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Comments: The Religious Land Use and Institutionalized Persons Act and Mega-Churches: Demonstrating the Limits of Religious Land Use Exemptions in Federal Legislation

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THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT AND MEGA-CHURCHES: DEMONSTRATING THE LIMITS OF RELIGIOUS LAND USE EXEMPTIONS IN FEDERAL LEGISLATION.

I. INTRODUCTION

In recent years, religious institutions and local governments have been interlocked in a charged debate over land use.[1] The conflict is the result of a convergence of several factors and it has culminated in local governments' implementing new regulations aimed at religious institutions' land use.[2] Part of the conflict can be attributed to society's evolving attitude towards religion, in terms of its preferred style of worship and in its perception of religious land use.[3] Religious institutions have also evolved and are increasingly using the land for secular purposes.[4] Burgeoning land use regulations are now a robust topic of debate among legal scholars and legislators, and tensions between religious institutions and government regulations is at an all time high.[5] On July 27, 2000, Congress stepped in and passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[6] With RLUIPA, Congress intended to

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1. *See, e.g.*, Marci Hamilton, *Struggling with Churches as Neighbors*, Findlaw's Writ (Jan. 17, 2002), http://writ.news.findlaw.com/hamilton/20020117.html [hereinafter Hamilton, *Struggling with Churches as Neighbors*]; *see also* Alan C. Weinstein, *Recent Developments Concerning RLUIPA, in* CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING 2 (Patricia Salkin ed., 2004) ("In the three years since RLUIPA was signed into law, churches in every section of the country have challenged zoning, historic preservation, and eminent domain decisions that they view as obstacles to how they develop or use their properties.").
2. *See infra* Part V.B.
3. *See* discussion *infra* Parts IV.A, V.B.
4. *See infra* Part IV.B.
5. *See infra* Part V.B; *see also* Christian Nolan, A Not-So-Simple Matter Of Faith, CONN. L. TRIB., Oct. 19, 2009, at 1, 9 (2009) (noting the prevalence of RLUIPA litigation across the country). In Nolan's article, Patricia Salkin, Associate Dean, Professor of Law, and Director of the Government Law Center of Albany Law School, states "'[i]t seems that whenever a religious organization is denied a permit to build something or enlarge something, there is often a retort to the local government that we're going to sue you under RLUIPA.'" *Id.* at 1.
6. 42 U.S.C. §§ 2000cc to -5 (2006).

ameliorate the effect of local land use regulations and widen the land use rights of religious institutions in land use conflicts.[7]

In the nine years since its enactment, the constitutionality and efficacy of RLUIPA's land use provisions have been debated extensively among supporters of the statute and a range of critics, which include state and local communities, prominent land use experts, and legal scholars.[8] Chief among the criticisms RLUIPA opponents advance are that additional First Amendment protection was unnecessary,[9] that the federal statute intrudes into an area that has historically been regarded as a prerogative of local governments,[10] and that Congress expanded established free exercise standards in contravention of the Supreme Court of the United States' province and duty to "say what the law is."[11]

This Comment uses the phenomenon of mega-churches as a vehicle to illustrate the common criticisms RLUIPA opponents have raised and to demonstrate the significant impact RLUIPA has had and has the potential to have on local land use regulations as well as on the communities coping with the impact of mega-churches. This Comment concludes that RLUIPA and similar federal legislation that applies broad First Amendment protection to all religious land use is ill equipped to address secular land use by religious institutions like mega-churches.[12] The substantial disconnect between the land use challenges that local governments currently face and the authority that they retain under RLUIPA compels the conclusion that RLUIPA is both impractical in application and unconstitutional. Locally developed land use regulations are better equipped to meet the demands of a developing religious society and account for *all* of the interests at stake when a land use dispute arises.[13]

Mega-churches exemplify a developing nuance in religion, and in turn, in religious land use. Mega-churches, typically defined as

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7. *See* An Internet Resource on the Religious Land Use and Institutionalized Persons Act of 2000, http://www.rluipa.com/index/php/topic/20.htm (last visited Jan. 4, 2009); *see also infra* Part III.A.
8. *See infra* Part III.B.
9. *See* discussion *infra* Part III.B.
10 *See* discussion *infra* Parts III.B, V.
11. Marbury v. Madison 5 U.S. 137, 177 (1803); *see also* City of Boerne v. Flores, 521 U.S. 507, 536 (finding that Congress exceeded its authority under the Constitution) ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles . . . and contrary expectations must be disappointed.").
12. *See infra* Part V.C.
13 *See infra* Part VI.

Protestant,[14] have ushered in a new form of religious observance distinct from the style of observance commonly associated with a "traditional" church.[15] A mega-church is not only a house for services and prayer, but it is also a one-stop shop for congregants—an all inclusive community where people can "eat, shop, go to school, bank, work out, scale a rock-climbing wall and pray . . . all without leaving the grounds."[16] Their secular amenities range from sports arenas and gymnasiums to day care centers and entire apartment complexes.[17]

Part church, part civic community, mega-churches function like small towns. They offer eighty plus activities daily and operate twenty-four hours a day, seven days a week.[18] Mega-churches have a sustained average weekly attendance of 2,000 or more persons[19] and their popularity continues to grow.[20]

Mega-churches are also extremely profitable business ventures.[21] Mega-churches frequently partner with for profit companies like Sysco, McDonalds, and Subway, and they also sponsor credit unions, issue credit cards, and lend to small businesses.[22] Mega-churches continue to add secular amenities to their repertoire as part of a well-crafted mission to attract new congregants and to provide newcomers with a reason to keep coming back.[23] The business of mega-churches has become so profitable, that new businesses are being created for the sole purpose of helping churches become bigger and better.[24] Entrepreneurs can now purchase books and attend seminars to learn how to successfully build a mega-church from the ground up.[25]

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14. The Hartford Seminary and Institute for Religion Research, Megachurch Definition http://hirr.hartsem.edu/megachurch/definition.html (last visited Jan. 5, 2009) [hereinafter Hartford Seminary].
15. *See* Hamilton, *Struggling with Churches as Neighbors*, *supra* note 1.
16. Patricia Leigh Brown, *Megachurches as Minitowns*, N.Y. TIMES, May 9, 2002, at F1.
17. *See id.*
18. *See id.*
19. Hartford Seminary, *supra* note 14.
20. *See* Brown, *supra* note 16. Brown argues that mega-churches prosper because they "reflect a broad cultural desire for rootedness and convenience for overextended families. . . . [and] offer relief from stresses on American family life." *Id.*
21. *See infra* notes 184–91 and accompanying text.
22. *See* Diana B. Henriques & Andrew W. Lehren, *Megachurches Add Local Economy to Mission*, N.Y. TIMES, Nov. 23, 2007, at A1.
23. *See id.*
24. *See infra* note 191.
25. *See infra* note 191.

