v. Abington Twp.*, 2004 U.S. Dist. LEXIS 16397, *16 (E.D. Pa. Aug. 12, 2004) (on remand from the 3rd Circuit, the court remarked that “[c]ases decided before the passage of the RFRA found no violation of the Free Exercise Clause when the burden imposed on religion was merely incidental, economic, or aesthetic.”).

courts to interfere. The most notable example in the federal courts is *Islamic Center of Mississippi, Inc. v. City of Starkville*.²¹⁷ The Court's decision seems to turn on a theory of intentional

²¹⁷ *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (overturning denial of approval to use an existing house in a residential zone for a mosque because the burden was more than incidental and the "the ordinance leaves no practical alternatives for establishing a mosque in the city limits."). See, e.g., *Church of Jesus Christ of Latter-day Saints v. Jefferson County*, 741 F. Supp. 1522 (N.D. Ala. 1990) (The court found unconstitutional a local ordinance allowing neighborhood opposition to decide rezoning applications; the court noted that the church had tried several other sites, ultimately settled on one at the edge of a residential area within a half-mile of a Bible College, and had approved a rezoning for a Presbyterian church that was somewhat similarly situated. Despite not being able to explicitly find that the rejections were based on denomination of religion as other churches had been denied, the court claimed that the system under the ordinance "lends itself to unexpressed opposition of that type" [i.e. discriminatory/denomination-based]. *Id.* at 1527.). At the same time, the highest courts in the States have proven themselves quite capable of rooting out and disposing of arbitrariness or discrimination even without a sweeping national legislative act such as RLUIPA. See *Pentecostal Holiness Church v. Dunn*, 27 So. 2d 561 (Ala. 1946) (invalidating ordinance as applied to the Church as it did not categorically prohibit such a use in a residential zone and it was apparent that the city commission under the ordinance exercised purely arbitrary authority in denying the church's application); *Ellsworth v. Gercke*, 156 P.2d 242, 244 (Ariz. 1945) (city refusal to issue permit to Church was unconstitutional as similar and more intensive uses were present in the zone and the restrictions on religious uses were "clearly arbitrary and unreasonable"); *State ex rel. Tampa, Fla., Co. of Jehovah's Witnesses, N. Unit, Inc. v. City of Tampa*, 48 So. 2d 78 (Fla. 1950) (finding the permitting decision to be arbitrary and unreasonable when the asserted reason for denial of a permit, namely availability of off-street parking, lacked substance); *Roman Catholic Archbishop v. Vill. of Orchard Lake*, 53 N.W.2d 308 (Mich. 1952) (invalidating ordinance which would restrict construction of church anywhere within the village/municipality); *State ex rel. Roman Catholic Bishop v. Hill*, 90 P.2d 217 (Nev. 1939) (invalidating ordinance as applied to the Church which required consent of 75% of neighboring property owners, and the city advanced no legitimate health, safety, or use concern); *Jewish Reconstructionist Synagogue v. Vill. of Roslyn Harbor*, 342 N.E.2d 534 (N.Y. 1975) (holding a setback provision unconstitutional when it provided a variable distance upon application for residences but an invariable distance for religious uses and the ordinance did not allow the synagogue to invoke mitigating factors available to other property owners in its special use application); *City of Sherman v. Simms*, 183 S.W.2d 415 (Tex. 1944) (ordinance fully excluding religious use from a residential area based not upon, among other objective factors, health, sanitation, and fire codes, was arbitrary and unenforceable against pastor); *State ex rel. Lake Drive Baptist Church v. Vill. of Bayside Bd. of Trustees*, 108 N.W.2d 288 (Wis. 1961) (enjoining enforcement of ordinance prohibiting construction of church in a zone when the village board acted arbitrarily and capriciously in denying the application after they had previously indicated the church would be allowed and traffic concerns were alleviated prior to construction). See generally YOKLEY, *supra* note 15, §37-2 (for above and additional state decisions defending religious uses in the face of arbitrary decision making).

discrimination and stresses both the exclusionary nature of the ordinance and the apparent discrimination of the city as it had never enforced its ordinance against a Christian center of worship *next door* to the Islamic Center at issue. “The City’s approval of applications for zoning exceptions by other churches suggests that it did not treat all applicants alike. This undermines the City’s contention that the Board denied a zoning exception to the Muslims solely for the purposes of traffic control and public safety.”²¹⁸ The court went on to explain that free exercise claims against local zoning decisions in the absence of exclusion or discrimination fail. Despite ruling for the religious entity, the court summed up the state of appellate decisions:

[R]ecent appellate court decisions clearly stand for the proposition that zoning ordinances which serve a legitimate public purpose by excluding from certain residential areas church buildings or regular worship services in homes do not violate the First Amendment where such ordinances place *only* an “incidental economic burden” on religious freedom *and* where alternative channels and opportunities are left open for religious conduct.²¹⁹

