

RLUIPA: LINKING RELIGION, LAND USE, OWNERSHIP AND THE COMMON GOOD

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Should the law offer special protection for the location, construction or expansion of houses of worship? And if so, how much? Houses of worship¹ are symbols of religious freedom and centers of religious activity. They make possible much of what churches² do: worship and ritual, transmission of faith across generations, and service to the community. They are extensions and instruments of religious exercise.

But houses of worship, like other kinds of assembly uses, are intense land uses that can have significant negative impacts on surrounding properties. Permit denials seem quite appropriate when house of worship development will cause identifiable harms that cannot be mitigated, even when that means excluding a church from worshipping on a parcel it owns. Indeed, the very purpose of zoning³ is to control such impacts and to ensure the compatibility of various land uses in any given zone. Yet, denials may needlessly restrict religious freedom when negative externalities are either nonexistent or can be ameliorated. Thus, the general question concerning legal protections owed to houses of worship gives rise to a more specific one: when zoning codes, either by their terms or as applied, prevent houses of worship from being located, built or expanded, how closely should courts scrutinize the municipal evaluations of impacts and compatibility?⁴

During the last sixty years, the degree of constitutional protection for religious land use has fluctuated between an

¹ This article will focus on houses of worship as opposed to other religious uses (e.g., schools, day care centers, soup kitchens and other social service programs). For discussion of those uses, see generally Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593 (2008).

² Throughout this article, the term “church” will be used generically to refer to any religious community or institution. More precise language will be used when necessary.

³ This article will focus on zoning (which includes planning) as the primary type of land use regulation because most of the case law discussed herein involves facial or as-applied challenges to zoning laws. Other forms of land use regulation that can affect churches include historic preservation and other kinds of aesthetic regulation, building and safety codes, environmental laws, eminent domain, and even private restrictive covenants.

⁴ The other area of constitutional concern is the land use regulation of adult businesses, which also focuses on restricting negative secondary effects (albeit of a very different sort). Such controls are subject to intermediate scrutiny under *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 72-73 (1976) (dispensing of adult theaters upheld). See also *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50 (1986) (concentrating adult theaters upheld); *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (concentrating adult theaters upheld).

“equality” approach, which would protect religious land use only from overt anti-religious discrimination in zoning, and a slightly more protective “liberty” approach, which would protect religious land use from some burdens caused by zoning even in the absence of discrimination.⁵ After the Second World War, state courts often employed a liberty rationale, invalidating as unconstitutional (on substantive due process or free exercise grounds) decisions to exclude houses of worship from residential zones. Some of those state courts employed a presumption of public benefit, deeming houses of worship to be in furtherance of the general welfare.

Religious land uses generally fared less well in federal courts. In 1983, when for the first time a federal court of appeals reviewed a zoning decision involving a church building, the Sixth Circuit thought giving a presumption of public benefit for houses of worship might violate the Establishment Clause and went on to reject even the religious significance of constructing a house of worship.⁶ Other federal courts followed,⁷ employing the equality approach even before its sweeping adoption for all free exercise claims in 1990 by the U.S. Supreme Court.⁸ The Religious Freedom Restoration Act (RFRA),⁹ passed in 1993 to counteract the Court’s exclusive focus on non-discrimination, produced some zoning decisions with a liberty rationale,¹⁰ but was held unconstitutional as applied to the states in 1997.¹¹

Against this uneven background, Congress in 2000 acted specifically to protect religious land use when it passed the

⁵ See generally Angela C. Carmella, *Land Use Regulation of Churches*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY AND THE LAW 565 (2006) [hereinafter LAND USE REGULATION]; Angela C. Carmella, *Liberty and Equality: Paradigms for the Protection of Religious Property Use*, 37 JOURNAL OF CHURCH AND STATE 573 (1995) [hereinafter *Liberty and Equality*].

⁶ Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 304, 306-07 (6th Cir. 1983).

⁷ See cases cited *infra* note 34.

⁸ Employment Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 888-89 (1990).

⁹ Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (2000).

¹⁰ See, e.g., W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C., 862 F. Supp. 538, 544-46 (D.D.C. 1994); Stuart Circle Parish v. Bd. of Zoning Appeals of the City of Richmond, 946 F. Supp. 1225, 1236 (E.D. Va. 1996). *Contra* Int’l Church of the Foursquare Gospel v. City of Chi. Heights, 955 F. Supp. 878, 880 (N.D. Ill. 1996); Daytona Rescue Mission Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995); Germantown Seventh Day Adventist Church v. City of Phila., No. 94-1633, 1994 U.S. Dist. LEXIS 12163, at *5 (E.D. Pa. Aug. 26, 1994).

¹¹ City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

Religious Land Use and Institutionalized Persons Act (RLUIPA).¹² RLUIPA provides a statutory cause of action to religious individuals and churches to challenge local zoning and landmarking regulations.¹³ The statute requires religious and secular assemblies to be treated on equal terms¹⁴ and subjects limitations that impose substantial burdens on churches to strict scrutiny judicial review.¹⁵ Whether the challenge is facial or as-applied, RLUIPA allows courts a close look at both the church's development proposal and the government's arguments to prevent it. In particular, courts have the opportunity to review the municipalities' evaluations of impacts and compatibility.

This article argues that RLUIPA, with its comprehensive approach to religious land use, is necessary to protect houses of worship while affirming legitimate land use regulation. RLUIPA enables courts to protect religious land uses that have been denied entry to a given site but are nonetheless compatible with surrounding land uses; and it enables courts to uphold municipal decisions that properly assess and exclude incompatible uses. The statute does so by restoring three fundamental connections lost in recent religion clause jurisprudence. First, RLUIPA explicitly recognizes the link between religious exercise and land use, a connection that has been obscured by an uncritical deference to land use controls.¹⁶ Second, RLUIPA explicitly reinforces the connection between religious exercise and property ownership, a connection frequently overshadowed by concerns with religious access to public property.¹⁷ Finally, RLUIPA ties religious exercise to the common good of society, a connection that has been dimmed by an exaggeration of the destabilizing rather than stabilizing possibilities of religious land use.¹⁸ Sections I, II

¹² Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000).

¹³ See 42 U.S.C. § 2000cc-5(5) (RLUIPA applies to "zoning and landmarking"). Some courts have held that it also applies to eminent domain. See *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002); *Albanian Associated Fund v. Twp. of Wayne*, No. 02-3924, 2007 U.S. Dist. LEXIS 73176 at *23-*24 (D.N.J. Oct. 1, 2007) (taking was the method of implementation of land use regulation). *Contra Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 253-256 (W.D.N.Y. 2005); *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 639-40 (7th Cir. 2007) (holding RLUIPA not applicable to eminent domain proceedings).

¹⁴ 42 U.S.C. § 2000cc(b)(1).

¹⁵ 42 U.S.C. § 2000cc(a)(1).

¹⁶ See *infra* notes 25-85 and accompanying text.

¹⁷ See *infra* notes 86-127 and accompanying text.

¹⁸ See *infra* notes 128-213 and accompanying text.

and III below elaborate upon these three connections.¹⁹

I use the concept of the common good instead of the “state’s interest” or “general welfare” to avoid a simple utilitarian weighing of interests.²⁰ The common good transcends these concepts and facilitates consideration of the many ways in which persons and society benefit from both religious freedom and land use regulation. The common good refers to “social conditions designed to enable the ‘total human development’ of the person, such as human rights for individuals, social health and development of the community, and a just, stable, and secure order.”²¹ Religious freedom contributes to the common good. Churches, along with other institutions in society, are capable of providing some of the social goods that help create the conditions for human flourishing, and should enjoy the proper degree of freedom that enables them to do so. Likewise, comprehensive and rational land use planning and development contribute to the common good. Municipal governments thus have the responsibility, through their public order function, to enact and enforce regulations in ways that create social conditions that respect rights, promote community development, and ensure economic stability.²² While churches and governments can promote the common good, they are also capable of thwarting it. It is especially important to recognize that we cannot assume that government always properly advances societal interests while

¹⁹ For Sections I and III, see generally Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195 (2008) (discussing RLUIPA’s impact on local governments); Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178 (2007) (discussing RLUIPA’s impact on federal courts); see also 42 U.S.C. §§ 2000cc-2000cc-5.

²⁰ See Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403, 407 (2007) [hereinafter *Responsible Freedom*] (explaining that the term “common good” more accurately captures the socio-political community); Kyle Duncan, *Subsidiary and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 88 (2007) (describing the common good theory); JACQUES MARITAIN, *MAN AND THE STATE* 148-150 (Richard O’Sullivan ed., 1954) (discussing the idea of a “common good”).

²¹ ANGELA C. CARMELLA, *A Catholic View of Law and Justice, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 255, 266 (2001). See also DAVID HOLLENBACH, *CLAIMS IN CONFLICT: RETRIEVING AND RENEWING THE CATHOLIC HUMAN RIGHTS TRADITION* 64 (1979) (The common good is “a set of social conditions which facilitate the realization of personal goods by individuals.”).

²² See Carmella, *supra* note 21, at 269 (stating that the public order function of government—that slice of the common good specifically within the state’s power to promote—is directed toward protecting human rights, civic peace, public morality and coordinating nongovernmental actors).

churches undermine them. It is for this reason that religious freedom should not be easily subordinated to municipal interests. Thus, there is a presumption in favor of freedom “as far as possible, and curtailed only when and in so far as necessary.”²³

Of course, the freedom of churches must be curtailed when there is substantial evidence of their negative secondary effects on, and fundamental incompatibility with, surrounding land uses.²⁴ A church whose land use proposal shows total disregard for its neighbors obviously does not contribute to the common good. But municipal decisions must also comport with the common good. Controls that are unnecessarily restrictive, or that promote only the interests of some social groups, exceed the bounds of proper concern for public order.

When there is congruence between church development plans and legitimate land use goals, there is no reason to stop the development. Indeed, this is the pattern emerging under RLUIPA case law. Courts interpreting RLUIPA protect churches when the negative impacts of their development proposals can be mitigated, but not in cases when a house of worship’s profound incompatibility cannot be remedied. Thus, it appears that RLUIPA jurisprudence calls for responsible religious freedom and responsible government: the statute protects churches that are attentive to neighbors and community, and affirms municipalities that address adverse impacts of religious land use with controls that are direct, carefully tailored, and evenhandedly applied. In

²³ *Declaration on Religious Freedom: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious*, in THE DOCUMENTS OF VATICAN II 675, 687 (Walter M. Abbott, S.J., ed.1966).

²⁴ In my work on exemptions and the common good, I have suggested that churches be more socially accountable when the main reason for an exemption is relief from financial obligation and less accountable when an exemption is primarily for the purpose of self constitution. Development proposals for houses of worship obviously implicate both self-constitution and financial constraints; but a permit to proceed with development on real property that is already owned, while economically favorable, differs substantially from a tax exemption or exemption from licensing fees that primarily relieve a financial burden. One could argue, then, that permits for houses of worship primarily involve self constitution. On the other hand, social accountability is properly built into the entire land use regulatory process because property use always affects others: it can never be exclusively about self constitution. Religious freedom must therefore be simultaneously protected and limited. This is a long way of saying that even with the most expansive conception of religious freedom, churches should enjoy only as much freedom as is socially responsible in the building, locating, and expanding of their houses of worship. *See Responsible Freedom*, *supra* note 20 at 404-407 (arguing that property exemptions for the church are designed to protect “both religious freedom and the socio-political community that provides the conditions for the meaningful exercise of that freedom”).

essence, RLUIPA is a vehicle for protecting religious land use that is (or can be made) compatible with the legitimate goals of the municipality.

I. RLUIPA: CONNECTING RELIGIOUS EXERCISE AND LAND USE

Churches use real property for ritual and worship and other communal activities. While some forms of individual religious exercise, like prayer, might be done anywhere a person goes, most forms of religious activity that involve external signs or conduct, or that involve more than one person, occur in a physical space. And by definition, churches, which involve the gathering of a community, must assemble in a physical space.²⁵ Churches make considerable efforts to raise money (from member contributions) and borrow funds to buy property on which to build their houses of worship. If funds are insufficient, churches might meet in homes, or rent property—usually from private owners, but sometimes from government if public spaces are available for temporary private uses. Real property—land and buildings—is thus a precondition to religious assembly and provides a critical opportunity for individual and collective religious exercise.²⁶

Most state courts throughout the twentieth century acknowledged the connection between religious exercise and land use. In fact, many of those courts prohibited blanket exclusions of houses of worship from residential zones. When neighbors raised issues of traffic, parking, noise, or decreased property values, courts would not support zoning exclusions because “[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers. . . .”²⁷ For many courts, it was “well settled that the building of a church may not be prohibited in a residential district” because of the right to freedom of worship and assembly.²⁸ State courts often presumed

²⁵ The advent of religious sites on the Internet has raised the question of whether a religious community can exist without physically gathering in the same space. Virtual religion online, however, is usually offered as a supplement, not a substitute for a real gathering.

²⁶ See *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669, at *45 (W.D. Tex. March 17, 2004) (“Inherent in any religion is a community of worship, rather than just the faith or conduct of a lone worshiper. Physical access to a community of worship is crucial to a religious observer’s ability to practice both faith and religious conduct within the community.”).

²⁷ *Westchester Reform Temple v. Brown*, 239 N.E.2d 891, 896 (N.Y. 1968).

²⁸ *Bd. of Zoning Appeals of Meridian Hills v. Schulte*, 172 N.E.2d 39, 44 (Ind.

that houses of worship promoted the general welfare and morals of the community. This presumption either conclusively outweighed negative impacts or was rebuttable in certain circumstances.²⁹ Of course, a fair number of state courts rejected any specific constitutional status for these buildings or their presumptively beneficial nature, and deferred to municipal decisions to exclude them.³⁰ Still, the notion of special protections for houses of worship to enable religious exercise was widespread.