The recent proliferation of mega-churches has garnered many followers, but not everyone is enthusiastic about having a mega-church operating twenty-four hours a day, seven days a week in their backyard. The manifold adverse effects that the mammoth establishments impose on those who reside nearby have prompted justifiable concern among some communities.[26] Similar to large-scale secular institutions, mega-churches increase traffic, noise, and pollution.[27] Mega-church grounds also occupy many acres of valuable local land, hindering community ambitions for future development.[28] For those that are not a part of a mega-church's congregation, the church and its seemingly limitless amenities are viewed as burdensome and injurious to the harmony of the community.[29]

Negative community responses to mega-churches and the resulting friction are part of a broader conflict over local land use for religious purposes. Concerned over the negative effects of religious land use, local governments have increasingly sought to regulate religious institutions on par with secular institutions, and in some instances, have expanded regulations aimed at religious land use.[30] The increase in local land use regulation has in turn generated additional claims by religious institutions who view such regulations as an obstacle to their First Amendment right to build or expand for religious purposes.[31]

In 2000, Congress responded to the claims of frustrated religious institutions and enacted RLUIPA.[32] RLUIPA regulates the relationship between religious institutions and local governments and communities by setting forth a general rule prohibiting local governments from enforcing or implementing land use regulations in a manner that imposes a substantial burden on the religious exercise of a person or a group of persons.[33] Local land use regulations and decisions are valid under RLUIPA only if the government is able to demonstrate that its imposition of the burden is in furtherance of a

26. *See* Hamilton, *Struggling with Churches as Neighbors*, *supra* note 1.
27. *See id.*
28. *See id.*
29. *See id.*
30. *See infra* Part V.B.
31. *See infra* Part V.B.
32. 42 U.S.C. §§ 2000cc to -5. Although RLUIPA addresses religious land use specifically, it should be noted that Congress has attempted to strengthen protections of religious conduct through broader legislation that preceded RLUIPA. *See infra* Part II.C.
33. 42 U.S.C. § 2000cc(a)(1).

compelling government interest and is the least restrictive means of furthering that interest.[34] Congress intended for the courts to construe RLUIPA broadly, in favor of heightened land use rights for religious institutions.[35] Despite vocal opposition, RLUIPA remains in force today and it continues to provide a federal remedy to aggrieved religious land users.[36] The mounting friction between religious institutions and some communities however has galvanized calls for its invalidation.[37]

Part II of this Comment explores the development of the First Amendment standards utilized in RLUIPA, including those articulated by the Supreme Court[38] and in federal legislation[39] that preceded its enactment. The First Amendment standards developed prior to RLUIPA heavily influenced the terms Congress used and the scope of RLUIPA's application in the land use context. The First Amendment standards applied before RLUIPA also reflect the inherent tension between religion and government that has existed for centuries.

Part III explains RLUIPA's land use provisions relevant to this Comment and distinguishes those provisions from previously established Free Exercise standards.[40] This part also identifies and considers some of the common criticisms that opponents have articulated against RLUIPA.[41] The following critiques proffered by RLUIPA opponents are the most likely to be corroborated or illustrated by the mega-church phenomenon:

First, Congress has substantially undermined the traditional authority of local governments to develop and implement land use

34. *Id.* §§ 2000cc(a)(1)(A)–(B).
35. *See* 146 CONG. REC. S7774–S7775 (2000).
36. The Supreme Court has yet to review the validity of RLUIPA's land use provisions, but it did uphold the RLUIPA provision involving prisoners against an Establishment Clause challenge in the 2005 case of *Cutter v. Wilkinson*, 544 U.S. 709 (2005). In *Cutter*, prisoners of an Ohio prison claimed that their rights were violated under RLUIPA when the prisoners were denied access to religious literature and the opportunity to conduct religious services. *Id.* at 712–13. The Court rejected the State's argument that the RLUIPA provision was unconstitutional under the Establishment Clause of the First Amendment. *Id.* at 720.
37. *See infra* Part III.B.
38. *See infra* Part II.B.
39. *See infra* Part II.C.
40. *See infra* Parts III.A, III.C.
41. *See infra* Part III.B.

regulations.[42] RLUIPA's overly intrusive land use provisions are at odds with the Supreme Court's recognition that land use regulation is a means for communities to achieve "a satisfactory quality of life in both urban and rural communities."[43]

Second, RLUIPA unfairly elevates religious land use above land use by non-religious individuals and institutions, intimating prohibited government establishment of religion.[44] The new and broadened terms in RLUIPA have far-reaching implications because they fail to distinguish between a church's religious and secular land use.[45] Congress's failure to exclude secular amenities carried out by a religious institution from RLUIPA's definition of "religious exercise" increases the probability that mega-churches and similar religious institutions will be immunized against local land use regulation in the future.

Part IV defines and discusses the common features of mega-churches. This part emphasizes the prevalence of mega-churches and suggests that the rationale for their immense popularity lies in the expansive amenities made available to congregants—a feature notably absent from the traditional church model.[46] This part also establishes a basis for the central claim of this Comment, focusing on the conclusion that RLUIPA is ill suited to address new and unanticipated land use concerns, such as the rise in the number of mega-churches. Although mega-churches lie at the extreme, they do demonstrate that religious institutions are beginning to use the land in ways that are not inherently religious. The mega-church phenomenon serves as a harbinger of the religious land use issues that are certain to arise in the future.