It wasn’t until after *Smith* and the enactment of RFRA that religious land use claims based on free exercise theories began to crop up. Nonetheless, the few that did were generally unsuccessful in proving that specific land usage was an integral part of their free exercise.²²⁰

Thus, before RFRA imposed strict scrutiny on all local, state, and federal laws or RLUIPA imposed strict scrutiny on all generally applicable local and state land use laws, religious land developers had no special privileges as applied to any other land use owners. When they did not obtain what they sought, they faced the same options other developers did, *e.g.*, they could compromise, re-file with a different plan more in keeping with local land use principles, or choose another location for their project. Lora Lucero describes the way RLUIPA changed local

²¹⁸ *Islamic Ctr.*, 840 F.2d 293.

²¹⁹ *Id.* (citing EDWARD ZIEGLER, *Local Land Control of Religious Uses and Symbols*, in 1985 ZONING AND PLANNING LAW HANDBOOK 331, 344 (1985) (emphasis added).

²²⁰ *See, e.g.*, *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 474 (8th Cir. 1991) (while remanding on the church’s “hybrid rights” claim—partially supported by *Smith*—the court affirmed summary judgment against the church on the Free Exercise claim); *Rector, Wardens, and Members of Vestry of St. Bartholomew’s Church v. City of N.Y.*, 914 F.2d 348, 350 (2d Cir. 1990) (holding that the Landmarks Law and subsequent denial of permission to build a commercial office tower on their land was not a violation of the church’s Free Exercise rights).

land use decision making as follows:

Whether Congress intended to or not, RLUIPA has clearly put local governments in a very difficult position vis-a-vis land use decisions and religious groups. Land use, growth, and development decisions have traditionally been a state and local affair, and most citizens expect that it will continue to remain in the hands of the elected and appointed officials down at city hall. But RLUIPA arguably gives religious groups a special seat at the table, while removing some others.²²¹

Until the states were placed within the reach of federal statutes such as RFRA and RLUIPA, many of the states' highest courts confirmed that land use does not automatically constitute free exercise. Moreover, religious entities were generally not given privileges above those of other land owners and were subject to the same ordinances.²²²

*B. Congress Ignored the Long History of Constitutionally
Required Respect and Deference to Local Land Use
Determinations and Communities*

Given the long line of Supreme Court decisions mandating federal deference to local community land use decision-making, RLUIPA's legislative history exhibits a stunning lack of concern about the constitutional parameters on its power. The one defense Congress could raise when it failed to consider how RFRA would affect land use law was that the Act was so expansive that it was impossible for anyone to fully comprehend all the ways that it could undermine every law in the country. That defense is hardly available with respect to RLUIPA. It is not as though the object of section 2 was a mystery or ambiguous: the very title of

²²¹ Lora A. Lucero, *The Evolving RLUIPA Landscape*, in 26 ZONING & PLAN. L. REP. 6 (2003).

²²² See, e.g., *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1300-01 (Alaska 1982)

In light of the fact that the Supreme Court rejected less than two years ago a constitutional argument virtually identical to the one presented in the case at hand [referring to *Damascus Community Church v. Clackamas County*, 610 P.2d 273 (Or. Ct. App. 1980), *appeal dismissed*, 450 U.S. 902 (1981)], we are constrained to hold that the First Amendment does not require the city to accommodate the desire of the members of Seward Chapel to provide a Christian education for their children by abandoning the zoning restriction which excludes schools from Forest Acres.

Id.; *Abram v. City of Fayetteville*, 661 S.W.2d 371, 371-72 (Ark. 1983) (affirming that there was no free exercise violation by denying church a conditional use permit to run a parochial school in a residential neighborhood).

the Act is the Religious *Land Use* and Institutionalized Persons Act.²²³ Not only did Congress fail to consider the United States Supreme Court's relevant jurisprudence, it also paid no attention to the well-developed land use jurisprudence in the state courts. There is no excuse for Congress's failure to connect the Court's land use cases and the role of state appellate review of local land use decisions.

The careless attitude toward the Supreme Court's settled precedents and the state courts' role is reminiscent of Congress's arrogant attitude toward its power in enacting the Gun-Free School Zones Act²²⁴ and brings to mind the Court's unsubtle warning to Congress in *City of Boerne v. Flores* that the deference Congress receives regarding the constitutionality of its actions can only be justified if Congress pays attention to the constitutional parameters of its acts:

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." 1 Annals of Congress 500 (1789). Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.²²⁵

The construction of the record that is supposed to undergird RLUIPA²²⁶ demonstrates no more fealty to the Supreme Court's

²²³ Professor Richard Schragger has suggested that "RLUIPA is, in essence, the first national land-use ordinance." Richard Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1839 (2004). It is hard to contend Congress was oblivious to the effect RLUIPA would have on local land use laws when it passed such a narrowly focused piece of legislation, though legislators have had a tendency in the United States to see religious liberty legislation through rose-colored glasses. See also MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 78-110 (2007) (examining local land use and the impact of RLUIPA on communities and local decision-making).