But federal judges questioned this connection between land use and religious exercise in 1983, when, for the first time, a federal court of appeals reviewed a church zoning case.³¹ A Jehovah's Witnesses congregation had been denied a permit to build a Kingdom Hall in a residential zone. At the time, the Free Exercise Clause was interpreted as giving strict scrutiny review to burdens on religious exercise. But the Sixth Circuit started its analysis by rejecting the connection between religious exercise and land use. The court said that for the Jehovah's Witnesses constructing a church building had no religious significance. The act of construction was neither a ritual, a fundamental tenet of the faith, nor a cardinal principle of the faith.³²

The Sixth Circuit's threshold requirement of a religious tenet for the construction of the building completely misunderstood the relationship between a church and its buildings. Certainly the *design* of the house of worship expresses faith,³³ and its *use* makes all kinds of religious exercise possible, but to require that the very act of constructing the building be a "ritual" or a "tenet"

1961).

²⁹ *Liberty and Equality*, *supra* note 5, at 592.

³⁰ See, e.g., *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 139 (3d Cir. 2002) (citing cases on both sides of the presumption issue, and rejecting it).

³¹ *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 303-04 (6th Cir. 1983).

³² *Id.* at 306-07. Before assessing the burden to religion, the court first assessed the "nature of the religious observance at stake. . . . The Congregation's 'religious observance' is the construction of a church building in a residential district. In contrast to prior cases, the activity has no religious or ritualistic significance for the Jehovah's Witnesses. There is no evidence that the construction of Kingdom Hall is a ritual, a 'fundamental tenet,' or a 'cardinal principle' of its faith. At most the Congregation can claim that its freedom to worship is tangentially related to worshipping in its own structure. However, building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs. . . . The ordinance prohibits the purely secular act of building anything other than a home in a residential district." *Id.*

³³ See generally Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 402 (1991) (cases discussed therein).

severely narrows the field of claimants. A church that must build precisely where a sacred event occurred or in a place and manner prescribed by a sacred text might meet this test, but most churches in America could never satisfy such a requirement.

So even under federal free exercise jurisprudence, which in the 1980s still called for a strict scrutiny standard of review, other federal courts followed suit.³⁴ In 1988, the Tenth Circuit found on the facts of the case before it “no evidence that building a church or building a church on a particular site is intimately related to the religious tenets of the church.”³⁵ Like the Sixth Circuit, the Tenth Circuit concluded that zoning that excludes a house of worship did not regulate religious conduct. And even courts that conceded the connection considered it to be highly attenuated. This, along with other trends, made land use regulation nearly unassailable in the federal courts, even before *Employment Division v. Smith*.³⁶ The federal courts thus adopted what had been a minority position in state courts: that no special considerations would be given to houses of worship.

Once the federal courts broke the link between religious exercise and land use, they could easily characterize the burdens of zoning laws as merely economic and aesthetic, so long as there was a theoretical alternative location within the municipality. Land use restrictions on a house of worship’s location, construction, or expansion—now a mere preference, a “desirable accessory of worship”³⁷—were easily found to cause only insubstantial burdens, “even when the resulting effect [was] to completely prohibit a religious congregation from building a church on its own land.”³⁸ Only in the most egregious cases of anti-religious discrimination toward a particular religious

³⁴ See, e.g., *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991); *Christ Coll., Inc. v. Bd. of Supervisors*, No. 90-2406, 1991 U.S. App. LEXIS 21680, at *12 (4th Cir. Sept. 13, 1991); *Salvation Army v. Dep’t of Cmty. Affairs of N.J.*, 919 F.2d 183, 194 (3d Cir. 1990); *St. Bartholomew’s Church v. City of N.Y.*, 914 F.2d 348, 354 (2d Cir. 1990); *Christian Gospel Church, Inc. v. City and County of S.F.*, 896 F.2d 1221, 1224 (9th Cir. 1990); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 823 (10th Cir. 1988); *Grosz v. City of Miami Beach*, 721 F.2d 729, 736 (11th Cir. 1983).

³⁵ *Messiah Baptist Church*, 859 F.2d at 824-25.

³⁶ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

³⁷ *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983).

³⁸ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 350 (2d Cir. 2007) (citing *Christian Gospel Church*, 896 F.2d at 1224; *Messiah Baptist Church*, 859 F.2d at 824-25; *Grosz*, 721 F.2d at 739-40; *Lakewood*, 699 F.2d at 303-04; *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 302-03 (5th Cir. 1988)).

congregation would a federal court agree that the Free Exercise Clause offered protection. The case of a Muslim community that was repeatedly denied the ability to locate a mosque in Starkville, Mississippi, while numerous Christian churches located their houses of worship without difficulty, exemplified the familiar kinds of discriminatory abuses the courts were ready to protect.³⁹

Why were federal courts, as well as a growing minority of state courts, unwilling to acknowledge a significant connection between land use and religious exercise? Why were they unwilling to interfere with local land use controls? The answer, in my opinion, lies primarily in the widespread acceptance of and dependence upon land use controls for socio-economic stability, and the fear of instability that might result from unanticipated land uses.⁴⁰ For a century now, zoning has been used to encourage, channel, or restrict the growth and development of almost every municipality in the nation.⁴¹ For over half a century historic preservation⁴² and eminent domain⁴³ have been employed to promote economic revitalization and beautification. Also, for nearly forty years, regulations and incentive-based policies of numerous environmental laws governing air and water pollution, pesticides, hazardous waste, noise, and toxins have yielded cleaner air, water, and land.⁴⁴ The benefits to society from such efforts are unmistakable.

Land use regulation, of course, is not without its critics. Property rights proponents denounce overreaching by land use

³⁹ *Islamic Ctr. of Miss.*, 840 F.2d at 302-03 (holding that a substantial burden was found when the city was clearly displaying anti-Muslim discrimination).

⁴⁰ See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 473 (1989) ("In the aftermath of the New Deal reformation, courts have been reluctant to use the Constitution's explicit protection of property and contracts in a way that would seriously interfere with social and economic regulation.").

⁴¹ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

⁴² *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 104 (1978).

⁴³ See *Berman v. Parker*, 348 U.S. 26 (1954) (upholding a D.C. agency's use of eminent domain to acquire and redevelop blighted property for both health and aesthetic reasons); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (declaring the use of eminent domain to redistribute land ownership as justified under the "public use" requirement of the Fifth Amendment); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005) (upholding New London's exercise of eminent domain power in furtherance of economic development).

⁴⁴ Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 6 (2007). See generally Symposium, *Harnessing the Power of Information for the Next Generation of Environmental Law*, 86 TEX. L. REV. 1347 (2008) (analyzing a wide range of environmental decision makers).

authorities. Proponents have been especially vocal about excessive exactions cities place on developers⁴⁵ and eminent domain actions that displace people from homes in favor of large scale development.⁴⁶ However, most land use controls—especially local zoning—are seen as protecting rather than thwarting property rights.⁴⁷ They create zones of predictable uses and development; provide mechanisms for flexibility to allow for different or more intense uses; give neighboring property owners a public process in which to voice support or opposition for development plans; and allow for a high degree of socio-economic stability (as well as economic segregation).⁴⁸ As Harvard Law Professor Joseph Singer has noted,

Despite the recent surge of support for deregulation, many laws limit the prerogatives of owners. Zoning laws, consumer protection laws, workplace safety rules, banking rules, building codes—all these types of measures for regulating owners' rights are quite popular. . . . Although we see great anger at particular applications of zoning and environmental laws, hardly anyone is calling for wholesale abolition of them. We tend to forget that . . . we retain a host of regulations that enjoy widespread support.⁴⁹

Similarly, others have noted that the notion that property rights are in conflict with land use regulation has been weakened because

comprehensive land use planning . . . has become an integral tool in the process of progress, as it allows Americans to design calculated growth strategies that attempt to avoid the strain placed upon land and economic resources that too often accompany development and that has contributed to the decline of overall environmental quality of the country.⁵⁰

Precisely because land use regulation has become such a familiar, trusted and “integral tool” of the local police powers and generally tends to support rather than threaten private property,

⁴⁵ See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁴⁶ See, e.g., *Kelo*, 545 U.S. at 469.

⁴⁷ JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 27 (2000) (“Zoning laws do not merely prevent harm. They are enacted to enable owners to enjoy the fullest benefits of their property by separating incompatible uses (residential, commercial, industrial) and at the same time avoid overcrowding and congestion.”).

⁴⁸ See, e.g., *S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713, 723, 724 (N.J. 1975).

⁴⁹ SINGER, *supra* note 47, at 8.

⁵⁰ Brian J. Nolan, Note, *The Metaphysics of Property: Looking Beneath the Surface of Regulatory Takings Law After Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 48 ST. LOUIS U. L.J. 703, 710 (2004).

courts usually employ rational basis review to zoning, historic preservation, and eminent domain. Indeed, deference in this area is the overwhelming standard, with an occasional departure for heightened scrutiny of controls aimed at adult establishments.⁵¹ Even in the regulatory takings jurisprudence, “if the regulation does not interfere with the owner’s control over the soil, it is extremely difficult for the owner to prove that a taking has occurred.”⁵²

Given such a deferential judicial environment, it is not surprising that late twentieth-century courts rarely protected churches from zoning restrictions. Courts also rarely found restrictions on religious land use to constitute regulatory takings (sometimes focusing on the non-economic nature of the interest).⁵³ Most critically, courts began to accept the judgment of local zoning authorities concerning negative impacts created by houses of worship. Given their penchant for deference to land use controls, courts repeatedly upheld municipal assumptions that religious land use is incompatible with, and destabilizing to, the surrounding community.

But not all houses of worship are destabilizing. First, not all houses of worship cause negative impacts. Their impacts depend entirely upon buildings and uses in the vicinity of the development, the size of the lots, and many other variables; it is a highly fact-specific determination, and different kinds of impacts carry different weights. Additionally, asserted impacts, and ultimately concerns of incompatibility, might be based on incorrect assumptions, rumors, fear, speculation, or dislike of outsiders. In fact, boards might make determinations of incompatibility without any evidentiary support because no

⁵¹ See *supra* note 4.

⁵² Eric R. Claeys, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock*, 2004 MICH. ST. L. REV. 877, 880 (2004).

⁵³ See, e.g., *Trs. of Sailors’ Snug Harbor in City of N.Y. v. Platt*, 288 N.Y.S.2d 314, 316 (1968) (historic preservation that prevents demolition of a house of worship is not a regulatory taking because the regulation does not physically or financially prevent or seriously interfere with the carrying out of charitable purpose); *accord Vestry of St. Bartholomew’s Church v. City of N.Y.*, 914 F.2d 348, 356 (2d Cir. 1990); *Mt. St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281, 1291, 1298 (D. Kan. 2007) (for religious properties, consider the present uses and primary expectation regarding the use of the parcel; if feasible and prudent alternatives exist, then there has been no regulatory taking). *But see Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 887, 888 (D. Md. 1996) (church prevails where there has been a total taking).

standards are set forth in the zoning codes.⁵⁴ Further, even if there are clearly identifiable negative impacts, there are often many ways to mitigate those impacts. It is a common and widespread practice to place conditions on development approvals to force the developer to reduce or eliminate those negative externalities.

Moreover, municipalities often consider houses of worship to be incompatible with many types of uses, not only residential. They have alleged that houses of worship are destabilizing just about everywhere: in commercial,⁵⁵ office-professional,⁵⁶ industrial,⁵⁷ agricultural,⁵⁸ entertainment,⁵⁹ and redevelopment zones.⁶⁰ But such decisions might be imprecise or baseless, particularly where special permits and grandfathering have already created a “crazy quilt of land uses” to which the addition of a house of worship would have little effect.⁶¹ While municipalities know they cannot exclude houses of worship entirely,⁶² they also know that under the federal jurisprudence of the 1980s they can bar houses of worship from many zones as

⁵⁴ *Hollywood Cmty. Synagogue v. City of Hollywood*, 430 F. Supp. 2d 1296, 1327 (S.D. Fla. 2006).

⁵⁵ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004).

⁵⁶ *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1166 (C.D. Cal. 2006).

⁵⁷ *Petra Presbyterian Church v. Vill. Of Northbrook*, 489 F.3d 846, 852 (7th Cir. 2007) (exclusive industrial zone), *cert denied*, 128 S.Ct. 914 (mem.) (U.S. 2008). *See also* *W. N.Y. Dist., Inc. of Wesleyan Church v. Vill. of Lancaster*, 17 Misc. 3d 798, 810 (Sup. Ct. Erie Co. 2007). There, a New York court (not interpreting RLUIPA) upheld the denial of special use permit for church; the court agreed that the board’s reasons (industrial park was developed at great public expense for purpose of providing suitable sites for industrial use and for promoting economic development) properly balanced religious interests against municipality’s. *Id.*

⁵⁸ *U.S. v. Maui County*, 298 F. Supp. 2d 1010, 1017 (D. Haw. 2003) (settlement permitting church to build in agricultural zone where many secular assembly uses were allowed); *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 991 (9th Cir. 2006) (allowing the building of a Sikh temple on land that was zoned for agriculture).

⁵⁹ *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 272 (3d Cir. 2007); *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 617 (7th Cir. 2007).

⁶⁰ *Lighthouse Inst.*, 510 F.3d at 272.

⁶¹ *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 771 (7th Cir. 2003) (Posner, J., dissenting) (describing how the commercial life of mixed commercial zones would not change, but the tone might be affected by a storefront church).

⁶² *See* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 74 (1981) (explaining a ban of all live entertainment, including nude dancing, was not narrowly tailored to control secondary effects).

long as such uses are allowed somewhere as of right or as conditional uses. Finally, sometimes intense secular uses are permitted in a given zone while houses of worship are not—without explanation as to why the same negative impacts are acceptable in one case and not in another. Thus, when municipalities deny a permit to locate or build or expand a house of worship (1) when no negative impacts exist, (2) when negative impacts can be mitigated, or (3) when other equally intense uses are permitted, simply because the church can “just go somewhere else,” they deny the essential means by which a constitutional right is exercised with no judicially mandated accountability.

Given the weight and ubiquity of land use controls, a statute was needed to assert the obvious connections between religious exercise and land use. RLUIPA retrieves the previously recognized and common-sense connection between religious exercise and land use without creating an untenable presumption of public benefit.⁶³ The legislative history notes that:

The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct to the core First Amendment right to assemble for religious purposes.⁶⁴

This sentiment is built into the statutory language, which provides that:

The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

...