Parts V and VI demonstrate the significant impact RLUIPA has had on the regulatory authority of state and local governments. These parts explain how Congress has divested state and local governments of their sovereign right to regulate land use and experiment with

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42. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335–41 (2003) [hereinafter Hamilton, *Federalism and the Public Good*]; *see also infra* Part V.A.

43. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981).

44. *See* Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 209 (2006); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1846–47 (2004) ("A nationwide measure subjecting all laws to strict scrutiny provides a benefit to religion as an institutional actor, rather than to any specific religious practice locally observed. It treats religion as a class for favored treatment."); *see also infra* Parts III.B, V.C.4.

45. *See infra* Part III.B.

46. *See* Brown, *supra* note 20; *see also infra* Part IV.B.

different approaches to meet the changing needs of their communities.[47] These parts also discuss why it is especially important to retain local authority to develop and implement land use regulations, in light of the proliferation of mega-churches and the potential increase in other religious institutions that operate amenities that are not inherently religious in nature.[48] Finally, these parts suggest a solution that is practical, consonant with our tradition of deferring to local land use regulation, and that will more effectively achieve religious diversity in today's society.[49]

The aim of this article is to demonstrate that RLUIPA is indeed unfair and ineffective in resolving land use disputes between religious institutions and state and local governments. State and local governments can and do effectively calibrate a fair balance between the First Amendment interests of religious institutions and the interests of the communities that are effected by religious land use exemptions. The flaws of RLUIPA, considered together with the rapid growth of mega-churches in the United States, should give pause to those assessing the continued necessity and constitutional soundness of RLUIPA.

II. DECIPHERING THE MEANING OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[50] These prohibitions embody two distinct and fundamental conceptions of religious liberty: the Establishment Clause and the Free Exercise Clause.[51] The Religion Clauses of the First Amendment safeguard religious liberty in two ways: first, the government may not use the coercive resources of the state to "establish" a favored religion or religions; second, the government cannot interfere with the free exercise of religion.[52] The Fourteenth Amendment incorporated these safeguards against the states.[53]

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47. *See infra* Part V.A.
48. *See infra* Part V.B–C.
49. *See infra* Part VI.
50. U.S. CONST. amend. I.
51. *See id.*
52. *See* Schragger, *supra* note 44, at 1811–12. Also central to the First Amendment's protections is prevention against majority-imposed norms on minority religious belief or exercise. *Id.*
53. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

A. The Inherent Tension Resulting From the Intersection of Religion and Government

The coexistence of religious institutions and government institutions necessarily implicates the power of each to influence the other. The Founders were cognizant of this inherent tension and incorporated specific guarantees in the First Amendment to effectuate a compromise in religion-government relations.[54] The First Amendment protects religious institutions and religious belief against government regulation in order to preserve religious autonomy, while forbidding direct government sponsorship of any one religious mission.[55] Although a compromise is inherent in the First Amendment, conflict over the extent of its protections has embroiled the Supreme Court and Congress in a protracted and sometimes bitter exchange.

For decades, the two branches of government have struggled to resolve the myriad issues that result from the intersection of religion and government. This Comment will focus principally on the issues that arise when the intersection between religion and government results in a Free Exercise Clause challenge. For the most part, the discourse between the Supreme Court and Congress in this area has centered upon the extent to which government regulations burden the free exercise of religion and on what religious accommodations are necessary to ameliorate those burdens.[56]

The Supreme Court has defined the "exercise of religion" as involving "not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation."[57] While this definition sheds some light on the

54. *See* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Religious Order*, 47 VILL. L. REV. 37, 38 (2002) (exploring the distinctive place of religious institutions in various legal contexts).

55. *Id.*

56. *See, e.g.*, Employment Div. of Oregon v. Smith, 494 U.S. 872, 879 (1990) (holding that the right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability); Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (holding that any governmental act that significantly burdens religiously motivated conduct is presumptively unconstitutional and valid only where the state can establish a compelling government interest).

57. *Smith*, 494 U.S. at 877; *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1451–52, 1488–90 (1990) (discussing extensive evidence from the period of the founding that supports the conclusion that the Free Exercise Clause protects conduct as well as speech).

meaning of the Clause, it does not entirely reveal the extent to which the First Amendment protects the religious conduct of individuals and institutions.

Recently, the Supreme Court and Congress have expressed divergent views over the proper standard of review of an alleged violation of the free exercise of religion.[58] The issue of whether strict scrutiny review is the appropriate standard of review has become increasingly relevant in recent years, as conflicts between religious institutions and local communities continue to rise in number and in magnitude.[59] Congress raised the stakes for everyone involved when it enacted RLUIPA in 2000.[60] The federal statute provides specific protection to religious institutions that seek to build, buy, or rent land for religious purposes.[61] RLUIPA is now the primary means for resolving land use disputes between religious and government institutions.[62]

Many consider RLUIPA to be Congress's most recent retort in its exchange with the Supreme Court.[63] As such, RLUIPA builds on an already complex Free Exercise doctrine, underscoring the great potential that it may have in reshaping established First Amendment standards and in governing the relationship between religious and government institutions in the future.

B. Religious Conduct and Laws of General Applicability in the Supreme Court

The Supreme Court's Free Exercise doctrine has vacillated between interpretations of the Clause that favor religious institutions and those that favor government institutions. This fluidity can be attributed to the Court's attendant concern over deferring too greatly to either party.[64] A too liberal reading of the Clause would relegate neutral

58. *See, e.g.*, Religious Freedom Restoration Act of 1997, 42 U.S.C. § 2000bb(b)(1) (2006) (reinstating strict scrutiny review of free exercise cases in direct contravention of the Supreme Court's adoption of rational basis review).

59. *See infra* Part V.B.

60. *See infra* Part III.

61. 146 CONG. REC. S7774 (2000).

62. *See* 42 U.S.C. § 2000cc.