²²⁴ See *United States v. Lopez*, 514 U.S. 549, 563 (2005).

²²⁵ *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

²²⁶ There were no hearings on RLUIPA per se. Rather, the hearings for a predecessor bill, the Religious Liberty Protection Act, are used to defend RLUIPA. Marci A. Hamilton, *Federalism and the Public Good: The True Story*

doctrine in the area. The hearing record includes multiple representatives of religious organizations denigrating standard land use principles,²²⁷ but no time or space was given to a single land use official, mayor, governor, or representative from the organizations that serve cities, e.g., the National League of Cities, which could have explained and defended local land use principles and practices.²²⁸ Congress studiously ignored those like New York Mayor Rudolph Giuliani who asked the members to slow down and take into account local governments' perspectives.²²⁹

C. How RLUIPA Changes the Free Exercise Landscape to the Detriment of Local Land Use Decisions and the Benefit of Religious Landowners

RLUIPA significantly increases the odds that religious entities will be able to obtain what they seek from local land use decision-makers, whether or not the request is consistent with local land use law or community goals. Setting aside for the moment the introduction of strict scrutiny, there are three distinctive means by which this expansion occurs.

First, when examined in light of pre-existing law, RLUIPA

Behind the Religious Land Use and Institutionalized Persons Act, 78 IND. L.J. 311, 334-35 (2002).

²²⁷ See H.R. REP. NO. 106-219, at 24 (1999) ("Land use regulation is commonly administered through individualized processes not controlled by neutral and generally applicable rules. The standards in individualized land use decisions are often vague, discretionary, and subjective."); see generally *id.* at 18-24.

²²⁸ Hamilton, *supra* note 226, at 335. See also, H.R. REP. NO. 106-219, *supra* note 227.

²²⁹ Hamilton, *supra* note 226, at 352. I also urged them, to no avail, to include those most affected by RLPA's impact on land use:

Artistic and historical preservation interests, including whole communities that depend on historical districts for revenue and jobs[.]

Neighborhoods attempting to enforce neutral rules regulating congestion, building size, lot size, and on- and off-street parking[.]

School boards desperately attempting to ensure order and safety in the public schools[.]

State, local, and municipal officials who will be forced to bear the cost of accommodating every religious request (whether from a mainstream religion or a cult) or bear the cost of litigating refusals to do so[.]

Last, but not least, citizens who will bear the extreme increase in litigation costs created by these new rights coupled to an attorney's fees provision (a virtual invitation to sue)[.]

Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution, 105th Cong. 98-99 (1998) (statement of Marci A. Hamilton, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University).

(and RFRA) created novel opportunities for religious landowners to avoid local land use planning decisions and goals. The plain language that land use by a religious entity is always “religious exercise” created a huge impact on local land use planning, residential neighborhoods, and communities.²³⁰

Second, those drafting RLUIPA did not stop with the extraordinary assumption that all land use by a religious landowner should be considered “religious exercise.” Rather, they also expanded the definition of “religious exercise” beyond any reasonable scope. The term “religious exercise,” as defined in RLUIPA, “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²³¹ When the Supreme Court has applied strict scrutiny in free exercise cases, it has instituted a limiting factor – the religious entity must prove that the practice is “central.”²³² RLUIPA erases that limitation even when the religious entity is getting the benefit of strict scrutiny. Thus, the religious plaintiff under RLUIPA can demand strict scrutiny of generally applicable laws as it demands an expansion of the quantum of religious beliefs that were protected under the Court’s strict scrutiny cases. Thus, to say that RLUIPA reflects the Court’s line of strict scrutiny cases is to misrepresent and misstate the doctrine.²³³

²³⁰ See 42 U.S.C. § 2000cc-5 (7)(B) (2000) (“The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”).

²³¹ 42 U.S.C. § 2000cc-5 (7)(A).

²³² *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that the availability of benefits that was effectively conditioned on the willingness of a religious adherent to violate a “cardinal principle” of her faith violated the adherent’s free exercise rights).