... 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.⁶⁵

⁶³ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 347 (2d Cir. 2007) (“To remove any remaining doubt how broadly Congress aimed to define religious exercise, RLUIPA goes on to state that the Act’s aim of protecting religious exercise is to be construed broadly and ‘to the maximum extent permitted by the terms of this chapter and the Constitution.’ sec. 2000cc-3(g).”); 42 U.S.C. § 2000cc-3(g) (2000).

⁶⁴ 146 CONG. REC. S7774-01 (2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

⁶⁵ 42 U.S.C. §§ 2000cc-5(7)(A)-(B) (2000) (emphasis added). *See also* First Freedom: Religious Land Use, http://www.usdoj.gov/crt/religdisc/ff_landuse.html (last visited Apr. 13, 2009) (“Religious groups simply cannot exercise their faiths without facilities adequate for their needs.”).

RLUIPA goes on to require reviewing courts to give strict scrutiny to land use restrictions that impose substantial burdens on churches,⁶⁶ and to require the courts to treat religious and secular assemblies on equal terms.⁶⁷ Putting these provisions together with the expanded definition of religious exercise means that it is now possible to find a *religious* burden caused by a zoning decision and that having a theoretical alternative location is not the end of the inquiry.⁶⁸ It also means that intense uses, whether secular or religious, should be treated comparably.

The series of decisions in *Congregation Kol Ami v. Abington Township*⁶⁹ are instructive. A synagogue excluded from a residential zone sued the municipality on a variety of constitutional and statutory claims. The district court found an equal protection violation on the grounds that there was no rational basis for distinguishing the synagogue (which was not permitted to apply for a special use permit) from other entities (library, train station, police barrack) that produced similar traffic, noise, and light impacts when these users were allowed to request special exceptions.⁷⁰ The Third Circuit reversed the district court's injunction against the municipality.⁷¹ The appeals court accepted the broad authority of the municipality to categorize and exclude land uses.⁷²

On remand, the district court analyzed the RLUIPA claim and found a substantial burden (against which no compelling governmental interest was offered).⁷³ The court noted that under pre-RLUIPA free exercise jurisprudence, the synagogue's free exercise claim would not have been cognizable because the congregation had not argued that locating the house of worship at this site was "a basic tenet of their faith" — the rabbi had not asserted a religious "mandate [] that worship services take place

⁶⁶ 42 U.S.C. § 2000cc(a) (2000).

⁶⁷ 42 U.S.C. § 2000cc(b)(1) (2000).

⁶⁸ See *infra* notes 167-213 and accompanying text.

⁶⁹ *Congregation Kol Ami v. Abington Twp.*, 161 F. Supp. 2d 432 (E.D. Pa. 2001), *vacated*, 309 F.3d 120 (3d Cir. 2002), *remanded to*, No. Civ.A. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004), *amended by* No. 01-1919, 2004 WL 2137819 (E.D. Pa. Sept. 21, 2004).

⁷⁰ *Congregation Kol Ami*, 161 F. Supp. 2d at 437.

⁷¹ *Congregation Kol Ami*, 309 F.3d at 144.

⁷² *Id.* at 139 (rejecting the argument that houses of worship "inherently further[s] the public welfare" as inconsistent with federal jurisprudence on zoning of religious uses).

⁷³ *Congregation Kol Ami*, 2004 WL 1837037, at *8, *amended by* 2004 WL 2137819, at *2, (to make clear that "[i]n passing the RLUIPA, Congress changed the definition of religious exercise . . .").

next to houses.”⁷⁴ But the court noted that the expanded definition of religious exercise under RLUIPA now meant that “developing and operating a place of worship . . . is free exercise.”⁷⁵ The new definition “undermines the relevance of holdings” in the federal jurisprudence of the 1980s that rejected the religious significance of houses of worship,⁷⁶ for “[u]nder the RLUIPA, the development of these properties would have been deemed ‘religious exercise.’”⁷⁷

Other courts interpreting RLUIPA have been quick to note, as the *Congregation Kol Ami* district court was, that while RLUIPA’s new definition departs dramatically from earlier federal jurisprudence,⁷⁸ the protection of churches is not limitless. RLUIPA cannot be interpreted to mean that *any* zoning restriction on religious land use automatically causes a substantial burden to religion, or that alternative locations are not relevant to the inquiry, or that any land use categorization is automatically suspect. Surely a few courts made this mistake early on,⁷⁹ but such an interpretation flies directly in the face of

⁷⁴ *Congregation Kol Ami*, 2004 WL 1837037, at *6.

⁷⁵ *Id.* at *9 (emphasis in original).

⁷⁶ *Id.* at *8 (the text is referring to cases cited in notes 31-39).

⁷⁷ *Id.*

⁷⁸ *See, e.g.*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007) (“[U]nlike RLUIPA, which explicitly defines as religious exercise: ‘The use, building, or conversion of real property for the purpose of religious exercise,’ the Free Exercise Clause does not define land use as a religious exercise.”); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006) (“[T]he statute substantially modified and relaxed the definition of ‘religious exercise.’”); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225-26 (11th Cir. 2004) (prior case law stood for the proposition that “zoning decisions do not generally impose a substantial burden on religious exercise[.]” and that they suggest the need for the property use to be compelled by or central to the religion—which RLUIPA clearly rejects); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003) (“This definition reveals Congress’s intent to expand the concept of religious exercise contemplated both in [RFRA and the First Amendment].” By expanding the definition to include land use and by eliminating the centrality test, “Congress necessarily contemplated that a broader range of governmental conduct could be prohibited as imposing a ‘substantial burden’ on religious exercise than the range of conduct that could be prohibited under . . . free exercise clause jurisprudence.” *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning and Zoning Comm’n of the Town of Newton*, 941 A.2d 868, 889 (2008)); *Chase v. City of Portsmouth*, No. Civ. A. 2:05CV446, 2005 WL 3079065, at *7 (E.D. Va. Nov. 16, 2005) (RLUIPA protects religious land use, but the Free Exercise Clause does not.).

⁷⁹ *See, e.g.*, *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1090, 1102 (C.D. Cal. 2003) (holding that the expanded definition meant that any prohibition on a house of worship constitutes a substantial burden and determining that the statute must be an unconstitutional attempt to reverse the

the legislative history and the statutory structure, which call for a separate inquiry into the nature of the burden on religious exercise.⁸⁰ Most courts have been careful to keep the definition separate from other operative provisions, accepting that house of worship use is obviously religious exercise but asking whether the municipal action constitutes a substantial burden on that exercise.⁸¹ Alternatives for the church remain an important part of the inquiry, but are no longer dispositive.⁸² Particularly in the area of auxiliary uses, courts are aware that despite the expanded definition of religious exercise, the statute still requires that the conduct on the real property be religious in nature.⁸³

interpretation of the Free Exercise Clause). *Elsinore's* holding on the issue of constitutionality was overturned by *Guru Nanak Sikh Soc'y of Yuba City*, which found that the expanded definition of religious exercise was not constitutionally problematic because Congress employed a proportional and congruent remedy for situations of individualized assessments by local governments. *Elsinore Christian Ctr. v. City of Lake Elsinore*, No. 04-55320, 2006 WL 2456271 (9th Cir. Aug. 22, 2006), at *1, *overruled by* *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 994-995 (9th Cir. 2006).

⁸⁰ "Substantial burden" is undefined in the statute, and the legislative history points courts to the free exercise jurisprudence for its definition. This is precisely what most circuit courts have done in defining this term.

⁸¹ *See, e.g., Civil Liberties for Urban Believers*, 342 F.3d at 761 (discussing that while a broader definition of what constitutes religious exercise affects the definition of "substantial burden," it obviously cannot mean that any regulation that inhibits real property use meets "substantial burden," as that "would render meaningless the word 'substantial'. . . ."); *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 698 (E.D. Mich. 2004) (stating that religious land use clearly qualifies for RLUIPA protection as religious exercise, but no substantial burden on religious exercise was found).

⁸² *See, e.g., Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217, 2007 U.S. Dist. LEXIS 73176, at *29 (D.N.J. Oct. 1, 2007). The fact that a church continues to "utilize its inadequate facility does not, *per se*, render any burdens insubstantial." *Id.*

⁸³ *See, e.g., Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 674 (10th Cir. 2006) (holding that RLUIPA's protections did not apply because the large day care center was seen as a commercial undertaking rather than sincere religious exercise by the proposing church); *Greater Bible Way Temple v. City of Jackson*, 733 N.W.2d 734, 754 (Mich. 2007) (holding an apartment complex, provided as housing to the poor, was not religious exercise under the statute). *Accord Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (engaging in an exacting review to ensure that "each room the school planned to build would be used at least in part for religious education and practice In light of these findings, amply supported in the record, the expansion project is a 'building [and] conversion of real property for the purpose of religious exercise' and thus is religious exercise under § 2000cc-5(7)(B)."). Moreover, the legislative history supports this close inquiry: The definition of "religious exercise" under this Act includes the "use, building, or conversion" of real property for religious exercise. However, not every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious

Now that RLUIPA has acknowledged that land use can affect the exercise of a constitutional right, the inexorable push toward rational basis deference has been tempered. Perhaps most importantly, RLUIPA's linkage of religious exercise and land use means that municipalities need substantial evidence of negative impacts and incompatibility before they can justify permit denials or unequal treatment. The statute is "targeted solely to low visibility decisions with the obvious—and, for Congress, unacceptable—concomitant risk of idiosyncratic application."⁸⁴ Municipalities are coming to learn that their decision-making must be clearly based on identifiable externalities.⁸⁵

In short, after RLUIPA, courts should no longer ask whether constructing or locating a house of worship is a ritual, a fundamental tenet of the faith, or a cardinal principle of the faith. They can instead acknowledge that development plans for a house of worship constitute religious exercise and then move to the real concerns at the heart of RLUIPA: whether religious land use has been subjected to unjustified burdens or unequal treatment.

II. RLUIPA: CONNECTING RELIGIOUS EXERCISE AND PROPERTY OWNERSHIP

RLUIPA can be invoked as a statutory claim or defense only by those who hold a property interest affected by a land use

institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition of "religious exercise." For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on "religious exercise." 146 CONG. REC. S7776 (2000) (joint statement of Sens. Hatch and Kennedy).

⁸⁴ *Freedom Baptist Church of Del. County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 873-74 (E.D. Pa. 2002). "[Z]oning ordinances must by their nature impose individual assessment regimes . . . [that] necessarily involve case-by-case evaluations of the propriety of the proposed activity against extant land use regulations." *Id.* at 868. But not all courts agree that zoning decisions involve individualized assessment. See, e.g., *Grace United Methodist Church*, 451 F.3d at 654; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007); *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning and Zoning Comm. of Town of Newtown*, 941 A.2d 868, 892 (Conn. 2008).

⁸⁵ Dwight H. Merriam, *One (1) Ounce of RLUIPA Prevention*, 49 MUN. LAW., May/June 2008, at 12-13, 37.

regulation.⁸⁶ The statute provides:

The term “land use regulation” means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), *if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.*⁸⁷

Most RLUIPA litigation is in fact brought by churches holding an ownership interest in real property. This is quite unremarkable, since the vast majority of churches in America own real property that is put to (or intended to be put to) religious use.⁸⁸ Private property is the primary locus for religious exercise—not only because the institution of private property is deeply embedded in our culture but also because Establishment Clause restrictions make churches responsible for obtaining private funds and private property for worship and all other church operations.⁸⁹ Indeed, the number and visibility in recent decades of Establishment Clause cases involving religious access to *public* property—placing religious symbols on municipal property, renting public facilities for religious meetings, and the like—have caused us to lose sight of the fact that worship on *private* property is most in need of protection. This section argues that RLUIPA is necessary to ensure fair opportunities for religious access to private property.

The Establishment Clause prohibits the use of public land by churches and the transfer of public land to churches for religious uses, when the use or transfer would be an endorsement of religion. Obviously the hallmarks of the colonial and early state establishments—providing land and paying for church buildings from tax revenues—are long gone.⁹⁰ And it is clear that it would

⁸⁶ See *Taylor v. City of Gary*, No. 06-3550, 2007 WL 1317130, at *1 (7th Cir. May 7, 2007) (holding RLUIPA not applicable to plaintiff who did not own church building but wanted to acquire it from city, which had plans to demolish it, for use as a church); *Prater v. City of Burnside*, 289 F.3d 417, 434 (6th Cir. 2002).

⁸⁷ 42 U.S.C. § 2000cc-5(5) (2000) (emphasis added).

⁸⁸ LAND USE REGULATION, *supra* note 5, 566-67.

⁸⁹ Many RLUIPA cases reveal churches that have spent large sums of money to purchase property. See, e.g., *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005) (even after purchase of the property, it would cost an additional \$12 million to build the church). Also, cases show long periods of time are taken to find the right parcel. See, e.g., *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227 (C.D. Cal. 2002) (taking a property owner five years to find and negotiate the purchase of the property).

⁹⁰ See Michael W. McConnell, *Establishment and Disestablishment at the*

be unconstitutional to build a church or a synagogue or a mosque or a temple on public property.⁹¹ While public property cannot be given to churches, churches can, under certain circumstances, purchase⁹² and lease (long term)⁹³ property from government

Founding, Part I: Establishment of Religion, 44 WM. & MARY L. REV. 2105, 2148-2151 (2003). “Land grants were among the most important privileges of the established church.” *Id.* at 2148. They were found in all the colonies and included land for houses of worship and ministers’ housing, as well as investment properties for ministers’ support. “So ingrained was the practice . . . that when Congress set about to organize settlement of the Northwest Territory, its first two substantial grants specified that a section in each township would be set apart for the support of religion, along with one for education.” *Id.* at 2150. But when the Northwest Ordinance was enacted in 1787, it did not contain any such provision, thus ending the explicit reservation of land for religious purposes. *Id.* at 2151. Justice Brennan noted in his dissent in *Valley Forge Christian Coll. v. Americans United for the Separation of Church and State, Inc.*, that Madison vetoed a bill providing federal land to a church for its use, seeing it as “a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the [federal Establishment Clause].” 454 U.S. 464, 512 n.20 (1982) (Brennan, J., dissenting).