63. *See generally* Hamilton, *Federalism and the Public Good*, *supra* note 42 (detailing the exchange between Congress and the Supreme Court leading up to the enactment of RLUIPA); *see also supra* notes 1, 5 (discussing the pervasiveness of RLUIPA litigation).

64. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (describing the anarchical result of permitting every religious belief to be carried into practice in derogation of laws that apply equally to every individual).

laws of general applicability to the whims of religion. A too narrow reading of the Clause would fail to adequately protect religious minorities against religious discrimination. The Court's subtle awareness of these possibilities is a recurring theme throughout the following cases, which demonstrate how the Court has calibrated a balance between the conduct of religious institutions and neutral laws of general applicability prior to RLUIPA.

In the first major free exercise case, the Supreme Court rejected the suggestion that the Free Exercise Clause created exemptions from generally applicable laws. In 1878, in the case of *Reynolds v. United States*,[65] the Court limited the scope of First Amendment protection by weighing conflicts between laws of general applicability and religious practices in favor of laws of general applicability.[66] Reynolds, the petitioner, challenged a federal statute that prohibited plural marriages, a practice he engaged in as a requirement of his religious faith and church.[67] Although the law required imprisonment of Reynolds for obeying a command of his religion, the Court upheld the law, reasoning that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[68] Following *Reynolds*, the courts generally interpreted the First Amendment to mean that

65. 98 U.S. 145.

66. *Id.* at 166. The Court reasoned that if it were to read the Free Exercise Clause otherwise, the Clause would excuse every practice that was contrary to a religious belief. *Id.* at 166–67. Eventually, the religious beliefs of individuals would become superior to the laws of the United States. *Id.* at 167. In a society where every individual were freed of their obligation to follow generally applicable laws, a "[g]overnment could exist only in name." *Id.* See also Garrett Epps, *"You Have Been in Afghanistan": A Discourse on the Van Alstyne Method*, 54 DUKE L.J. 1555, 1575 (2005) [hereinafter Epps, *You Have Been in Afghanistan*], for a criticism of the Court for "imagin[ing] the most extreme assertions of religious rites that could be advanced and refut[ing] them instead of the case actually in front of it."

67. *Reynolds*, 98 U.S. at 161. The Morrill Act was designed to outlaw Mormon polygamy. *See* Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501, 501 (1862) (repealed 1910) (criminalizing the practice of polygamy); Epps, *You Have Been in Afghanistan*, *supra* note 66, at 1572.

68. *Reynolds*, 98 U.S. at 166. According to the Court, polygamy was condemnable for two reasons. First, it was not a belief or "mere opinion." *Id.* at 164. Second, it was "in violation of social duties or subversive of good order." *Id.* ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

religious practices must give way to neutral laws of general applicability.[69]

Beginning in 1963, the Court's interpretation of the Free Exercise Clause shifted in favor of religious conduct. In *Sherbert v. Verner*,[70] the Court departed from *Reynolds* and adopted a strict scrutiny test for free exercise cases.[71] Any government act that significantly burdened religiously motivated conduct was presumptively unconstitutional and government imposed burdens were valid only where the state could establish a compelling government interest.[72] The emphasis of the free exercise test was no longer on the nature of the law, but instead focused on the impact that the challenged prohibition had on the religious individual.[73] Thus, in *Sherbert*, the Court invalidated a South Carolina law that denied unemployment benefits to the petitioner because she refused to work on Saturday, a practice consistent with her religious beliefs as a Seventh-day Adventist.[74] The Court held that South Carolina had no compelling interest in recognizing secular but not religious excuses for failure to work when determining eligibility for unemployment benefits.[75]

Following *Sherbert*, the Court employed a strict scrutiny test in free exercise cases, balancing religious beliefs and generally applicable laws to determine whether to apply an exemption to a specific

69. During this period, some religious minorities did win exemptions from neutral and generally applicable statutes, but most cases involved a free speech or due process claim applicable to all individuals, in addition to a religious claim. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643–44 (1943) (finding that the State of West Virginia could not constitutionally compel schoolchildren in public schools to salute the flag); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (finding that the State of Connecticut could not constitutionally restrict a group of Jehovah's Witnesses from distributing religious materials by traveling door-to-door); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental . . . liberty upon which all governments . . . repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.").

70. 374 U.S. 398 (1963).

71. *Id.* at 403–08.

72. *Id.* at 406–08. The Court derived this balancing test from its prior cases resolving free speech challenges. *See id.*

73. *See id.* at 403–04.

74. *Id.* at 399–402. The Court held that the South Carolina law was invalid because it forced Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

75. *Id.* at 408–09.

individual's conduct.[76] The individual claiming the exemption had to demonstrate that the generally applicable law imposed a burden on his or her practice of religion and the state had to demonstrate that granting an exemption would interfere with a compelling state interest.[77]

In 1990, in *Employment Division of Oregon v. Smith*,[78] the Court abandoned the strict scrutiny test and held that *Sherbert* had no application outside of the unemployment compensation field.[79] In the place of strict scrutiny, the Court returned to its holding in *Reynolds*.[80] Emphasizing that the Free Exercise Clause does not excuse compliance with neutral and generally applicable laws, the Court applied rational basis review to find that the State of Oregon was permitted to prohibit the sacramental use of peyote by Native American individuals under a neutral and generally applicable criminal statute.[81]

The *Smith* decision jettisoned virtually all of the principles promulgated by the Court only twenty-seven years earlier, prompting a wave of backlash against the Court.[82] Critics immediately attacked

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76. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141, 146 (1987); United States v. Lee, 455 U.S. 252, 260 (1982); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).

77. *Sherbert*, 374 U.S. at 403–08; *see also* Claire McCusker, Comment, *When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith *World*, 25 YALE L. & POL'Y REV. 391, 394 (2007) (citing *Sherbert*, 374 U.S. at 403). Some critics note that while *Sherbert's* strict scrutiny test theoretically should have allowed for more exemptions for religious minorities than the standard in *Reynolds*, in practice very few exemptions were granted between 1963 and 1989. *See id.* at 394 (citing 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 30 (2006)).

78. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

79. *Id.* at 884–85.

80. *See id.* at 878–79. The Court stated that, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *Lee*, 455, U.S. at 263 n.3 (Stevens, J., concurring)).

81. *Id.* at 878–79, 882 (upholding the application of the statute to Native Americans discharged and denied unemployment benefits).

82. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4, 10–39 (arguing that courts' deferral to facially neutral laws restricting religion creates a "legal framework for persecution"); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 (1993) (claiming that *Smith* was "substantively wrong and institutionally irresponsible"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U.

the Court's apparent disregard of *Sherbert* and its curtailment of established First Amendment protections.[83] Indeed, *Smith* did once again tip the scale in favor of neutral and generally applicable laws.[84] Moreover, the Court removed the authority of the courts to accommodate religious beliefs and practices altogether, reasoning that exemptions from neutral laws of general applicability were more appropriately worked out through the political process.[85]

C. *Congress Rebuffs* Smith *with the Religious Freedom Restoration Act ("RFRA")*[86]

Given the public shock and outrage following the *Smith* decision,[87] it is no surprise that Congress increasingly became a key player in redeeming free exercise rights.[88] Critics' claims that *Smith* stripped away crucial protections and subverted well-settled First Amendment standards resonated with Congress,[89] and in response to the Court's decision, Congress enacted RFRA.[90] The purpose of RFRA was to restore the compelling interest test as set forth in *Sherbert* and *Wisconsin v. Yoder*,[91] a *Sherbert*-era case.[92] Congress relied on its power under Section Five of the Fourteenth Amendment, which

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CHI. L. REV. 1109, 1111 (1990) (stating that "*Smith* is contrary to the deep logic of the First Amendment").

83. *See, e.g.*, Linda Greenhouse, *Court is Urged to Rehear Case on Ritual Drugs*, N.Y. TIMES, May 11, 1990, at A16 (stating that fifty-five constitutional scholars and a diverse array of religious groups petitioned for a rehearing of the case).

84. *See* Laycock, *supra* note 82, at 11–13.

85. *See Smith*, 494 U.S. at 890 ("Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."); *see also* Garrett Epps, *The Wrong Vampire*, 21 CARDOZO L. REV. 455, 464 (1999) [hereinafter Epps, *The Wrong Vampire*] (stating that the *Smith* decision referred the claims of religious minorities to the political process because the courts were ill-equipped to weigh them).

86. 42 U.S.C. § 2000bb (Supp. 1993).

87. *See supra* notes 82–83 and accompanying text.

88. *See* Epps, *The Wrong Vampire*, *supra* note 85, at 465.

89. *See* 42 U.S.C. § 2000bb(a). "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

90. *See* 42 U.S.C. § 2000bb(a).

91. 406 U.S. 205, 234 (1972) (holding that the First Amendment and Fourteenth Amendment prevent a state from compelling Amish parents to enroll their children in formal high school to age sixteen).

92. 42 U.S.C. § 2000bb(b)(1).

permits it to enforce the Free Exercise Clause of the First Amendment and impose RFRA's requirements on the states.[93]

The central feature of RFRA was that it was remedial. RFRA provided all religious individuals and institutions with a claim or defense when the government (state or federal) substantially burdened their religious exercise.[94] Most notably, RFRA departed from the holding in *Smith* by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden resulted from a law of general application.[95]

Touting its impassioned name, Congress held RFRA out as necessary to reinstate "[m]eaningful constitutional protection[s]."[96] Based on committee hearing findings of constitutional abuses throughout the United States,[97] Congress concluded that the strict scrutiny test applied in *Sherbert* was still a workable test for striking sensible balances between religious liberty and competing government interests.[98] Congress also found that the political process was an inappropriate forum for preserving religious protections because the political process tended to favor majorities and because

93. The Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions [of the Fourteenth Amendment]." *Id.* § 5. Section Five gives Congress "the same broad powers expressed in the Necessary and Proper Clause" with respect to state governments and their subdivisions. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

94. 42 U.S.C. § 2000bb(b)(2).

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

96. *See* S. REP. NO. 103-111, at 4–5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893–94. At the committee hearings, Reverend Oliver S. Thomas, appearing on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee, testified that "[s]ince *Smith* was decided, governments throughout the [United States] have run roughshod over religion" and warned that "[i]n time, every religion . . . will suffer." *Id.* at 8, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897. Examples of religious conviction included churches being zoned out of commercial areas and Jews being subjected to autopsies in violation of their families' faith. *Id.*

97. *See, e.g., Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcommittee on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong., 327–28 (1992) (statement of Douglas Laycock, Law Professor, University of Texas); *see also* Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (reversing an earlier decision upholding Hmong Religious objections to an autopsy, in light of *Smith*).

98. 42 U.S.C. § 2000bb(a)(5).

state and local legislators were unreliable when it came to crafting individual exemptions from laws of general applicability.[99]

Only four years later, however, it became evident that Congress's enforcement power under the Fourteenth Amendment was not enough to sustain the broad protections of RFRA. In 1997, in *City of Boerne v. Flores*,[100] the Supreme Court reviewed the constitutionality of RFRA and invalidated the Act as it applied to the states.[101] The *City of Boerne* case was as good a case as any to challenge the constitutionality of RFRA, as it presented a classic conflict between a religious institution and a law of general application.[102]

In *City of Boerne*, the petitioner, Archbishop of San Antonio, relied upon RFRA as one basis of relief in seeking strict scrutiny review of a local zoning board's denial of its construction permit to enlarge its building.[103] The local zoning board denied St. Peter Catholic Church's permit based on a local historic preservation ordinance, which governed any construction affecting historical landmarks.[104] A conflict ensued between the local zoning board and the church, the local zoning board claimed that the church was designated as a historic district, and St. Peter countered that the construction was necessary to accommodate its growing parish.[105]

The Court resolved the conflict by invalidating RFRA, concluding that its far-reaching provisions exceeded Congress's authority under Section Five of the Fourteenth Amendment.[106] Although Congress is permitted to enact remedial and preventative legislation under Section Five of the Fourteenth Amendment, it is prohibited from enacting legislation that is substantive in nature.[107] The Court held that RFRA was substantive in nature because it created new First Amendment rights for religious individuals and institutions.[108] In

99. S. REP. NO. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897. Congress found that because the political process tended to favor majorities, it provided inadequate protection for minority religious individuals and institutions. *Id.*

100. 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to -5 (2006)).