²³³ While the proposition that RLUIPA simply reinstates the pre-*Smith* standards seems to enter the commentary, few cases directly assert this idea even if they apply it. Indeed, it seems as though the courts treat this idea as a foregone conclusion. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 714-15 (2005) (stating that Congress enacted RFRA and RLUIPA to respond to *Smith* decision); *Smith v. Allen*, 502 F.3d 1255, 1265-66 (11th Cir. 2007) (RFRA/RLUIPA are attempts to “reinstate the pre-*Smith* ‘compelling interest’ standard for laws of general applicability burdening a person’s religious practices.”); Richard Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1840 (2004) (RLUIPA reinstates the compelling interest test); David Zucco, *Super-Sized with Fries: Regulating Religious Land Use in the Era of Megachurches*, 88 MINN. L. REV. 416, 437 (2003) (RLUIPA’s standard mirrors that of RFRA, applying the compelling state interest standard of *Sherbert* and *Yoder*); Mathew Staver & Anita Staver, *Disestablishmentarianism Collides with the First Amendment: The Ghost of Thomas Jefferson Still Haunts Churches*, 33 CUMB. L. REV. 43, 101 (2002) (“RLUIPA reinstates the compelling state interest standard to any state

Instead, RLUIPA reflects a new combination of factors, with the drafters picking and choosing among previous doctrines to obtain the best possible advantage for the religious land use applicant. When the Supreme Court made it clear that strict scrutiny is the inappropriate standard for neutral, generally applicable laws in *Smith*, it also eliminated the centrality requirement:

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. Cf. *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S., at 474-476 (Brennan, J., dissenting). It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." *United States v. Lee*, 455 U.S., at 263 n. 2 (Stevens, J., concurring). As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S., at 699. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, e.g., *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S., at 716; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S., at 450; *Jones v. Wolf*, 443 U.S. 595, 602-606 (1979); *United States v. Ballard*, 322 U.S. 78, 85-87 (1944).²³⁴

Thus, neutral, generally applicable laws were to be subjected to rationality review, but courts would not be in the business of engaging in centrality analysis. RLUIPA substitutes strict scrutiny and scuttles any limitation on the relevant religious belief that would trigger an RLUIPA claim. The combination is an extraordinary transformation of the law to benefit religious

law that 'limits or restricts a claimant's use or development of land.'"); cf. Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1, 7-8 (2001) (claiming that section 2(a)(1) is essentially a reinstatement of the *Sherbert* standard but that section 2(a)(2)(A-C) are within the *Smith* holding).

²³⁴ *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990).

landowners.

Third, section 2(a) imposes strict scrutiny on land use laws that are neutral and generally applicable if there is an effect on commerce or if there is federal spending.²³⁵ Given existing Supreme Court cases, this is a double offense against local government. First, it flies in the face of the Court's free exercise doctrine as it re-adjusts free exercise rights by unilaterally ratcheting up the free exercise obligations of local government when it applies generally applicable laws to religious landowners.²³⁶ Second, it subjects local government to a level of scrutiny and federal interference the Constitution has forbidden in case after case. It has thrown local governments for a loop because it is such a dramatic departure from the constitutional environment in which they quite properly operated until Congress imposed RFRA and RLUIPA.

The decision in *Employment Division v. Smith* established that neutral, generally applicable laws could not be successfully challenged by religious entities on a free exercise theory.²³⁷ To put it another way, the Constitution does not and has not mandated that local governments accommodate land use applicants simply because they are religious. RLUIPA attempts to reverse *Smith* by invoking the spending and commerce powers to permit Congress to impose strict scrutiny on neutral, generally applicable land use laws. The astonishing weight RLUIPA imposes was accurately described by the Court in *Boerne v. Flores*:

Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If " 'compelling interest' really means what it says . . . , many laws will not meet the test [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.*, at 888. [*Smith*, 494 U.S. at 888.] Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to

²³⁵ See 42 U.S.C. § 2000cc (a)(2)(A-B) (2000).

²³⁶ *City of Boerne v. Flores*, 521 U.S. 507, 528-29 (1997) (rejecting the ratchet theory of *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which would allow Congress to expand the constitutional rights found in § 1 of the Fourteenth Amendment. Granting Congress the power to change the fourteenth amendment would alter the paramount character of the Constitution, rendering it an ordinary, legislative act amenable by Congressional discretion).

²³⁷ *Employment Div.*, 494 U.S. at 872.

reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.²³⁸

Taking the three together, section 2(a) introduced into the land use process rules that operate synergistically to overturn and undermine local land use planning as well as community involvement in local land use determinations. Litigation has exploded in this arena and cash-strapped local and state governments see no light at the end of the tunnel so long as the federal government is permitted to burden their communities with section 2(a)'s strictures.

D. Congressional Power and the Inherent Limits of Federalism

The Supreme Court has not yet addressed Congress's power to enact any provision of RLUIPA. When the Court upheld the prison provisions of RLUIPA against Establishment Clause attack in *Cutter v. Wilkinson*, Justice Ginsburg, writing for a unanimous Court, stated that "Section 2 of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act."²³⁹ Justice Thomas, in a concurrence, further narrowed the reach of *Cutter* by noting that the holding did not presage or determine whether Congress had the power to enact RLUIPA in the first place:

[T]hough RLUIPA is entirely consonant with the Establishment Clause, it may well exceed Congress' authority under either the Spending Clause or the Commerce Clause. See *Sabri v. United States*, 541 U. S. 600, 613 (2004) (*Thomas, J.*, concurring in judgment) (for a spending clause condition on a State's receipt of funds to be "Necessary and Proper" to the expenditure of the funds, there must be "some obvious, simple, and direct relation" between the condition and the expenditure of the funds); *United States v. Lopez*, 514 U. S. 549, 587 (1995) (*Thomas, J.*, concurring) ("The Constitution not only uses the word 'commerce' in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that

²³⁸ *Boerne*, 521 U.S. at 534.