⁹¹ *See, e.g.,* *Hein v. Freedom From Religion Found., Inc.*, 127 S.Ct. 2553, 2571 (2007) (Justice Alito noting in dicta that it would be an “abuse” for a federal agency to use funds to build a house of worship, for which standing would likely exist). Justice Souter noted in dissent that “[i]t would surely violate the Establishment Clause” for a federal agency to use federal funds “to build a chapel for weekly church services.” *Id.* at 2586 (Souter, J., dissenting); *see also* *Wallace v. Washoe County Sch. Dist.*, 701 F. Supp. 187, 192 (D. Nev. 1988) (finding that a church cannot establish a permanent place of worship at public high school).

⁹² Payment of fair market value, together with no on-going post-sale relationship, renders the sale constitutional. *See, e.g.,* *Southside Fair Hous. Comm. v. City of N.Y.*, 928 F.2d 1336, 1338 (2d Cir. 1991) (holding that a sale of urban renewal property to Hasidic community for fair market value for a city block to build a synagogue, yeshiva and faculty housing did not violate the Establishment Clause). Even when no fair market value is paid, but some governmental interest is furthered, the transfer can be constitutional when the property will be used for non-worship purposes. *See, e.g., In re Redevelopment Auth. of Phila.*, 938 A.2d 341, 348 (Pa. 2007) (finding that blighted property taken by eminent domain can be conveyed to a religiously-affiliated developer as part of a redevelopment plan for building a religious school without violating the Establishment Clause when primary purpose and effect is to eliminate blight); *64th St. Residences v. City of N.Y.*, 150 N.E.2d 396, 398-99 (1958), *cert. denied*, 357 U.S. 907 (1958) (holding that Fordham University’s purchase of public land at below market rate was not “an unconstitutional grant or subsidy of public moneys to a religious corporation” because the city got the benefit of slum clearance). There is further indication that payment of full market value is sufficient to render the transfer constitutional. *See Valley Forge Christian Coll.*, 454 U.S. at 468, 480 n.17. The Court held that Americans United lacked taxpayer standing to challenge a no-cost transfer of a seventy-seven acre parcel of surplus federal property to a religious college for educational use because the transfer was made pursuant to the Property Clause rather than the Spending Clause. The college paid nothing because the appraised value was discounted

entities (typically when fair market value or some comparable consideration is given).

But the federal courts have been kept busy by a host of other issues not terribly relevant to the religious exercise of most churches. The first category relates to religious symbols on public property, either temporarily commemorating religious holidays or permanently commemorating civic values or events. Of course the Establishment Clause would prohibit government from placing a Latin cross (or any sectarian symbol) atop a city hall.⁹⁴

by the federal government's calculation of a 100% public benefit allowance. Americans United claimed that the government did not receive adequate consideration because the college's use of the property will not confer a public benefit. Although there was no decision on the merits, the Court noted that "there is no basis for believing that a transfer to a different purchaser would have added to Government receipts," since it probably would have been transferred to another school or nonprofit institution; moreover, maintenance costs were depleting the Treasury and this property had no value to the Government. The dissent would have found standing and allowed the suit to proceed on the merits. *Id.* at 511-512, 512 n.19 (Brennan, J., dissenting) ("It can make no constitutional difference in the case before us whether the donation to the petitioner here was in the form of a cash grant to build a facility [citing *Tilton v. Richardson*, 403 U.S. 672 (1971)] or in the nature of a gift of property including a facility already built." *Tilton* had required religious colleges receiving building funds to give assurances that the educational use of the buildings would be secular; if the use became religious, the college would have to pay "full value for the property, as the Constitution requires." "[I]t is entirely clear from *Tilton* that if the facility is and was used for sectarian purposes, the Government was required to obtain full market value at the time such use commences.").

⁹³ See generally Shelley Ross Saxon, *Government and Religion as Landlord and Tenant*, 58 RUTGERS L. REV. 409, 409 (2006). There are examples of leases that were held not to violate the Establishment Clause. See, e.g., *Hawley v. City of Cleveland*, 24 F.3d 814, 815, 819 (6th Cir. 1994) (holding that there is no violation when a church leased and operated a chapel in an airport, as other nonprofit groups lease facilities as well); *Pratt v. Ariz. Bd. of Regents*, 520 P.2d 514, 517 (Ariz. 1974) (leasing to a religious group on a permanent basis or leasing for less than fair rental value would be unconstitutional, but occasional leasing of state university football stadium for a worship service at a fair rental value did not violate Arizona's establishment clause); *Woodland Hills Homeowner Org. v. L.A. Cmty. Coll. Dist.*, 218 Cal. App. 3d 79, 83-84, (Cal. Ct. App. 1990) (finding a seventy-five year lease of surplus property to a Jewish congregation for more than fair rental value in an open bidding process was constitutional even though it involved the building of a mixed use village, including a temple, and educational and senior housing). Note that the Ninth Circuit has certified questions to the California Supreme Court as to the interpretation of the California Constitution's No Preference and No Aid clauses, in the course of proceedings challenging the lease of public park land for management by the Boy Scouts. See *Barnes-Wallace v. City of S.D.*, 530 F.3d 776, 779 (9th Cir. 2008).

⁹⁴ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part) ("I doubt not, for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a

But for anything short of that, the Supreme Court has produced a most convoluted and fractured line of Establishment Clause decisions, finding instances in which some religious symbols can be placed on public property, particularly when those symbols can be identified as primarily historical, non-sectarian, civic or cultural.⁹⁵ Some government entities, attempting to remedy unconstitutional displays, transfer to private entities the public land on which the displays sit, but circuits are split on the constitutionality of the transfers themselves.⁹⁶

Another category of federal case law focuses on the ability of churches and other religious organizations to rent public facilities (on a per-event basis) that are generally open to groups in the community. Here, the Supreme Court is interpreting the public forum doctrine under the Free Speech Clause (sometimes in considerable tension with the Establishment Clause), which allows private uses in traditional or designated public spaces and facilities.⁹⁷ Some federal courts applying the doctrine have allowed local governments to prohibit rentals for worship in public libraries⁹⁸ and in public schools (even during non-

large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.”).

⁹⁵ See *McCreary County v. ACLU*, 545 U.S. 844 (2005) (upholding decision to ban the hanging of the Ten Commandments in a courthouse when the purpose is to endorse the commandments' religious message); *Van Orden v. Perry*, 545 U.S. 677 (2005) (finding that a display inscribed with the Ten Commandments did not violate the establishment clause); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that the state did not violate establishment clause by permitting private party to display unattended cross on grounds of state capitol); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (finding that crèche display in a courthouse violated the establishment clause but a menorah, next to a Christmas tree, outside the courthouse did not); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (allowing the inclusion of a nativity scene in the city's Christmas display because it was held to not violate the establishment clause).

⁹⁶ Compare *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005), and *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000), with *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008).

⁹⁷ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 105, 106, 107 (2001) (banning a Christian group from meeting after hours at a school based on its religious nature was unconstitutional); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993) (holding that school district unconstitutionally denied church access to school premises solely because of religious viewpoint); *Widmar v. Vincent*, 454 U.S. 263, 273, 273 n.13 (1981) (excluding religious groups from open forum by state university was held unconstitutional).

⁹⁸ *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 911, 911 n.11 (9th Cir. 2007) (finding library policy of allowing religious meetings but not

instructional time).⁹⁹ When churches are permitted to use public facilities, they must be careful to set up and then remove any sign of their presence each time they worship so that the space does not become identified with the religious use.¹⁰⁰ When churches are not permitted to use public facilities, the justification is the possible identification of public space as a house of worship. In fact, the library policy barring worship upheld by the Ninth Circuit was considered reasonable to prevent the space from being “transformed into an occasional house of worship,”¹⁰¹ and the Board of Education policy upheld by the Second Circuit specifically forbade “holding religious worship services, or otherwise using a school as a house of worship.”¹⁰²

Despite the amount of ink spilled by courts on such cases, these issues of symbolism on public property and access to public facilities are peripheral to the needs of the vast majority of churches in the nation. Most churches have or seek to obtain permanent or long-term facilities for worship. Further, governmental grants of access to public property are largely optional; government has near total control over the uses to which its property is put.¹⁰³ Aside from traditional open forums like sidewalks and parks, which are governed by free speech protections, municipalities are not required to open or designate non-public forums for private use. So even if courts held that a forum open to private speech must include worship, a municipality could simply close the property to all private use. Similarly in the symbols context, municipalities have no

religious worship was reasonable), *cert. denied*, 128 S.Ct. 143 (2007).

⁹⁹ *See, e.g.*, *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 492 F.3d 89, 90, 91, 94 (2d Cir. 2007) (vacating, without common rationale, permanent injunction that would have barred city from enforcing a policy that allowed religious meetings but not religious worship). *But see* *Resnick v. E. Brunswick Twp. Bd. of Educ.*, 389 A.2d 944, 950-51 (Sup. Ct. N.J. 1978) (allowing temporary rental of school for worship “at cost” during non-instructional time); *accord* *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 704, 705 (4th Cir. 1994) (holding that there are no establishment concerns when church pays rent to cover its costs); *accord* *Gracepointe Church v. Jenkins*, No. 2:06-CV-1463-DCN, slip op. 2006 WL 1663798, at *7 (D.S.C. June 8, 2006). Note that this practice has a long history. *See, e.g.*, *Townsend v. Hagan*, 35 Iowa 194, at *3 (Iowa S.Ct. 1872) (finding that school buildings were allowed to be used for Sunday worship services where there were not enough church buildings).

¹⁰⁰ *See, e.g.*, *Vineyard Christian Fellowship v. City of Evanston*, 250 F. Supp. 2d 961, 970 (N.D. Ill. 2003).

¹⁰¹ *Faith Center*, 480 F.3d at 910.

¹⁰² *Bronx Household*, 492 F.3d at 94 (Calabresi, J., concurring).

¹⁰³ *See, e.g.*, *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.31 (1984) (noting the government’s dominion and control over its own property).

obligation to allow any private display;¹⁰⁴ even if a public forum is found to exist, from which religious symbols cannot be excluded, a municipality has no obligation to create and maintain such a forum in the first place. Even with all the litigation surrounding these issues of religious access, it remains undeniable that, by constitutional design, permanent, continuous, and sectarian religious exercise is supposed to take place on private property—where, in fact, nearly all religious groups locate their worship, or at least want to locate their worship.¹⁰⁵ The conflicts over religious access to public facilities reflect the reality that poorer, smaller religious groups are dependent upon the precarious availability of public spaces. And the conflicts over religious displays on public property are largely fueled by the symbolic importance of religion's place in the public square.

In my view, the real symbolism of religion's "place" in the public square, in civil society, is not a crèche and menorah on the courthouse lawn but rather a landscape dotted with houses of worship. Vibrant and life-giving religious experience occurs at houses of worship, which can be saturated with religious imagery, texts, sounds, smells, symbols, music, and meaning, and can teach and transmit faith across generations. Some churches without enough money to own property (or rent long term) have no choice but to rent public or private space on a per-event basis. (I do not suggest that churches should not seek the use of public facilities open generally to private groups. Public space might be more readily available on weekends because private spaces are typically in use all week long.) In other cases, the need to seek public access results from a confluence of disparate factors. Indeed, sometimes churches rent public facilities not because they cannot afford to own property, but because zoning restrictions prevent them from worshipping in property they already own.¹⁰⁶ Given the temporary nature of the use of public

¹⁰⁴ *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125 (2009) (holding that placement of permanent monument in public park is government speech).

¹⁰⁵ For communities totally dependent upon government property for their worship, like Native Americans, the situation is regrettable. Federal property interests take priority over religious use, leaving Native Americans protected in their access to sacred sites but subject to all other federal decision-making. "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (emphasis in original).

¹⁰⁶ *See, e.g., Vineyard Christian Fellowship v. City of Evanston*, 250 F. Supp. 2d 961, 970, 976, 978 (N.D. Ill. 2003) (considering that church rents local high school for Sunday worship and rents other facilities for baptisms, weddings and

facilities, however, and the need to set up and break down for each event—not to mention the expense¹⁰⁷—the use of public facilities can never approach the benefits of owning (or renting long term) one's own house of worship.

In the ways just described, religious access to *public* property is restricted by both constitutional design and through the exercise of governmental discretion. And in the ways described in Section I, religious access to *private* property is restricted by land use regulation. I do not dispute that land use regulation (and zoning in particular) is critical to protecting life in common for all the reasons set out earlier—for all the reasons it is so widely accepted. But precisely because zoning is so comprehensive, governing nearly every inch of private property, there must be room for religious uses. Every municipality decides by its code and by its individualized processes the precise locations in which houses of worship will be permitted, conditional, or forbidden, as well as their dimensions, height and bulk. If government confronts constitutional restrictions regarding religion on its own property, all-encompassing regulatory processes like zoning must be more sensitive to religious land uses to ensure that religious exercise can occur primarily where it is supposed to: on private property.¹⁰⁸ It simply cannot be the case that religious exercise

funerals because it cannot use building for worship, as churches are treated differently from cultural/membership organizations; distinction is found to lack rational basis and violates equal protection); Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, No. CV 02-2989(TCP)(MO), 2006 WL 572855, at *2 (E.D.N.Y. March 6, 2006) (limited space in the building meant the church had to rent a local elementary school for children's religious education; other non-worship activities had to be conducted off-site).

¹⁰⁷ Rental costs may be exorbitant. See, e.g., *Vineyard Christian Fellowship*, 250 F. Supp. 2d at 970 (“Renting the high school auditorium and exercising various options within the rental lease costs Vineyard almost \$100,000 a year for a 90 minute service each week.”).