101. *See id.* at 535–36.

102. The ordinance at issue authorized the City's Historick Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. *Id.* at 512.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 536.

107. *Id.* at 508.

108. *See id.* at 532; *see also supra* note 11 and accompanying text.

addition, the Court held that the RFRA provisions as applied to the states were unconstitutional because its broad provisions unnecessarily curtailed the authority of the states to regulate for the health and welfare of their citizens.[109]

III. RFRA REVISITED: THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000[110]

Not long after *City of Boerne*, Congress countered with RLUIPA. Heeding the Court's exhortations regarding the constitutional soundness of RFRA, Congress held nine hearings over three years to address the extent of religious discrimination in the United States, and also Congress's authority to enact counteractive legislation.[111] Congress passed RLUIPA on July 27, 2000, and President Clinton signed the Act on September 22, 2000.[112]

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109. *Id.* at 533–35 ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct . . . ."). RFRA is still applicable against the federal government. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 438 (2006) (holding that the government failed to demonstrate a compelling interest in barring a religious sect's sacramental use of *hoasca*, a hallucinogenic tea imported from the Amazon Rainforest).

110. 42 U.S.C. §§ 2000cc to -5 (2006).

111. *See, e.g.*, *Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 1 (1997) (statement of Rep. Canady, Chairman, H. Subcomm. on the Constitution) ("Because the freedom to practice one's religion is a fundamental right, we are meeting this morning in the wake of *Boerne* to consider what sources of authority Congress may utilize to protect this most precious freedom from governmental infringement."); *Protecting Religious Freedom After* Boerne v. Flores *(Part II): Hearing Before Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 1 (1998); *Protecting Religious Freedom After* Boerne v. Flores *(Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 1 (1998); *Congress' Constitutional Role in Protecting Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 1–2 (1997); *Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 2 (1999); *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 1–2 (1999); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. 1 (1998); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 1 (1998); *see also* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 985 (2001).

112. An Internet Resource on the Religious Land Use and Institutionalized Persons Act of 2000, http://www.rluipa.com/index.php/topic/20.htm (last visited Jan. 4, 2009). The

A. Congress Distinguishes RLUIPA From Its Predecessor

Careful to avoid the constitutional infirmities that plagued RFRA, Congress designed RLUIPA to provide increased protection for the free exercise of religion, but narrowed its application.[113] RLUIPA targets two contexts: land use regulation, and persons in prisons, mental hospitals, nursing homes and similar state institutions.[114] Congress reinstated strict scrutiny review of free exercise challenges in land use and state institutions, because Congress determined that free exercise rights of vulnerable and minority groups were frequently infringed in these two areas.[115]

The section on land use applies in any case in which a "substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."[116] A land use regulation is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land."[117]

Congress traced the "individualized assessment" language in the land use section from the Court's decisions in *Sherbert* and *Smith* and concluded that strict scrutiny review was appropriate because "[l]aws that provide for individualized assessments . . . are not generally applicable."[118] Ever mindful of the Court's warnings in *City of Boerne*, Congress used this language to remain closely tethered to the Court's current interpretation of the First Amendment and,

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language and legislative history of RLUIPA is drawn largely from the Religious Liberty Protection Acts of 1998 and 1999 (RLPA), which Congress introduced to reenact RFRA through the Commerce and Spending Clauses. *See* 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). RLPA failed because of strong opposition of lobbyists, however certain members of Congress did not cease in their efforts to pass particular elements of the bill. *See* Hamilton, *Federalism and the Public Good*, *supra* note 42, at 334–35. Congress enacted RLUIPA despite the fact that it did not hold a single hearing addressing the Act's land use provisions. *Id.*

113. 146 CONG. REC. S7774, S7774 (2000).

114. *Id.*

115. *See* 146 CONG. REC. H7191 (daily ed. July 27, 2000) (statement of Rep. Canady).

116. 42 U.S.C. § 2000cc(a)(2)(C) (2006).

117. *Id.* § 2000cc-5(5).

118. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady).

accordingly, how much protection is afforded to religious individuals and institutions under the Free Exercise Clause.[119]

Congress also compiled "massive evidence" that the right to build for religious purposes was frequently violated because of the high level of discretion that local officials have in zoning processes.[120] The legislative record preceding RLUIPA included several anecdotal examples of local zoning boards across the country denying land use rights to new, small, or unfamiliar churches.[121] Congress generally categorized local zoning boards' reasons for denying land use rights—traffic, noise, and aesthetics—as mere pretexts for discrimination.[122]

In addition to developing a more extensive legislative record than in the case of RFRA, Congress further distinguished RLUIPA in two other important ways. First, Congress added two jurisdictional prongs; Congress limited RLUIPA's enforcement to cases where Congress has power under the Commerce Clause and the Spending Clause, in addition to Section Five of the Fourteenth Amendment.[123] Second, Congress purported to track and codify the legal standards established by the Supreme Court rather than create new ones.[124] Congress intentionally excluded a new definition of the decisive term "substantial burden" and directed courts applying RLUIPA to interpret the term "by reference to Supreme Court jurisprudence."[125]

Nevertheless, RLUIPA remains substantially similar to RFRA in its standard, scope of application, and overall purpose. RLUIPA

119. Congress concluded that "[the] factual record is itself sufficient to support prophylactic rules to *simplify the enforcement of constitutional standards* in land use regulation of churches." 146 CONG. REC. S7774, S7775 (2000) (emphasis added).

120. *Id.*; *see also* 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady) ("[RLUIPA's land use provisions] are designed to remedy the well-documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context."); Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 255 (W.D.N.Y. 2005) ("The legislative history indicates that Congress was concerned about local governments' use of their zoning authority to discriminate against religious groups by making it difficult or impossible for them to build places of worship or other facilities . . . .").