²³⁹ *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.3 (2005).

‘substantially affect’ interstate commerce”). The Court, however, properly declines to reach those issues, since they are outside the question presented and were not addressed by the Court of Appeals.²⁴⁰

Section 2(a) rests RLUIPA’s imposition of strict scrutiny on local land use laws on three potential sources of congressional power: the Spending Clause, the Commerce Clause, and Section 5 of the Fourteenth Amendment.²⁴¹

1. The Commerce Power, Rewriting the Court’s Land Use Jurisprudence, and Article V

RLUIPA attempts to justify its imposition of strict scrutiny on generally applicable local land use laws under the Commerce Clause. Section 2(a) applies to a law if it imposes a substantial burden that “affects . . . commerce with foreign nations, among the several States, or with Indian tribes, even if the burden

²⁴⁰ *Id.* at 727 n.2 (Thomas, J., concurring).

²⁴¹ Though not central to this article’s discussion, it must be noted that RLUIPA attempts to position its imposition of strict scrutiny on generally applicable laws on the Spending Clause. The spending power invoked in Sec. 2(a)(2)(A) requires that the substantial burden on religious exercise be “imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000cc (a)(2)(A) (2000). The same language is reflected in section 3 of RLUIPA, governing institutionalized persons and primarily prisoners. It is a fact that this basis will justify the imposition of RLUIPA in a very small number of land use cases. While it is not unusual for prisons and other state institutions to receive federal grants and funds, local land use planners and decision makers are not federally funded, and the projects involved rarely would be involved in a federal activity or program. Thus, for all practical purposes, this is a meaningless provision in the land use context and will rarely justify RLUIPA’s intervention in local decision-making. See Sara Smolik, *The Utility and Efficacy of the Rluipa: Was It a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723, 731 (2004)

As is to be expected, RLUIPA cases thus far have involved challenges to state and local land use regulations, and courts have not found it necessary to evaluate the statute in light of Congress’s Spending Clause authority. It is unlikely that this section will be relevant to the majority of challenges involving land use regulations that are brought under the RLUIPA because most land use regulation is local and is not funded through grants from the federal government.

Id. If there is a claim that an RLUIPA claim is justified on the basis of federal spending, to avoid a violation of federalism principles, there must be a showing at least that the spending is related to the federal interest in the particular national project or program, i.e., to the land use law being diminished by federal law. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). See also *Cutter*, 544 U.S. at 727 n.2. This is not to say that the spending provision justifies imposition of strict scrutiny without constitutional peril.

results from a rule of general applicability.”²⁴² Once again, RLUIPA ignores clear Supreme Court precedent. In recent cases, the Court has explained that a mere effect on interstate commerce will not support congressional power. Rather, “in order to be within Congress’ power to regulate . . . under the Commerce Clause,” the activity must be one that “*substantially* affect[s] interstate commerce.”²⁴³

Section 2(a) also raises a novel commerce power question: can Congress invoke the Commerce Clause to alter multiple constitutional doctrines?. Congress has aggrandized its power by (1) taking over powers which are inherently local and state; (2) ignoring the Court’s constitutional doctrine of deference in that arena; (3) revising free exercise rights; (4) using the Commerce power when the effect is not substantial; and (5) turning back Establishment Clause doctrines to create a special class of landowners defined by religion.

Under *Heart of Atlanta Motel*, Congress has been allowed to use its commerce power to extend anti-discrimination rights of private persons against private entities.²⁴⁴ There was a time when it would have been thought that discrimination was not a proper subject of the commerce power, because it was not

²⁴² 42 U.S.C. § 2000cc (a)(2)(B).

²⁴³ U.S. v. Lopez, 514 U.S. 549, 559 (1995). See also *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring):

[I]t would be a mistake to conclude that Congress’ power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce. . . Moreover, simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Congress’ findings must be supported by a “rational basis” and are reviewable by the courts. . . In short, unlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause.

Id. (citations omitted). See also David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 43-44 (2006) (examining the current state of the Commerce Clause); Jenny Miao Jiang, *Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALB. L. REV. 537, 547-53 (2007) (inter alia, examining Commerce Clause jurisprudence).