¹⁰⁸ Government itself must acknowledge that the freedoms connected to private property ownership are entirely dependent upon the self restraint of government. No private property exists without a governmental system to “define, allocate, and enforce property rights.” SINGER, *supra* note 47, at 8. Private property is governmentally controlled all the way from the very definition of property rights to its regulation under zoning, planning, preservation, takings and environmental law. Thus, religious freedom that is associated with property use depends entirely upon governmental recognition of the significance of the rights at stake. Especially in the post-New Deal world, the government has vast regulatory powers regarding property. The government constantly creates and refines legal property rights, recognizing new rights, abolishing old ones, and modifying the scope and strength of existing rights. Modification of property is achieved through a number of government powers. States often act under their police powers—their residual authority as sovereigns, permitting them to act almost without limitation in the interests of

can be severely restricted on both public and private property.¹⁰⁹

Yet such a restrictive regime is precisely what was allowed before RLUIPA was enacted. Aside from *Starkville*-type discrimination against a particular denomination, which was and continues to be clearly unconstitutional,¹¹⁰ federal courts, as well as many state courts, deferred to zoning controls as long as the zoning code at issue allowed houses of worship somewhere in the municipality. When the Sixth Circuit Court of Appeals held that building a church was not religious exercise and that any burdens caused by zoning were economic, the court found it sufficient that ten percent of the city's land area was open to houses of worship under the zoning code, without regard to actual availability.¹¹¹ Pre-RLUIPA jurisprudence allowed municipal zoning officials to deny houses of worship entry to many zones on the grounds of alleged incompatibility with residential, commercial, office, retail, entertainment, agricultural, and/or industrial uses.¹¹² Do we

public welfare, safety, or morals...The advent of popularity of zoning has led to an extensive land use law that prescribes in very restrictive terms the bounds within which realty may be used. Zoning laws commonly permit only certain kinds of uses of property. They determine the permissible physical shapes of buildings and other structures, height and setback, architectural style, construction materials, their number of inhabitants or residents, and whether commercial services may be offered. Together with safety regulations and building licensing, zoning laws cover nearly every facet of activity and use of realty and fixtures. In addition, state governments define the nature and scope of ownership in land and chattels. The government recognizes or refuses to recognize the various estates in land, describes the scope of the owner's right to exclude, to alienate and restrict alienation, and to transfer by gift or devise. New quasi-property rights—such as a right to one's likeness—are created, and others—such as rights in genetic materials—denied. States have reallocated property rights among neighbors by changing rules in nuisance law regarding permissible land uses. Similarly, states have transferred property rights from lessors to lessees by means of leasehold regulations. The result is that many of the prerogatives ordinarily associated with ownership may, in fact, be exercised by the government at any time. Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1427-30 (2006) (arguing that eminent domain takings, which provide compensation, are preferred to functionally equivalent property regulation and taxation powers, which do not involve compensation).

¹⁰⁹ See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613 (1993) (arguing that certain limitations on religion under the Establishment Clause lead to more robust Free Exercise Clause protection).

¹¹⁰ See *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 302-303 (5th Cir. 1988).

¹¹¹ *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983).

¹¹² See, e.g., *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 771 (7th Cir. 2003) (on the argument that houses of worship can be excluded from some zones because they are preferred in others). Judge Posner's dissent found an equal protection violation on the grounds that allowing churches in

really want to say that municipalities have met their constitutional obligations as long as zoning codes permit houses of worship in some zone?

RLUIPA is necessary to ensure fair opportunities for religious access to private property. It is the mechanism that ensures constitutional sensitivity to religion on private property. It recognizes that when government excludes houses of worship in some zones and allows them in others, such action undoubtedly affects the availability and affordability of properties, and that beyond the economic realities, such action affects religious exercise.¹¹³ It comprehensively protects against unjustified substantial burdens, unequal treatment of religious and secular assemblies, discrimination, and the exclusion of religious uses, as well as their unreasonable limitation.

The fact that the Establishment Clause, with some exceptions, locates permanent, continuous, and sectarian religious exercise on private property makes it all the more curious to see the argument that RLUIPA violates that very clause.¹¹⁴ RLUIPA conforms to the constitutional requirements under the clause: it

residential districts while excluding them from commercial districts lacked a rational basis:

Religious competition presupposes free entry into the religious “marketplace.” A new church is unlikely, however, to have the resources necessary for building its place of worship in a residential area other than a slum, especially as the Chicago ordinance requires that the church provide parking, which will mean that unless its building is tiny it will have to acquire more than one city lot. A church that wants to build in the commercial zone, where land is cheaper, must obtain a special permit; and if it wants to build in the manufacturing zone, it is out of luck unless it can procure an amendment to the zoning ordinance.

....

... [O]btaining [a permit] is costly . . . [and public] opposition to the church’s application . . . is predictable because churches do not enhance commercial activity.

Id. at 770-71. The distinction would be rational only if churches would crowd out commercial uses, “[b]ut that is an absurd suggestion.” *Id.* at 772.

¹¹³ Note, however, that it is not the case that churches can simply purchase a parcel without considering the zone and the risks that use permits or variances will be held properly denied under RLUIPA. *See, e.g.,* Int’l Church of the Foursquare Gospel v. City of San Leandro, No. C 07-3605 PJH, 2007 WL 2904046, at *14 (N.D. Cal. Oct. 2, 2007); *see also* Petra Presbyterian v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (finding no RLUIPA protection for purchaser who assumed risk of purchasing in zone that was later rezoned to comply with RLUIPA).

¹¹⁴ Marci Hamilton, *The Constitutional Limitations on Congress’s Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act is Unconstitutional*, *supra* this volume.

promotes free exercise of religion on private property because it lifts government-created burdens. RLUIPA enables courts to look closely at the real impacts of proposed development projects to ensure that religious freedom does not come at the expense of other non-beneficiaries and other important goals.¹¹⁵ Surely, if RLUIPA immunized churches from land use regulations and disempowered municipalities from controlling socially detrimental impacts, then the Establishment Clause would be violated, for churches then would be given a privilege to cause identifiable harms far beyond any legitimate free exercise protection.¹¹⁶ In fact, it would be as though churches had been delegated unilateral authority over land use decisions, a clear violation of the Establishment Clause.¹¹⁷ But RLUIPA does not function in this way. Many churches lose their RLUIPA claims, while the churches that win generally do so on a staggering record of arbitrary or groundless local decision making.¹¹⁸ RLUIPA is a mechanism for protecting both religious exercise and legitimate land use regulation.

RLUIPA is consistent with the Establishment Clause because

¹¹⁵ *Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005). RLUIPA itself provides: "This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g) (2000).

¹¹⁶ *See, e.g.*, *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *12 (W.D. Tex. Mar. 17, 2004). The church sought approval for a large number of parking spaces to enable expansion of the congregation well beyond existing size. In asking how much parking the church needs and how much the city must permit, the court said, "Surely, the answer is not whatever amount the church desires." *Id.* at 12.

¹¹⁷ *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982) (invalidating a statute which effectively vested churches with the power to veto applications for liquor licenses within a specific distance surrounding their property).

¹¹⁸ *See infra* notes 139-200 and accompanying text; *see also* *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (noting churches are vulnerable "to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards."); *Petra Presbyterian Church* 489 F.3d at 851 (referring to *Saints Constantine & Helen*, the Seventh Circuit Court of Appeals later noted that the permit denial was "was so utterly groundless as to create an inference of religious discrimination"). The Second Circuit Court of Appeals noted in *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007) that *Saints Constantine & Helen*, *Guru Nanak Sikh Soc'y v. County of Sutter*, 465 F.3d 978 (9th Cir. 2006), and *Westchester Day* are all examples of arbitrary, capricious and unlawful imposition of land use regulations because there is no relation to health, safety, or welfare and no support by substantial evidence. But these "subtle" forms of discrimination would not be protected under the pre-RLUIPA jurisprudence, which protected churches only against overt discrimination.

it advances religious freedom by protecting property rights that, despite the views of their more extreme proponents, are themselves far from absolute. Property rights are always exercised within a thick web of competing concerns.¹¹⁹

The institution of private property has traditionally been understood as a fundamental precondition to limited government and democracy, as a “bulwark” against government; it has also been seen as the source for the development of entrepreneurship and innovation, and for the creation and expansion of mediating institutions like families and neighborhoods.¹²⁰ Most importantly, the institution of private property was not conceived to be wholly self-regarding, and certainly not to be defined by avarice and greed. Locke’s labor theory “incorporates affirmative obligations of potential owners to nonowners [Property, like all rights,] include not only the liberty to pursue one’s own private interests but also a duty to consult the needs of others.”¹²¹ Madison, for instance, did not view property as an end for individuals, but as a means to the public good. “[T]he Revolutionaries did not intend to provide men with property so that they might flee from public responsibility into selfish privatism: property was rather the necessary basis for a committed republican citizenry.”¹²²

¹¹⁹ SINGER, *supra* note 47, at 6, 94 (“Because the assertion and exercise of property rights have effects on others, they cannot be absolute.”).

¹²⁰ *See id.* at 23 (“[s]ome property uses are necessary to provide a setting within which individuals can exercise liberties . . . such as free speech, religious activity, and private family life, without undue government interference.”); *see also* Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 737 (1999) (noting property “secures individual autonomy from government coercion, prevents an over-concentration of political authority generally, and encourages investment and economic development.”). Kmiec also notes:

[P]roperty is itself merely a means to the protection of person and family and the freedom associated with both family life and economic initiative The private nature of property is protected not because ownership is a good in itself, but because it fulfills higher goods, including: the security against theft, civil disorder, and violence; the incentive to work and to find worth in that work and the efforts of others; and the development of neighborhoods that fulfill a deep and natural human yearning for community in both a social and political sense.

Id. at 753. Property sustains neighborhoods that lie between individual and state. *Id.* at 759. *See also* Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531, 1532 (1996) (arguing that private property plays “the necessary role . . . in the actualization of human freedom”).

¹²¹ Harvard Law Review Association, *Richard Epstein on the Foundations of Takings Jurisprudence*, 99 HARV. L. REV. 791, 798, 801 (1986).

¹²² Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean*

More modern voices echo the other-regarding nature of a private property regime. Joseph Singer of Harvard University has argued:

Property confers power over others, but also obligation toward them. The two go hand in hand For property to be justified, it must be limited. Entitlements, including property rights, go both ways; they entitle and they obligate. You cannot have one without the other. To learn what entitlements we should have, we must ask what obligations we owe each other. This is the paradox of property.¹²³

So, to emphasize the private property grounding of religious exercise in no way suggests that religious land use is not subject to obligation. I would argue to the contrary.¹²⁴ As with all private property, obligations are inherent in the very definition of rights. Since land use regulation is an extension of those basic obligations to other property owners and to the community at large, it rightly constrains all property owners to varying degrees for its proper purposes of limiting negative secondary effects and striving for compatibility among neighboring land uses. RLUIPA is not intended to provide a “free pass” or immunity to churches in the land use regulatory context; churches must participate in the public process that enables the fair distribution of rights and obligations.¹²⁵ In fact, neighbors as well as holders of covenants

Solliloquy: A Role for Intellectual and Legal History in Takings Analysis, 26 ENVTL. L. 1095, 1140 (1996), quoting DREW MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 68 (1980).

¹²³ SINGER, *supra* note 47, at 210.

¹²⁴ *Id.* at 88-89.

The title holder is not the only person with legally protected interests in the property. Others may have legal rights to control various aspects of the property The focus is not just on the rights of one owner but on those affected by that owner's actions Because owners do not live alone but in society with others, and because property rights may conflict—both with other property rights and with personal rights—we cannot sensibly understand or shape property law without attending to the effects of recognizing particular entitlements There is no vested property right to commit harm to other persons or property.

Id.

¹²⁵ *Davis v. Zoning Bd. of Appeals, Vill. of Lockland*, 797 N.E.2d 548, 551 (Ohio Ct. App. 2003) (in describing the specific restrictions RLUIPA sets out and the broad authority municipalities maintain, the Court stated, “RLUIPA . . . does not completely strip zoning authorities of their right to impose lot-size or setback requirements.”). RLUIPA does not interfere with a municipality's freedom to amend the zoning ordinance to forbid church use. *See, e.g., Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007). Nor does it block the freedom to amend zoning ordinance even during the pendency of a church's application in a way that makes it more difficult for the

have heightened protection in RLUIPA suits.¹²⁶ Those churches with profound and unavoidable negative impacts on neighbors typically lose—as they should.¹²⁷

III. RLUIPA: CONNECTING RELIGIOUS EXERCISE AND THE COMMON GOOD

My third and final point is that RLUIPA connects religious exercise and the common good. What do I mean by the common good? It refers to the conditions in society that enable the protection of human rights, civic peace, and a just, stable order—in short, conditions that allow for human flourishing.¹²⁸ Both religious freedom and land use regulation contribute to the common good. Both are critical to civic peace and the social stability of the wider community. However, individual church decisions and individual municipal decisions are capable of undermining the common good. A church whose land use proposal shows total disregard for its neighbors does not

church to build. *See, e.g.*, *House of Fire Christian Church v. Zoning Bd. of Adjustment*, 879 A.2d 1212, 1222 (N.J. Super. Ct. App. Div. 2005). Further, RLUIPA respects state and local processes as courts have uniformly held that the procedural requirements do not constitute a burden. *See, e.g.*, *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761-62 (7th Cir. 2003) (RLUIPA urges towns to avoid statutory problems. Chicago amended its code to put churches on equal footing with comparable secular assemblies. The zoning code, as amended, did not substantially burden religious exercise and equalized treatment of religious and nonreligious assemblies.); *Christ Universal Mission Church v. City of Chi.*, 362 F.3d 423, 424 (7th Cir. 2004). RLUIPA promotes settlements and accommodations to avoid conflict. *See, e.g.*, *Mintz v. Roman Catholic Bishop of Springfield*, 424 F.Supp.2d 309 (D. Mass. 2006). However, settlements done under it cannot override or circumvent the state or local processes. *See, e.g.*, *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1057 (9th Cir. 2007) (noting a settlement cannot grant a church a conditional use permit that has completely circumvented the notice and hearing requirements for the affected community).

¹²⁶ *See, e.g.*, *Mintz*, 424 F. Supp. 2d at 311 (although the abutters do not prevail, court recognizes their concerns); *League of Residential Neighborhood Advocates*, 498 F.3d at 1057 (again noting a settlement cannot circumvent the notice and hearing requirements for the affected community); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 674-75 (10th Cir. 2006) (wherein church property was restricted, and homeowners association holding the benefit of the covenant was allowed to intervene and argue that day care center would cause a nuisance); *E. Hill Synagogue v. City of Englewood*, 240 Fed. App'x 938, 939 (3d Cir. 2007) (“neighbors . . . purchased an adjacent property . . . in order to become an ‘interested party’ [and intervened] in the zoning process.”).