²⁴⁴ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

“commerce” itself. But the Court has taken a different perspective, permitting the exercise of the commerce power so long as there is a substantial effect on commerce and the law does not take over inherently local law.²⁴⁵

Section 2(a)(2)(B) of RLUIPA, however, is different from any other exercise of commerce power to date. It does not extend the rights of private individuals against other private individuals. Rather, it uses the commerce power as a ruse to amend constitutional rights to the detriment of local and state governments and to diminish the power of state and local governments. Because section 2(a) echoes the language of the commerce jurisprudence, it seems to cloak this naked grab for power with legitimacy. That is a formalistic reading of existing doctrine and one that gives Congress extraordinary new power to be both legislature and Supreme Court as it sees fit.²⁴⁶

If Congress disapproves of the Supreme Court’s constitutional interpretation, its one clearly legitimate option is to amend the Constitution. When it attempted to insert its alternative reading of the Free Exercise Clause into the law via the Religious Freedom Restoration Act, the Court in *Boerne v. Flores* held that it could not displace the amendment procedures in Article V.²⁴⁷ With RLUIPA, it is flying in the face of two different Supreme Court doctrines at once, the one of respectful deference to state and local land use law and the other, the Free Exercise Clause as it is applied to neutral, generally applicable laws. Even if it invokes the Commerce Clause, Congress cannot simply reverse the Court’s jurisprudence of deference to local land use authorities and its free exercise jurisprudence through simple majority vote. That is an end run around the procedures mandated by Article V.

As with RFRA, the violation of Article V by RLUIPA is tied into separation of powers issues and the proper role of these competing branches. Under Article V, Congress is constrained to amend the Constitution only through the following procedure:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which

²⁴⁵ See *United States v. Lopez*, 514 U.S. 549 (1995).

²⁴⁶ If Congress wants to extend constitutional guarantees, its power rests in Section 5 of the Fourteenth Amendment and it must abide by the doctrine laid out in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁴⁷ *Boerne*, 521 U.S. at 529.

in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress²⁴⁸

Under Article V, Congress is required to involve the states and through them, the people, in order to make constitutional changes. Had the constitutional process worked as intended, states, local governments, and the people would have been part of a national debate instead of being in the dark that there was a movement afoot to demote their values below the plans and dreams of religious developers. By enacting a re-interpretation of constitutional doctrine through simple legislation, Congress short-circuited the role of the people and the states. Invoking commerce terminology cannot be sufficient to overcome that structural violation.²⁴⁹

2. Section 5 of the Fourteenth Amendment and Individualized Assessments

Only the spending and commerce provisions of 2(a) can be applied to generally applicable laws under the plain language of the statute. Section 2(a)'s spending and commerce provisions explicitly extend the reach of strict scrutiny to "generally applicable" land use laws and therefore are the most extreme attempts to alter constitutional standards.

Section 2(a)(2)(C) does not refer to generally applicable laws. Under standard statutory construction principles, the failure to include the term "generally applicable" in this provision, which is part of a series, means that it does not apply to generally applicable laws.²⁵⁰

Under *Church of Lukumi Babalu Aye*,²⁵¹ a law that is not

²⁴⁸ U.S. CONST. art V.

²⁴⁹ Given the Supreme Court's interpretation of the prison provisions in *Cutter v. Wilkinson*, which transforms the bare strict scrutiny standard into an intermediate level of scrutiny and the fact that previous case law would have recognized the proper standard as intermediate, see, e.g., *Turner v. Safley*, where the same issues do not arise. *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Turner v. Safley*, 482 U.S. 78 (1987).

²⁵⁰ See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 277 (3rd Cir. 2007) (finding Plan to be a neutral law of general applicability not subject to strict scrutiny). See also *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 653 (10th Cir. 2006).

²⁵¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540, 542 (1993).

generally applicable is one that targets and singles out a religious entity for negative treatment no other entity receives. In that case, the City of Hialeah outlawed the way in which the Santerians killed and handled dead animals, but permitted others, both religious and secular, to handle animals in similar ways.²⁵² It was a “gerrymander” that targeted the Santerians. If that is what not being generally applicable means, this provision of RLUIPA applies only in the breach. As Section I, above, illustrates, it is rare that local officials have the capacity to engage in unbounded discretion to single out one land use applicant for targeted, differential treatment. The combination of planning principles, settled procedures, and state judicial review severely limit local officials’ capacity to engage in behavior similar to the Hialeah City Council. If section 2(a)(2)(C) is understood in this way, it merely reflects the free exercise doctrine explained in *Lukumi*.

Section 2(a)(2)(C) mandates strict scrutiny of land use laws that are not generally applicable to circumstances where the local government “has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved.”²⁵³ If individualized assessment is treated as unbounded discretion to grant nonreligious applicants better than religious applicants, once again, it is just a reflection of constitutional guarantees as explained in *Sherbert v. Verner*.²⁵⁴

There are those, however, who have tried to paint all local land use decision-making as boundless and discretionary²⁵⁵ and therefore have tried to expand the application of section 2(a)(2)(C) to any land use determination, not just those like the unconstitutional government decision-making in *Lukumi* and *Sherbert*. Their argument, which is really sleight of hand, is that *whenever* land use laws are applied—because they are necessarily applied case-by-case to a unique application for a unique property—local officials engage in “individualized assessment.”

This cannot be correct, however, because it would mean that this provision applies to the application of laws that are generally applicable, which the plain language does not permit. Quite

²⁵² *Id.*

²⁵³ 42 U.S.C. § 2000cc (a)(2)(C) (2000) (emphasis added).

²⁵⁴ See *Employment Div. v. Smith*, 494 U.S. 872, 883-84 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

²⁵⁵ This argument rests on feigned or real ignorance about land use law, procedure, and state judicial review.

appropriately, the courts have generally rejected a reading of this provision that permits strict scrutiny to be applied to generally applicable laws.²⁵⁶

This discussion of whether this provision reflects constitutional doctrine or not is crucial in determining whether it is consistent with Congress's power under Section 5 of the Fourteenth Amendment. There is no debate that Section 5 gives Congress the power to enforce constitutional guarantees.²⁵⁷ Thus, if it is limited to circumstances like those reflected in *Lukumi* or *Sherbert*, it is a straightforward application of Congress's power.

To the extent that Section 2(a)(2)(C) applies strict scrutiny to land use laws simply because they are handled on a case-by-case basis by local land use officials, it is imposing strict scrutiny on neutral, generally applicable laws. In those circumstances, Congress is only justified in imposing extra-constitutional requirements on the state and local governments if the law is congruent and proportional to widespread and persisting constitutional violations by the local and state governments.²⁵⁸ This provision cannot be justified on this basis.

First, there is no evidence of widespread and persisting constitutional violations in the land use process. Knowing that they needed to say it, members of Congress declared that RLUIPA was based on a record of discrimination in the land use process, but actual examination of the record reveals that the record is thin on constitutional violations by state and local land use authorities.²⁵⁹

²⁵⁶ See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 277 (3d Cir. 2007) (despite Long Branch's Plan having an amendment procedure involving individualized assessments, "the existence of an amendment procedure does not make the Plan less than generally applicable."); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) ("[A]lthough zoning laws may permit some individualized assessment for variances, they are generally applicable if they are motivated by secular purposes and impact equally all land owners in the city seeking variances."); *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n*, 941 A.2d 868, 892 (Conn. 2008) ("We agree with these courts [*Grace United Methodist Church*] that zoning regulation that is applicable without discrimination to all property owners in a jurisdiction and is intended to protect the public health and safety does not constitute an 'individualized assessment' under existing first amendment jurisprudence.").

²⁵⁷ *Boerne*, 521 U.S. at 518-19, 536.

²⁵⁸ *Boerne*, 521 U.S. at 520, 530, 533; *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365, 374 (2001); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003).

²⁵⁹ See Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2002).

Even more important, the states already have in place comprehensive state judicial review of local decisions that roots out arbitrary and discriminatory land use determinations.²⁶⁰ As the Court pointed out in *Garrett*, if the states themselves are redressing and preventing discrimination, it is difficult to make the case that Congress needs to burden them with requirements that exceed constitutional requirements.²⁶¹ Indeed, there is a paucity of federal cases involving discrimination in the land use process. The reason for that is the success of the state courts in reviewing local land use determinations for arbitrariness and capriciousness. Thus, if this provision is applied to neutral, generally applicable laws, it cannot be justified as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

E. The Establishment Clause

Section 2(a) of RLUIPA also affords financial privileges to religious entities provided to no other land owners. Accommodation perhaps need not come packaged with benefits to non-religious entities,²⁶² but government financial benefits must be available to religious and non-religious alike to be constitutional.²⁶³ Financial benefits from government to religious

²⁶⁰ See *supra* notes 54, 217 and accompanying text.

²⁶¹ *Garrett*, 531 U.S. at 372.

²⁶² *Cutter*, 544 U.S. at 724 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1998)).

²⁶³ This concept applies also when religious institutions receive non-monetary benefits from a governmental entity. In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Supreme Court struck down an ordinance that essentially gave churches (along with schools) "veto" power over the issuance of liquor licenses within 500 feet of their premises. While the Supreme Court acknowledged that preventing the foibles associated with liquor-serving establishments from impinging upon centers of cultural, educational, or spiritual significance was a valid secular goal, the fact that churches did not have to provide standards or reasoning for their decisions was constitutionally problematic. The Court found that a number of other establishments serving liquor were already within the 500 foot radius and the same goals which the ordinance was designed to foster could have been legislatively accomplished simply by banning the sale of liquor within a reasonable distance of any type of entity or institution. The Court ultimately found that giving religious entities such "veto" power ran afoul of the Establishment Clause in that the ordinance "substitutes the unilateral and absolute power of a church for the reasoned decision making of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications." *Larkin*, 459 U.S. at 127. RLUIPA's section 2(a) behaves in a similar manner; it gives religious entities a "veto" power over the decision making of the local authority. In cases where there is no evidence of discrimination, RLUIPA effectively creates a new set of