¹²⁷ *See infra* notes 201-212 and accompanying text.

¹²⁸ *See supra* notes 20-23 and accompanying text.

contribute to the common good. Furthermore, municipal decisions that assist only some citizens, have exclusionary tendencies, create problems for other municipalities and the larger region, or are unnecessarily restrictive and oppressive, do not contribute to the common good.

Free exercise jurisprudence has often assumed that religious claims are antagonistic to the interests of the state or the needs of society.¹²⁹ But this is not always the case. Certainly abuses done in the name of religion cannot be protected as liberties. But religious exercise that does not threaten the proper concerns of state or society—that is in fact socially responsible, stabilizing, and beneficial—should be, and usually is, protected.¹³⁰

RLUIPA provides a mechanism to discriminate between responsible and truly detrimental religious land uses.¹³¹ RLUIPA allows judicial scrutiny of both the church's development proposals and the municipal restrictions. In some significant cases, the following pattern emerges: when houses of worship are compatible with surrounding properties or can be made so through mitigation conditions, municipal action to deny them is held to violate RLUIPA. When houses of worship are shown to be incompatible based on impacts on surrounding properties, the RLUIPA claim fails.¹³² By protecting religious exercise that does not undermine (and may in fact promote) the common good, RLUIPA gives expression to the notion that religious freedom can be compatible with social goods.

In the past, some states presumed the compatibility between houses of worship and the surrounding community.¹³³ As discussed in Section I, it was not uncommon for state courts to

¹²⁹ See *Responsible Freedom*, *supra* note 20, at 426-27.

¹³⁰ See generally *id.*

¹³¹ Courts have recognized many impacts that are detrimental. The traditional ones are traffic, parking, burdens on infrastructure, decrease in neighboring property values (attributable to particular disruptive practices), and specific health and safety issues. Some impacts may be detrimental but are not valid for purposes of denying permits, such as decreases in property value relating to house of worship design and the changed character of a neighborhood. See *Cambodian Buddhist Soc'y of Conn. v. Planning & Zoning Comm'n of Newtown*, 941 A.2d 868, 897 (Conn. 2008).

¹³² See, e.g., *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 693 (E.D. Mich. 2004); *Cambodian Buddhist Soc'y of Conn.*, 941 A.2d at 873-74; *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. City of W. Linn*, 111 P.3d 1123, 1124 (Or. 2005); *House of Fire Christian Church v. Zoning Bd. of Adjustment*, 879 A.2d 1212, 1225 (N.J. App. Div. 2005); *Davis v. Zoning Bd. of Appeals, Vill. of Lockland*, 797 N.E.2d 548, 555 (Ohio Ct. App. 2003).

¹³³ See *supra* notes 27-30 and accompanying text.

consider houses of worship to be inherently beneficial to the public welfare. The problem with the presumption, of course, is that it simply did not take into account the reality of negative impacts on surrounding properties. The federal courts reacted by deferring uncritically to municipal decisions, thereby giving rise to the opposite imbalance.¹³⁴

RLUIPA rejects both of these extremes. It does not presume that religious land uses are inherently beneficial; nor does it presume that they are harmful. It does not immunize religious groups from land use controls; nor does it allow uncritical deference to governmental decisions. It does not assume that religion and land use regulation work at cross purposes. Instead, it allows courts to review what churches are prepared to do to mitigate impacts, and reviews what towns have to say about impacts and compatibility in the context of a given permit denial or rule application. It allows courts to review the entire structure and content of land use controls in a given jurisdiction. It allows courts to look closely at how both parties have conducted themselves during the process.

RLUIPA sets out three significant provisions intended to protect religious land use but also to respect the integrity of legitimate land use controls and the protective role they are intended to play.¹³⁵ First, it prohibits denominational discrimination.¹³⁶ It also prohibits unequal treatment as between religious and secular assemblies.¹³⁷ Finally, it prohibits substantial burdens that are not justified by compelling state interests advanced by the least restrictive means possible.¹³⁸ The first two provisions have proven less controversial than the third; but, for all three provisions, courts have looked closely at the ways in which the municipalities assess impacts and compatibility. Especially in the context of determining unequal treatment and substantial burden, courts want to know: what are the adverse impacts of allowing the house of worship project to proceed? Churches lose when there is substantial evidence that the municipality's restrictions are controlling or preventing real harms. But they have a better chance of prevailing when the

¹³⁴ See *supra* notes 31-39 and accompanying text.

¹³⁵ The statute also provides that “[n]o 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.” 42 U.S.C. § 2000cc (b)(3) (2000).

¹³⁶ 42 U.S.C. § 2000cc (b)(2).

¹³⁷ 42 U.S.C. § 2000cc (b)(1).

¹³⁸ 42 U.S.C. § 2000cc (a)(1).

municipality does not produce substantial evidence of the project's harm. In essence, RLUIPA is emerging as a vehicle for protecting religious land use that is (or can be made) compatible with the legitimate goals of the municipality. With the twin goals of responsible religious freedom and responsible government, RLUIPA protects churches that are attentive to neighbors and community, and affirms municipalities that address adverse impacts of religious land use with direct, narrowly tailored controls.

A. Denominational Discrimination and Equal Treatment Provisions

Municipal officials sometimes allege negative impacts and incompatibility as a pretext when discrimination against a particular church is the primary motivating factor for their decision. RLUIPA's nondiscrimination provision addresses this problem by forbidding any government from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."¹³⁹ Like the *Starkville* decision in the federal jurisprudence of the 1980s, in which egregious intentional discrimination toward a Muslim community was found to violate the constitution,¹⁴⁰ some cases now brought under this RLUIPA provision involve the same kinds of anti-religious animus. Perhaps the best example of this type of discrimination is found in *Hollywood Community Synagogue, Inc. v. City of Hollywood, Florida*.¹⁴¹ In that case, a Jewish congregation seeking permission to worship in a residential zone was met with harassment and selective enforcement of code provisions, with local officials constantly monitoring and investigating the congregation, and repeatedly issuing violation notices.¹⁴² And like the local officials in *Starkville*, the *Hollywood* officials gave permission to numerous other houses of worship but denied

¹³⁹ 42 U.S.C. § 2000cc (b)(2).

¹⁴⁰ See *supra* note 39 and accompanying text.

¹⁴¹ *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, Fla.*, 436 F. Supp. 2d 1325 (S.D. Fla. 2006) [hereinafter *Hollywood Cmty. Synagogue*] (granting in part the synagogue's partial motion for summary judgment); *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, Fla.*, 430 F. Supp. 2d 1296 (S.D. Fla. 2006) [hereinafter *City of Hollywood, Fla.*] (granting in part the city's motion to dismiss).

¹⁴² See *City of Hollywood, Fla.*, 430 F. Supp. 2d at 1311.

permission to the synagogue.¹⁴³ Furthermore, the board had discretion to deny the permit even if the applicant met all the enumerated criteria.¹⁴⁴ The district court found the criteria to be so “broad and imprecise” as to “empower the [zoning authorities] to covertly discriminate against places of worship under the guise of ‘compatibility’ or other intangible considerations.”¹⁴⁵ Thus, the local government action failed because the criteria for making land use decisions, together with the application of those criteria, disregarded and devalued the need for a careful assessment of actual land use impacts.¹⁴⁶

The need for a proper assessment of impacts and compatibility is also prominent in interpretations of the equal terms provision. This section provides, “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.”¹⁴⁷ Because assembly and institutional uses are intense land uses, they generally cause negative impacts on traffic, parking, infrastructure, and the like; the impacts are caused by the intensity of the land use, and are not related to the identity of the land user. It therefore makes sense that RLUIPA calls for equal treatment of religious and nonreligious “assemblies and institutions” on the assumption that assembly and institutional uses will produce similar secondary effects. So if churches are not allowed, but theaters, fraternal organizations, private clubs, and other assembly uses are, then unequal treatment seems obvious.¹⁴⁸ But on facial challenges

¹⁴³ *Id.* at 1302.

¹⁴⁴ *Hollywood Cmty. Synagogue*, 436 F. Supp. 2d at 1337 (explaining how the board was directed to consider certain issues).

[T]o determine whether the use is “compatible with” the natural environment and other properties; whether there will be “adequate provision” for safe traffic movement or “adequate setbacks, buffering, and general amenities . . . to control . . . potential nuisances”; and whether the land area is “sufficient, appropriate, and adequate for the use.”

Id.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1337-38.

¹⁴⁷ 42 U.S.C. § 2000cc (b)(1) (2000). Under this provision there can be “(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.” *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006).

¹⁴⁸ The equal terms provision does not prevent exclusive use zones. Dwight

brought under this provision, courts have split on the proper scope of comparison.¹⁴⁹ The Eleventh Circuit Court of Appeals, for instance, uses the “natural perimeter” approach, in which houses of worship easily fall within a “natural perimeter of ‘assembly or institution.’”¹⁵⁰ But some other circuits have chosen to use a “similarly situated secular comparator” approach in order to determine whether or not less than equal treatment has occurred.¹⁵¹ For these courts, it is not enough that a house of worship is excluded and another assembly use is permitted. Yet for both approaches, the negative secondary effects of land uses continue to be the focus of the inquiry.

The case of *Midrash Sephardi, Inc. v. City of Surfside*¹⁵² illustrates the natural perimeter approach to the equal terms provision. The city’s zoning code excluded houses of worship while allowing private clubs and lodges in business districts on the grounds that

such organizations are compatible with the retail character of the

H. Merriam, *One (1) Ounce of RLUIPA Prevention*, MUN. LAW., May-June, 2008, at 10, 12 (“Exclusive residential areas, single-purpose industrial zones, and protected agricultural areas are typical of zoning classifications that may exclude religious activities entirely in those areas, so long as . . . you provide ample opportunities for the religious uses in appropriate locations elsewhere.”). See, e.g., *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 850-851 (7th Cir. 2007) (noting that an industrial area that excluded all assembly uses, secular and religious did not violate equal terms).

¹⁴⁹ For an example of an as-applied challenge under the equal terms provision, see generally *Konikov v. Orange County, Fla.*, 410 F.3d 1317 (11th Cir. 2005). In that case, zoning code enforcers watched a house for sixty-eight days and determined that it was being used for religious meetings two or three times a week; such use was found to constitute the operation of a synagogue in a residential zone, which was illegal. *Id.* at 1320-21. But the Eleventh Circuit Court of Appeals pointed out that cub scouts, sports, family or social meetings in any residence two or three times a week were legal. *Id.* at 1328. The lack of enforcement standards in the code, together with this type of discriminatory enforcement despite identical secondary impacts between permitted and forbidden activities, resulted in a finding of an equal terms violation. *Id.* at 1329. In contrast to *Konikov*, the plaintiff in *Primera Iglesia*, another as-applied challenge, failed to “present evidence that a similarly situated nonreligious comparator” was treated differently. *Primera Iglesia*, 450 F.3d at 1311-13. This is necessary in an as-applied challenge in order to show less than equal treatment, even though not a requirement under *Midrash*-type facial challenges. *Id.* at 1311; accord, *Rocky Mountain Christian Church v. Board of County Comm’rs*, No. 06-cv-00554-REB-BNB, 2008 U.S. Dist. LEXIS 28942, at *17-*22 (D. Colo. Mar. 31, 2008); see *infra* notes 146-50 and accompanying text.

¹⁵⁰ See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004).

¹⁵¹ See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264-68 (3d Cir. 2007).

¹⁵² *Midrash*, 366 F.3d 1214.

business district [They] are entertainment centers and typically occupy retail space in commercial districts where revitalization is required. . . . [C]hurches and synagogues, on the other hand, contribute little synergy to retail shopping areas and disrupt the continuity of retail environments.¹⁵³

Looking at the words of the equal terms provision, the Eleventh Circuit Court of Appeals found “that churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of ‘assembly or institution’” and concluded that there was unequal treatment.¹⁵⁴ Applying strict scrutiny, the court held that the Town of Surfside failed to provide a compelling governmental interest to justify the unequal treatment because it

provides no evidence that private clubs and lodges actually contribute to the business district in a way appreciably different than religious institutions. Surfside’s stated goal of retail synergy is pursued only against religious assemblies, but not other non-commercial assemblies, thus devaluing the religious reasons for assembling.

. . . .

. . . Because private clubs do not serve Surfside’s economic and commercial goals but are nevertheless permitted in the business district indicates that [the law] pursues Surfside’s interest only against conduct motivated by religious belief.¹⁵⁵

Thus, the municipality could not justify its distinction based on negative impacts attributable to houses of worship.¹⁵⁶

¹⁵³ *Id.* at 1222.

¹⁵⁴ *Id.* at 1231.

¹⁵⁵ *Id.* at 1234-35 (emphasis omitted).

¹⁵⁶ See *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165 (C.D. Cal. 2006) (the church repeatedly modified proposal to mitigate traffic and parking impacts, but the permit was denied because the use was not compatible with office-professional zone). The court granted a preliminary injunction against the city, holding that the facially unequal treatment of religious and non-religious assembly uses (allowing private clubs to operate as of right while prohibiting religious assemblies) violated RLUIPA’s equal terms provisions because there was no compelling governmental interest for differential treatment. The zoning board noted the impacts of traffic, parking, and loss of revenue caused by religious use, but failed to explain how it was that uses creating identical impacts could be permitted. See also *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 978-79 (N.D. Ill. 2003) (on facts similar to *Midrash*, where the church was not allowed but other nonprofit assembly uses were, the Equal Protection Clause was violated because the distinction lacked any rational basis; no evidence supported the notion that the church’s impacts would differ from those of other assembly uses). For an example of an as-applied challenge under the equal terms provision, see generally *Konikov v. Orange County, Fla.*, 410 F.3d 1317 (11th Cir. 2005), *supra* note 149.

In contrast to *Midrash's* natural perimeter approach, other courts have interpreted the equal terms provision to mean that a violation is found only in situations in which similarly situated secular comparators (which are permitted) cause the same impacts as the religious use (which is excluded).¹⁵⁷ The religious and secular assemblies and institutions must be “similarly situated *as to the regulatory purpose*.”¹⁵⁸ In other words, if the municipality restricts negative impacts caused only by religious uses, then it is justified in barring those religious uses while allowing other secular assembly uses. In *Lighthouse Institute of Evangelism v. City of Long Branch*,¹⁵⁹ a New Jersey shore community adopted a redevelopment plan which sought to create an entertainment area full of restaurants, bars and clubs.¹⁶⁰ Because New Jersey has a law that prohibits liquor within two hundred feet of a church, the city plan allowed theaters, cinemas, performance art venues, restaurants, bars and clubs, culinary schools, and dance studios, but not houses of worship.¹⁶¹ The Third Circuit Court of Appeals agreed with the city that “churches are not similarly situated to [these]” because of the state statute.¹⁶² “It would be very difficult for Long Branch to create the kind of entertainment area envisaged by the Plan—one full of restaurants, bars and clubs—if sizeable areas of the [zone] were not available for the issuance of liquor licenses.”¹⁶³ It granted summary judgment for Long Branch because no evidence showed that the plan treats a church on less than equal terms with a *secular assembly that would cause an equivalent negative impact on the town's regulatory goals*.¹⁶⁴

¹⁵⁷ *Midrash* accepts RLUIPA's categorization as the “natural perimeter” (secular and religious assemblies), rather than “similarly situated.” *Midrash*, 366 F.3d at 1231.

¹⁵⁸ *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (emphasis added).

¹⁵⁹ *Lighthouse Inst.*, 510 F.2d 253.

¹⁶⁰ *Id.* at 257.

¹⁶¹ *Id.* at 270.

¹⁶² *Id.*

¹⁶³ *Id.* at 270-71.

¹⁶⁴ *Lighthouse Inst.*, 510 F.2d at 269. “If a land use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions that are no less harmful to the governmental objectives in enacting the regulation, that regulation—without more—fails under RLUIPA.” *Id.* at 269. The dissent notes that the majority's use of an economic rationale (that churches do not contribute to economic activity) makes no sense because nonprofits are allowed in the zone. *Id.* at 291. If however generating revenue is a compelling governmental interest, then all nonprofits, including churches, can be excluded. One court notes the irony of allowing tax

The Third Circuit Court of Appeals, like the Eleventh Circuit Court of Appeals, focused on impacts. Because the relevant impacts usually involve traffic, parking, and the like, those impacts are tied to the intensity of the land use but not to the identity of the land user. The *Lighthouse* court may have taken the concern with impacts too far when it made the religious identity relevant; in the process, the court seems to have gone down this path unnecessarily. Certainly on the facts before it, no such “anti-liquor” impact would have occurred because the church was willing to waive its rights under the state liquor statute. In fact, such a waiver could have been made a condition of any permit to locate in the zone, thereby neutralizing the impact of the liquor law. As the Seventh Circuit Court of Appeals stated in a nearly identical case, state law cannot serve as a defense to a violation of federal law; the government cannot, by granting a special privilege, “furnish the premise for excluding churches from otherwise suitable districts.”¹⁶⁵

The *Lighthouse* court may have believed that municipalities should be able to craft some zones that cluster related uses, including assembly uses, and still have the right to exclude religious uses. But this approach seems to quite directly contradict the statute. The Third Circuit Court of Appeals refused to follow *Midrash’s* approach, which it considered a “free pass” for houses of worship to locate anywhere secular institutions or assemblies are allowed, regardless of impact. But as the *Lighthouse* dissent correctly pointed out, any negative impact can be prohibited, as long as the restriction is applied equally to religious and nonreligious assemblies. It remains to be seen whether the *Lighthouse* interpretation will permit

exempt status to institutions because they contribute to the public benefit and then allowing their exclusion because they are adverse to the public welfare. *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002).

¹⁶⁵ *Digrugilliers v. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) (churches were not permitted in commercial zones, but assembly halls were. The court held that, like *Midrash*, there was no need for a “similarly situated” requirement to the equal terms provision. *Id.* at 617. With respect to the liquor law, “a state cannot be permitted to discriminate against a religious land use by a two-step process in which the state’s discriminating in favor of religion becomes a predicate for [a city] to discriminate against a religious organization in violation of federal law.” *Id.*). See also *Church Property Protected from Eminent Domain Seizure*, THE BECKETT FUND FOR RELIGIOUS LIBERTY (May 5, 2005), <http://www.becketfund.org/index.php/article/394.html> (last visited Apr. 8, 2009) (recognizing that presence of house of worship was not inconsistent with revitalization plans).

municipalities to create “religion-free” zones.¹⁶⁶

B. Substantial Burden Provision

The substantial burden provision is another mechanism by which courts review religious land use impacts and protect those uses that are compatible with the surrounding environment.¹⁶⁷ RLUIPA provides:

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.¹⁶⁸

The substantial burden-compelling interest formulation, known as the “strict scrutiny” standard of judicial review, is a familiar concept from free exercise jurisprudence and RFRA, but it has always been problematic for the courts and seems especially problematic in the land use context. Strict scrutiny, applied narrowly, would have invalidated numerous laws; many of those laws cause burdens to religion and not all of them advanced a paramount interest by the least restrictive means. Indeed, when faced with church zoning conflicts, the federal courts in the pre-*Smith* era avoided applying strict scrutiny at all costs: land use controls are not generally considered paramount state interests, but striking down burdensome laws would surely disrupt land use governance. As we saw in Section I, courts not only avoided finding burdens on religious exercise—they did not even find religious exercise.¹⁶⁹

¹⁶⁶ Whatever the effect, the existence of the equal terms provision does encourage municipalities to review and amend their categorizations. *See, e.g., Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752 (7th Cir. 2003).

¹⁶⁷ *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226-27 (11th Cir. 2004); *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900-01 (7th Cir. 2005); *Guru Nanak Sikh Soc’y v. County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260, 261-62 (3d Cir. 2007); *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1089 (C.D. Cal. 2003) (*rev’d* 197 Fed.Appx. App’x 718 (9th Cir. 2006)); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1219-20 (C.D. Cal. 2002).

¹⁶⁸ 42 U.S.C. § 2000cc (a)(1) (2000).

¹⁶⁹ *See supra* notes 31-38 and accompanying text.

In the RLUIPA context, however, there are hopeful signs that courts will not engage in a wooden application of strict scrutiny to avoid the finding of burden, but will focus instead on practical issues: the impacts of the law on the church, the impacts of the church's proposal on the municipality, and the alternatives available to both church and municipality. Obviously courts have focused on defining "substantial burden" (because it is not defined in the statute), some more harshly than others,¹⁷⁰ but it seems that even with narrow definitions intended to bar most religious claims, courts still find burdens when the impacts of the church's project simply do not justify denial of the permit.

Viewing strict scrutiny as a mechanism for assessing impacts on, and alternatives available to, both churches and municipalities allows us to break out of some common misunderstandings regarding religious accommodations. The prevalent understanding of free exercise strict scrutiny is that it allows courts to weigh antagonistic, opposing interests. It rests on the assumption that religious claims are destabilizing and will wreak havoc on social and state interests—that a "win" for religion is always a "loss" for society. However, as I have set forth earlier, religious exercise can be socially stabilizing and beneficial, and the strict scrutiny formula can be understood to serve as a mechanism for analyzing the social impacts of religious claims.¹⁷¹ Protected religious exercise is thereby limited to conduct that does not undermine (or that actually fosters) the social conditions that promote the common good.

Churches, along with other intermediary associations, contribute to a vibrant civil society. Commentators often consider the freedom of those associations important because they sustain the line between the state and civil society. Indeed, as we see from Section II, the institution of private property contributes to

¹⁷⁰ See generally Salkin & Lavine, *supra* note 19, at 225-26. See, e.g., *Civil Liberties for Urban Believers*, 342 F.3d at 761 ("a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable"); *Midrash Sephardi, Inc.*, 366 F.3d at 1227 ("a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct"); *Westchester Day School*, 504 F.3d at 349 ("when there has been a denial of a religious institution's building application, courts appropriately speak of government action that directly coerces the religious institution to change its behavior").

¹⁷¹ See *Responsible Freedom*, *supra* note 20 at 426-32.

this boundary-marking function.¹⁷² Church use of private property strengthens the autonomy of religious communities, and in turn strengthens both the society-state distinction as well as the church-state distinction. But government plays an essential role in coordinating nongovernmental actors in society. Further, churches and other institutions of civil society complement the work of the state; there is often significant overlap and congruence between the values and goals of law and those of the institutions of civil society.

Churches thus contribute to the common good by being a bulwark against the state *and* by promoting many of the substantive values and goals of the state. Note, for instance, how American society relies on both the institution of private property as well as the comprehensive regulation of land uses. Churches whose development plans are congruent with legitimate land use goals contribute to the common good not only by sustaining the society-state and church-state boundaries, but also by promoting substantive social goals. Land use is an area undoubtedly marked by concern for the substantive compatibility of the church's goals with those of the municipality. Churches are accountable to society to ensure that religious land use does not thwart the property rights of neighbors and land use needs of the community. Of course, municipalities are also accountable: beyond the constitutional requirement that they not overtly discriminate against churches, they are accountable to society to ensure the fair opportunity for churches to settle in any given jurisdiction and to allow religious uses when compatible with social needs. The old presumption of public benefit had a kernel of truth in it: houses of worship can be socially responsible, stabilizing and beneficial to the community.

RLUIPA provides the necessary judicial check on the state when it coordinates nongovernmental actors in society through its zoning laws. Such a check is especially necessary because the state's public order function—that part of the common good that can be coerced through law—must be directed and structured to respect the inherent limitations of law. RLUIPA thus allows courts to look closely at the church's claim of burden, the impacts the church project will generate, the alternatives the church might have; and to review the conduct of the municipality in assessing the impacts and compatibility, and the alternatives the municipality might have. Most courts have, to date, engaged in

¹⁷² See *supra* notes 90-93 and accompanying text.

this analysis by way of the substantial burden inquiry, with minimal attention to the compelling interest-least restrictive alternative prong, but by far the most instructive decision is the recent opinion of Chief Justice John Roberts for a unanimous Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal (UDV)*.¹⁷³ That decision interpreted the Religious Freedom Restoration Act (RFRA), which also contains the strict scrutiny formulation of RLUIPA.

Gonzales applied RFRA's substantial burden-compelling interest test to a claim by a minority religious group seeking an exemption from federal drug laws to enable ceremonial use of a hallucinogenic drug. The federal government conceded that its prohibition of the drug constituted a substantial burden on the church, but argued that the absence of a legislative exemption was sufficient proof of a compelling interest to justify the burden. Rather than describe the process as a "weighing" of antagonistic interests, Chief Justice Roberts remarked that the pre-*Smith* Free Exercise Clause interpretation, which RFRA was intended to replicate, "scrutinized the asserted harm [to state interests] of granting specific exemptions to particular religious claimants."¹⁷⁴ He emphasized repeatedly how applicable precedent examined not only the government's interests but also "the impediment[s] to those objectives that would flow from recognizing *the claimed . . . exemption*."¹⁷⁵ The government was required to demonstrate "with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the [specific church]."¹⁷⁶ Thus, the government must demonstrate a causal connection between the exemption and harm to state and society.¹⁷⁷ The case rejected the assumption that religious exemptions stand in opposition to the common good, instead placing the onus on the government to specify harms that would warrant the denial of the exemption.

For the *Gonzales* court, analyzing the societal impacts of granting an exemption goes far deeper than the simplistic formula of strict scrutiny. The burden in the case is conceded, but so is the importance of the federal interest. Chief Justice

¹⁷³ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006).

¹⁷⁴ *Id.* at 431.

¹⁷⁵ *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972)).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 432-33. The Court pointed out that the text of the federal drug law at issue "contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety.'"

Roberts does not focus on the nature or weight of the federal interest. Rather, he poses the question at the heart of the Free Exercise Clause: how far can we protect freedom before it undermines the law? This inquiry fits nowhere more perfectly than in the land use context. Within this context, strict scrutiny boils down to a clear analysis of the connection between the religious land use proposal and the impact on the community. If local governments cannot provide substantial evidence of the negative impacts of a church's proposal, then courts should—and do—find that the denial of permission is unjustified.

Examples are abundant. In *Guru Nanak Sikh Society*, a Sikh community sought permission to build a temple in a residential zone (where houses of worship were conditional uses).¹⁷⁸ Despite the Sikh community's acceptance of numerous mitigation measures, and the recommendation of the appropriate county authority, the Planning Commission denied the application on grounds that neighbors complained of noise and traffic.¹⁷⁹ The Sikhs then sought permission to build a smaller temple on a much larger parcel in an agricultural zone (where houses of worship again were conditional uses), in an effort to avoid the impacts on neighbors altogether, given that the surrounding land was dedicated predominantly to orchards.¹⁸⁰ The planning division found "a less-than-significant impact on the environment," and the Planning Commission approved, but then neighbors complained of traffic and reduction in property values.¹⁸¹ The County Board of Supervisors reversed the Planning Commission's decision, this time because the temple would be inconsistent with other uses in the area and caused "leapfrog development"—but this was contradicted by the fact

¹⁷⁸ "The [conditional use] application process is intended to ensure that a religious group's proposed property use conforms with the type of development that the particular district contemplates." *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 989 (9th Cir. 2006).

¹⁷⁹ *Id.* at 982.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 983. Approval comes only after the Planning Commission finds that the establishment, maintenance, or operation of the use or building applied for will or will not, *under the circumstances of the particular case*, be detrimental to the health, safety and general welfare of persons residing or working in the neighborhood of such proposed use, or be detrimental or injurious to property and improvement in the neighborhood or to the general welfare of the County.