entities have only been upheld in circumstances where they are equally available to non-religious recipients. Thus, it was permissible for the government to give computers to parochial schools where they were already provided to other schools,²⁶⁴ and it was permissible to permit religious schools to collect school vouchers when parents had a “true private choice” between secular and religious schools.²⁶⁵ It was not permissible to give religious publications a tax break no other publications received.²⁶⁶

One of the primary objections to land use practices by religious entities is the cost.²⁶⁷ Yet, the cost of submitting land use applications and going through the process is a cost necessarily borne by all land use applicants, whether religious or not. To relieve the religious landowner of the cost of standard land use procedures and practices is to grant a privilege based on religious status, not to provide permissible accommodation.²⁶⁸

There is also reason to doubt the accommodation aspect of RLUIPA’s land use provisions. A claimant under RLUIPA is not one whose religious conduct is burdened by land use laws. Rather, through its definition of “claimant,” it works to the benefit of only a subset of individuals, those who own property and intend to use it for religious purposes. Thus, a member of a congregation may not bring an RLUIPA claim where local land use law is inhibiting worship. Only the property owner may do so. Thus, it is a set of benefits for property owners, which enables them to purchase property at an economically advantageous price in one district (where their intended use is inappropriate) and then force local government to change the zoning and use permission. For example, they can buy property in a residential

rights that are available to religious but not to secular landowners. *See also* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (holding state statute that created a school district defined by the boundaries of a Hasidic enclave violated the Establishment Clause; there were no guarantees that the next religious group would receive a similar grant and the statute in question amounted to an “allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion.” 512 U.S. at 690.).

²⁶⁴ Mitchell v. Helms, 530 U.S. 1296 (2002).

²⁶⁵ Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

²⁶⁶ Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 21 (1989).

²⁶⁷ *See* H.R. REP. NO.106-219, at 20 (1999) (“This inherent uncertainty for churches attempting to locate is exacerbated by the fact that, as one witness explained, the church must commit to a costly lease or a mortgage to hold the property while it litigates in order to have standing.”).

²⁶⁸ *Texas Monthly*, 489 U.S. at 25 (holding Texas’s sales tax exemption for religious publications unconstitutional under the Establishment Clause).

district at prices below those in the commercial or institutional sections of the city and then force a conversion of the zoning to their advantage. There is not a secular developer who would not covet this extraordinary financial benefit, yet they may not engage in the same economic transaction because they lack the legal weapon of RLUIPA to force the permission that will make their purchase profitable.

Finally, RLUIPA gives the benefit of attorneys' fees to religious land developers to overcome generally applicable zoning and land use regulations. Other land developers must pay attorneys' fees to challenge denials. Such denials happen on a regular basis and they have to pay significant attorneys' fees for ambitious projects. Because of the way that attorneys' fees typically operate, religious land use applicants who settle also get the benefit of this provision. They simply refuse to settle unless the attorneys' fees are part of the settlement. That means that a local government that is in compliance with local and state land use laws, but that may be in violation of RLUIPA, and that wishes to avoid the expense of litigating the issues further, generally must pay attorneys' fees to the other side. As an economic matter, that means that religious developers often no longer need take into account the cost of litigating. The federal government has not only created a greater incentive for religious developers to sue local and state governments (and incur the additional cost in fees and greater insurance needs), but also has increased the likelihood of such lawsuits, because the religious developer is more likely to find lawyers willing to work these cases on the assumption that, in all likelihood, there will be a settlement at some point that will cover fees. These are real financial benefits doled out by the federal government on the basis of religious identity.

CONCLUSION

Section 2(a) of RLUIPA is a repudiation of the Supreme Court's jurisprudence of respectful deference to state and local land use decisions in the absence of discrimination and a takeover of the states' well developed systems of judicial review of local land use decisions. Its interference in local land use law and state courts is both novel and severe. Section 2(a) imposes strict scrutiny in circumstances where it never would have been applied before. It is a congressional aggrandizement of power that reconfigures the relationship between the federal courts and state and local land

use authorities. Moreover, it topples the political balance between local and state governments and Congress, between local governments and their communities, and between neighbors. Congress betrayed residential homeowners, local officials, and planning principles in general.

Congress's actual or willed ignorance of RLUIPA's effect on local planning has yielded perhaps unintended, but plainly unacceptable, results. The Constitution cannot let stand Congress's brazen and careless overreaching into the roles of the federal courts, the states, the local governments, and the people.