Id. at 986 (quoting SUTTER COUNTY, CAL., ZONING CODE §§ 1500-8216 (2002)).

that numerous developments had been approved in this zone.¹⁸²

The Ninth Circuit Court of Appeals interpreted the substantial burden term to refer to a land use regulation that is “oppressive’ to a ‘significantly great’ extent . . . [one that] impose[s] a significantly great restriction or onus upon such exercise.”¹⁸³ Here, the court found there to be

a substantial burden [] based on two considerations: (1) that the County’s broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak; and (2) that Guru Nanak readily agreed to every mitigation measure suggested by the Planning Division, but the County, without explanation, found such cooperation insufficient.¹⁸⁴

In determining the extent of the oppressiveness, the *Guru Nanak Sikh* court took into account the way in which the Sikh community had been treated during the process, as well as the real options with which they were left. They had been given the run-around, and had no real options. Of course there was a theoretical possibility of getting approval to settle somewhere in the county (which was enough for courts under pre-RLUIPA law), but the Ninth Circuit Court of Appeal’s inquiry questioned whether the possibility was plausible.¹⁸⁵ It was clear that future applications would fail. Critical to this determination was whether the county had made the case for the fundamental incompatibility of the temple development: the court found that it had not. In my view, the municipality did not show how, in the words of *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, “its admittedly strong interest . . . would be adversely affected by granting” the permit.¹⁸⁶

The Seventh Circuit Court of Appeals also found in favor of a church where no negative impacts could be discerned. Even though the Seventh Circuit Court of Appeals employed a stricter

¹⁸² *Guru Nanak Sikh Soc’y*, 456 F.3d at 983-84.

¹⁸³ *Id.* at 988 (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)).

¹⁸⁴ *Id.* at 989. The county’s actions greatly lessened the prospect of the Sikhs being able to construct a temple in the future; the county has imposed a substantial burden on religious action. *Id.* at 992. Furthermore, “the County did not assert, much less prove, compelling interests for its action.” *Id.* at 981.

¹⁸⁵ *See, e.g., Int’l Church of the Foursquare Gospel v. City of San Leandro*, No. C 07-3605 PJH, 2007 U.S. Dist. LEXIS 76831, at *35 (N.D. Cal., Oct. 2, 2007) (“[U]nder *Guru Nanak Sikh [Soc’y]*, a religious group need not show that there is no other possible location where it could build its church” in order to establish a burden).

¹⁸⁶ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972)).

definition of “substantial burden” than the Ninth Circuit Court of Appeals, the court still found a RLUIPA violation. In *Saints Constantine and Helen Greek Orthodox Church v. City of New Berlin* the city denied permission to the church to build its house of worship because it was concerned that a non-religious facility would be built instead—despite the fact the church did everything within its powers legally to restrict the development to house of worship use.¹⁸⁷ Much like the mitigation measures agreed to by the Sikhs in *Guru Nanak Sikh*, these assurances were ignored.

Despite the use of a narrower “substantial burden” test (where a land use regulation renders religious exercise “effectively impracticable”), the Seventh Circuit Court of Appeals applied strict scrutiny less as a formula and more as a mechanism for asking the question that Chief Justice Roberts asked in *Gonzales*: would the impact of the church development impede governmental goals? In my view, the facts of the case did not really meet the substantial burden definition. The land use denial did not render its religious exercise “effectively impracticable,” as there is always a theoretical alternative location. Yet the court said a church need not “show that there was no other parcel of land on which it could build its church.”¹⁸⁸ The court found a substantial burden in terms of “delay, uncertainty and expense”¹⁸⁹ because it realized the futility of requiring the church to sell and buy elsewhere or restart the process “to satisfy the Planning Commission *about a contingency for which the Church has already provided complete satisfaction.*”¹⁹⁰ The court never reached the compelling interest prong; it did not view strict scrutiny woodenly. Instead, Judge Posner did what the *Guru Nanak Sikh Society* court did and what Chief Justice Roberts did in *Gonzales*: he asked whether the granting of permission would adversely affect the government’s goals.¹⁹¹ Indeed, the court found that the denial of permission had not advanced *any* governmental goal.¹⁹²

¹⁸⁷ *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005).

¹⁸⁸ *Id.* at 899 (citing *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761-62 (7th Cir. 2003)).

¹⁸⁹ *Id.* at 901.

¹⁹⁰ *Id.* at 900 (emphasis added).

¹⁹¹ *See id.* at 901; *Gonzales*, 546 U.S. at 431.

¹⁹² *See Saints Constantine & Helen Greek Orthodox Church*, 396 F.3d at 901; *see also* *Grace Church of N. County v. City of S.D.*, 555 F. Supp. 2d 1126, 1137-38 (S.D. Cal. 2008) (noting there was no evidence supporting the argument that

A similar pattern is demonstrated in *Westchester Day School v. Village of Mamaroneck*.¹⁹³ While this case did not involve a house of worship, it is nevertheless instructive on the issue of impacts. In this case, a religious school sought permission to expand in an area that already had many institutional uses. The zoning board pointed to traffic and parking impacts—but the Second Circuit Court of Appeals found that these were unsupported by the board's own experts.¹⁹⁴ The question turned on whether the denial of the permit had anything to do with impacts of the project on the surrounding area. The Second Circuit found that the zoning board's reasons for denying the expansion were completely unrelated to preventing adverse impacts on the public.¹⁹⁵ Under RLUIPA, the court found a substantial burden because there were no "ready alternatives."¹⁹⁶

For the Second Circuit, as for the Eleventh Circuit,¹⁹⁷ a substantial burden is demonstrated when government action directly coerces the church to change its behavior: "[w]hen the school has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty and expense,' a complete denial of the school's application might be indicative of a

reducing the church's permit length to five years in industrial zone furthered the city's interest in preserving industrial zone because the zone already permitted nonindustrial uses); *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 U.S. Dist. LEXIS 28, at *24, *26-28 (E.D. Mich. Jan. 3, 2007) (in light of denial of parking variance, which meant that no worship could be conducted on site, "selling [the] building and searching for another is not a mere inconvenience" when no proof was offered of traffic or parking impacts); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669, at *34, *38, *48-49 (W.D. Tex. Mar. 17, 2004) (mentioning how a substantial burden was found when denial of special use permit followed city's refusal to review the application; on the other hand, the denial of parking permit did not create a substantial burden because the level of parking allowed was sufficient and had no negative impact on the safety and welfare of the neighborhood).

¹⁹³ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007).

¹⁹⁴ *Id.* at 351.

¹⁹⁵ *Id.* (finding that the justifications "'do not bear the necessary substantial relation to public health, safety, or welfare' and the zoning board's findings are not supported by substantial evidence").

¹⁹⁶ *Id.* at 352-53 ("[W]hen an institution has a *ready alternative*—be it an entirely different plan to meet the same needs or the opportunity to try again in line with a zoning board's recommendations—its religious exercise has not been substantially burdened." (emphasis added)).

¹⁹⁷ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[A] 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.").

substantial burden.”¹⁹⁸ The theoretical alternative location made no sense for a long-term user like the Westchester Day School, which had been a good neighbor and only sought expansion of facilities on an already large piece of property where abutters were other large institutional uses.

In its discussion of the compelling interest, the *Westchester* court invoked *Gonzales*, noting that the “mere invocation of the general characteristics of” the state’s interest is not sufficient; the government must review “the harms posed by the particular use at issue.”¹⁹⁹ No such interest was being advanced because the zoning board had simply done the will of a small group of neighborhood opponents. The less restrictive alternative available to the municipality was “to approve the application subject to conditions” even if there had been a compelling governmental interest.²⁰⁰

Of course there are plenty of examples of churches that lose their burden claims, and indeed should lose because the alternatives are real or because the development proposal’s impacts simply cannot be mitigated. In *Episcopal Student Foundation v. City of Ann Arbor*, for instance, the historic commission denied the church’s request to demolish and construct a new and larger house of worship because the church failed to establish that its existing facilities were inadequate.²⁰¹ The court determined that the church could use the second floor of its facility for precisely the uses it claimed it would add when it built its new building.²⁰² The historic commission also made clear it would consider additions to the existing building; a variety of alternatives short of demolition thus existed.²⁰³ Although the court spent considerable time discussing the pre-RLUIPA jurisprudence for understandings of “burden,” it is clear that for as long as there are unexplored alternatives for the church, the court is not going to allow the irreversible demolition of a historic structure and attendant impact on the character of the

¹⁹⁸ *Westchester Day Sch.*, 504 F.3d. at 349 (quoting *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901).

¹⁹⁹ *Id.* at 353 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 432 (2006)).

²⁰⁰ *Id.*

²⁰¹ *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 694-695, 704 (E.D. Mich. 2004).

²⁰² *Id.* at 704. See also *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207, 1215-16 (S.D. Fla. 2005) (noting there was no substantial burden because the congregation has practical options for solving their distractions and limitations during services).

²⁰³ *Id.* at 695.

neighborhood.²⁰⁴

The existence of unexplored options also led to the denial of RLUIPA relief in *Corporation of Presiding Bishop v. City of West Linn*.²⁰⁵ In that case, the city denied a permit to build a house of worship in a residential zone because of numerous negative impacts that were not sufficiently mitigated.²⁰⁶ Because there were unexplored options for the church at the site, the church was encouraged to submit a new application.²⁰⁷ “[N]othing in the record indicates that the city would not approve a revised application that met its concerns.”²⁰⁸ Thus, no substantial burden was found to exist because the expense and delay involved were necessary to reworking the development plan into one that is compatible with the surrounding area.²⁰⁹

In *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission of Newtown*,²¹⁰ substantial evidence of residential neighborhood disruption, which could not be mitigated, supported the denial of the application:

On the grounds that the level of activity at the proposed temple would not be in harmony with the general character of the neighborhood, that the temple would substantially impair neighboring property values, and that the proposed septic wastewater and water supply systems would create a health or safety hazard.²¹¹

²⁰⁴ *Episcopal Student Found.*, 341 F. Supp. 2d at 708.

²⁰⁵ *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. City of West Linn*, 111 P.3d 1123 (Or. 2005).

²⁰⁶ *Id.* at 1125.

²⁰⁷ *Id.* at 1130.

²⁰⁸ *Id.*

²⁰⁹ *Id.*; *accord*, *House of Fire Christian Church v. Zoning Bd. of Adjustment*, 879 A.2d 1212, 1225 (N.J. Super. Ct. App. Div. 2005). It also appears that expense and delay involved in the permitting process is not given much weight in the substantial burden determination when the church ultimately receives approvals. *See, e.g.*, *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (noting that where the plaintiff churches ultimately find properties on which to locate, zoning ordinances “do not render impracticable the use of real property in [the jurisdiction] for religious exercise, much less discourage churches from locating or attempting to locate [there]”).

²¹⁰ *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning and Zoning Comm’n of Newtown*, 941 A.2d 868 (Conn. 2008).

²¹¹ *Id.* at 907. The temple would have hosted frequent, heavily populated events with noise, crowds, cars, and loudspeakers. *Id.* at 902-04. *See also* *Davis v. Zoning Bd. of Appeals of Lockland*, 797 N.E.2d 548, 554 (Ohio Ct. App. 2003) (noting that although the church’s variance was denied, no substantial burden was found because parking impacts could not be mitigated by ad hoc parking arrangements); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999-1000 (7th Cir. 2006) (holding that the ordinance aimed at preventing oversized buildings was not a substantial burden because the church would not agree to

Unfortunately the court went far beyond where it needed to go to arrive at this holding: it narrowed the scope of RLUIPA's protection in the substantial burden context (much like *Lighthouse Evangelism Institute* did in the equal terms context).²¹²

These cases and others stand for the proposition that when churches can demonstrate that their land uses will be socially responsible and stabilizing, their presence contributes to the common good. Recall that they contribute to the common good not only by their religious freedom and freedom as property holders, but also by meeting their obligations to non-owners through their substantive compatibility with values and goals of comprehensive land use planning. Indeed, in cases in which churches were denied permits even though their development plans actually promoted specific municipal development goals, courts have found RLUIPA violations.²¹³

CONCLUSION

In words that are applicable to the issues that can arise between a church and its neighbors when the church seeks zoning approval for a house of worship, Joseph Singer has written in regard to property conflicts:

[W]e are faced with choosing legal rules that will both respond to and shape social reality. Different rules will distribute power

all mitigation conditions and therefore the court could not "fathom a situation in which limiting the church to a three-building, 55,000 square foot facility would impose an unreasonable and substantial burden on [its] religious exercise").

²¹² *Cambodian Buddhist Soc'y*, 941 A.2d at 890 (RLUIPA is applicable only to those situations of "individualized assessment" . . . when the government has the discretion to exempt certain conduct from the applicable law for secular reasons, the government cannot refuse to extend the exemption to similar conduct that is religiously motivated."). The court finds the law here to be neutral and generally applicable. *Id.* at 882. But whether zoning involves individualized assessment or not has been an issue for the courts. *Compare* *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006), and *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002) (zoning involves individualized assessment), *with* *Vision Church*, 468 F.3d at 999 (zoning is neutral and generally applicable).

²¹³ *See* *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1094-96 (C.D. Cal. 2003) (noting that the city failed to show that permit denial was in furtherance of goal of curbing blight; indeed, church development would curb urban blight), *rev'd* 197 F. App'x 718 (9th Cir. 2006); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) ("[I]t is evident that the refusal to grant Cottonwood's application . . . was not at all premised on blight. The construction of a church on the Cottonwood property would eliminate the blight.").

differently, impose obligations differently, shape expectations differently, and order social relations differently. Our choice of a particular property regime alters the social world. It will determine what expectations people have a legal right to expect. It will impose duties and vulnerabilities in a certain pattern. It will make life harder for some people and easier for others. The social world will be different depending on how we shape the law. We will live in a different world. Rights structure relationships and can only be adequately judged if such considerations are brought to the center of our attention.²¹⁴

RLUIPA alters our social world because it reminds courts that religious land use is religious exercise, and that judicial sensitivity to religious land use performs part of the larger task of keeping religious exercise primarily on private property. Finally, RLUIPA ultimately enables the courts to evaluate how governmental bodies promote the common good by giving life to the notion that “[o]wners have entitlements, but they also have obligations.”²¹⁵ RLUIPA protects churches with land use plans that conform to the legitimate goals of land use law. In the context of the relationship between churches and their neighbors, there is no pre-set list of obligations.²¹⁶ Social obligations will be worked out in each situation, in each place. Sometimes, it will be the church that is obliged to defer to the needs of neighbors; other times, it will be neighboring property owners obliged to allow a house of worship to exist at a given location. The contingency of the results makes a case-by-case analysis no less necessary for responsible religious freedom and responsible government.

²¹⁴ SINGER, *supra* note 47, at 139.

²¹⁵ *Id.* at 216.

²¹⁶ *See id.*