121. 146 CONG. REC. S7774, S7774–S7775; *see also* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769–83 (1999) (summarizing the evidence that Congress relied upon in passing RLUIPA).

122. 146 CONG. REC. S7774, S7774.

123. 42 U.S.C. § 2000cc(a) (2006); 146 CONG. REC. S7774, S7775.

124. 146 CONG. REC. S7774, S7775. Congress claimed that RLUIPA satisfied constitutional standards because it merely codified the legal standards in one or more Supreme Court opinions for "greater visibility and easier enforceability." *Id.*

125. *Id.* at S7776.

requires strict scrutiny review of government actions,[126] and as discussed in the following sections, RLUIPA's scope of application is broad in the land use context.[127] RLUIPA's purpose is also redolent of RFRA; Congress reinstated strict scrutiny review in RLUIPA in order to compel regulators to "more fully justify substantial burdens on religious exercise."[128]

Moreover, RLUIPA's imposing mandates are commensurate to the comprehensive restrictions that RFRA imposed on the states and which the Supreme Court found unconstitutional in *City of Boerne*.[129] The similarities between RLUIPA and RFRA, considered in context with Congress's instruction to the courts to broadly apply RLUIPA to maximize religious protection, tend to indicate that Congress intended for RLUIPA to serve the same end goal as RFRA: to effect a substantive change in First Amendment protections.[130]

B. An Outpouring of RLUIPA Opposition

Although RLUIPA is a "recalibrated" version of RFRA, it continues to receive considerable criticism from many opponents of the Act who claim that RLUIPA is unnecessary, unbalanced in favor of religious land use, overly vague, and unconstitutional.[131] RLUIPA opponents advance several arguments in support of its invalidation.

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126. *See* 42 U.S.C. § 2000cc(a)(1).

127. *See infra* Part III.B–C.

128. 146 CONG. REC. S7774, S7775 (joint statement of Senators Hatch and Kennedy).

129. In fact, Senator Hatch, co-sponsor of RFRA and RLUIPA, conceded that he would have "preferred a broader bill" than the one that was passed in 2000. 146 CONG. REC. S7774, S7774.

130. 42 U.S.C. § 2000cc-3(g). Despite language in the statute instructing the courts to construe the statute as a whole broadly, Congress ostensibly did not intend for the terms "religious exercise" and "substantial burden" to be given any broader interpretation than the Supreme Court's articulation of the two concepts. 146 CONG. REC. S7774, S7776.

131. For arguments that RLUIPA is constitutional, see, for example, Storzer & Picarello, *supra* note 111; Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons From RLUIPA*, 31 HARV. J. L. & PUB. POL'Y 717 (2008); Matthew D. Krueger, Note, *Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause*, 89 MINN. L. REV. 1179 (2005). For arguments that RLUIPA is unconstitutional, see, for example, *Federalism and the Public Good*, *supra* note 42; Julie M. Osborn, *RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to City of Boerne*, 28 U.C. DAVIS ENVTL. L. & POL'Y J. 155 (2004); Joshua R. Geller, Note, *The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of the Fourteenth Amendment*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 561 (2002/2003).

The degree to which frequent free exercise violations actually occur in the land use context has been hotly contested.[132] The primary study, conducted by Brigham Young University, relied upon by proponents of RLUIPA, has been widely criticized for being misleading, marred with discrepancies, and for using cases that are more than forty years old (a notable critique the Court made regarding the evidence Congress presented in support of RFRA).[133] In addition, more current studies tend to disprove claims of widespread discrimination and demonstrate that, in fact, religious institutions seeking permission to use land face little to no barriers above and beyond the standard barriers faced by all land users.[134]

To further undermine the primary assumption of RLUIPA—that a federal remedy was necessary—RLUIPA opponents emphasize that not even Congress could definitively assert that discrimination against religious land use "occur[s] in every jurisdiction with land use authority."[135] Some members of Congress felt that there was insufficient evidence of land use discrimination to "justify making every federal, state and local land use decision and regulation vulnerable to attack."[136]

A lack of substantial evidence that there is widespread discrimination in land use decisions buttresses opponents' demands that Congress retreat from an area traditionally reserved to state and

132. *See, e.g.*, Hamilton, *Federalism and the Public Good*, *supra* note 42, at 345–52; Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001); Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA'S Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002).

133. *See* Adams, *supra* note 132, at 2397–400; *see also* Hamilton, *Federalism and the Public Good*, *supra* note 42, at 347 (citing, among other weaknesses of the Brigham Young study, that it asserts a general, unsupported claim that churches are treated less well than other uses).

134. *See, e.g.*, Stephen Clowney, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 868 (2007) (concluding that, in the context of zoning exemptions, churches are treated no differently than secular applicants and that no disparity exists between the treatment of minority and mainstream denominations). In another frequently cited study, empirical results indicated that "[t]he nearly universal experience of American congregations seeking government authorization to do something they want to do is one of facilitation rather than roadblock." Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the Federal Congregations Study*, 42 J. CHURCH & ST. 335, 341 (2000).

135. 146 CONG. REC. S7774, S7775 (2000).

136. H.R. REP. NO. 106-219, at 37 (1999).

local governments.[137] If current studies indicate that state and local governments can and have fairly balanced the interests of religious institutions against those of the community, then there is no justification for usurping local policy and norms in favor of a federal remedy.

Another consequence of providing a federal remedy when there is no demonstrated need for one is that it raises additional First Amendment Establishment Clause concerns. This heightened potential for constitutional violations is exacerbated by the broadened and vague terms used in RLUIPA, which foster considerable room for judicial interpretation in favor of religious individuals and institutions seeking to overturn unfavorable local land use regulations.

C. Congress Redefined and Broadened "Religious Exercise"

RLUIPA provides a religious institution with a claim when government action substantially burdens its religious exercise.[138] The application of RLUIPA and its heightened standard of review is heavily dependent on the Act's definition of the term "religious exercise" because if a religious institution cannot demonstrate that a particular land use policy affects their exercise of religion, then the institution cannot establish a claim under RLUIPA.

RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[139] This definition includes the building or conversion of real property if the person or entity that uses or intends to use the property does so for that purpose.[140]

Not every religious activity constitutes a "religious exercise," but the provisions of RLUIPA fail to exclude tangential amenities from the Act's definition of the term.[141] Taken to its logical extreme, the

137. Cheryl L. Runyon, Kelly Anders, & Susan Parnas Frederick, *Religious Land Use—State and Federal Legislation*, 25 N.C.S.L. ST. LEGISL. REP. 14 (2000), *available at* http://www.ncsl.org/programs/natres/SLR2514.htm.; *see also supra* note 43; discussion *infra* Part V.A.

138. 42 U.S.C. § 2000cc(a) (2006).

139. 42 U.S.C. § 2000cc-5(7)(A). By contrast, the definition of religious exercise in RFRA was arguably less broad. RFRA defined religious exercise as the "exercise of religion under the First Amendment to the Constitution." Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5, 107 Stat. 1488 (1993).

140. 42 U.S.C. § 2000cc-5(7)(B).

141. *See* 146 CONG. REC. S7774, S7776 ("In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions.

language of RLUIPA allows a religious institution to avoid having to comply with local zoning regulations that would otherwise apply to its activities or facilities that are unrelated to its beliefs or mission, or that would apply to a non-religious institution offering the same amenities.[142]

Moreover, this definition is far broader than the definition of religious exercise that the Supreme Court has previously articulated. In prior cases, the Supreme Court has defined religious exercise as "the observation of a central belief or practice,"[143] and as behavior and beliefs compelled by a particular religion.[144] The Supreme Court and lower courts have used these definitions in order to closely examine whether there was a connection between the religious institution's conduct and the religious belief at issue.[145] In contrast to this line of case law, RLUIPA lacks any requirement that a party demonstrate the significance of their conduct before the court imposes the high burden on the state to demonstrate that the regulation serves a compelling government interest.[146]

In addition to establishing that their conduct is a religious exercise as defined under RLUIPA, a party must also demonstrate that the regulation at issue imposes a substantial burden on their free exercise of religion.[147] If a party fails to meet their burden of proof, their action cannot proceed.[148] Fortunately for religious institutions, RLUIPA's broadening of the definition of religious exercise all but guarantees that most religious institutions will proceed to the issue of

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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 or 'religious exercise.'").

142. *See* Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 834 (2006).

143. Hernandez v. Commr, 490 U.S. 680, 699 (1989).

144. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); *see also* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (defining religious exercise as adherence to the central precepts of a religion).

145. *See Thomas*, 450 U.S. at 717–18; *Sherbert*, 374 U.S. at 403–04.

146. The troubling implication of RLUIPA's new and broadened terminology is already playing out in the courts charged with applying the federal statute. The Seventh Circuit surmised that it was "Congress's intent to expand the concept of religious exercise [as it was used] both in decisions discussing the precursory RFRA . . . and in traditional First Amendment jurisprudence." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 760 (7th Cir. 2003) (citations omitted) [hereinafter *C.L.U.B.*].

147. *See* 42 U.S.C. § 2000cc(a)(1) (2006).

148. *C.L.U.B.*, 342 F.3d at 760.

whether a land use regulation imposes a substantial burden on its conduct.

This potential increase in facilitated access to the courts for religious institutions only underscores another equally troubling implication of RLUIPA's broad scope. When Congress drafted RLUIPA, it opted not to define the term substantial burden and instead directed the courts to apply RLUIPA with reference to the Supreme Court's previous articulations of the term.[149] This, however, only invites further confusion and room for judicial interpretation because even the Supreme Court has avoided conclusively defining substantial burden, emphasizing that the analysis of its existence is fact specific.[150]

Thus, it is no surprise that there is a split among the courts as to what exactly constitutes a substantial burden on religious conduct under RLUIPA.[151] Some courts have endeavored to fashion a workable definition of the term in order to avoid immunizing religious individuals and institutions against land use regulations,[152]

149. 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy).

150. Living Water Church of God v. Charter Twp. of Meridian, 258 Fed. App'x 729, 733–34 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high and that determining its existence is fact intensive.").

151. *See* 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, 226, app. at 259–67 (2008) (summarizing the various formulations of the meaning of substantial burden).

152. *See, e.g.*, Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348–49 (2d Cir. 2007) (holding that the proper inquiry is whether the government act "directly *coerces* the religious institution to change its behavior"); Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006) ("'[F]or a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent.'" (quoting San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004))) (alteration in original); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 661–62 (10th Cir. 2006) ("[T]he incidental effects of otherwise lawful government programs 'which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs' do not constitute substantial burdens on the exercise of religion." (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1998))); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.").

while other courts have abstained from firmly adopting any one definition.[153]

In *Civil Liberties for Urban Believers v. City of Chicago*,[154] the Seventh Circuit, faced with a RLUIPA claim, was compelled to narrow its previous definition of substantial burden to avoid establishing a precedent that would immunize religious institutions against almost all land use regulations.[155] If the court were to apply both RLUIPA's broadened definition of religious exercise and its previous definition of substantial burden, it would transform minor, incidental burdens into a substantial burden.[156] The slightest obstacles to land use would be enough to trigger RLUIPA's requirement that the government regulation pass under strict scrutiny review.[157] Essentially, RLUIPA "render[ed] meaningless the word substantial."[158]

Practically speaking, if the court had not modified its previous definition of the term substantial burden, then religious institutions would be immunized against land use regulations, which imposed only an incidental burden on the free exercise of religion.[159] Though the Seventh Circuit avoided this result in *C.L.U.B.*,[160] the climate created by RLUIPA is ripe for another court to find otherwise. In

153. *See, e.g.*, Mintz v. Roman Catholic Bishop, 424 F. Supp. 2d 309, 319–22 (D. Mass. 2006) (citing the definitions contained in Seventh, Ninth, and Eleventh Circuit decisions but not specifically adopting a particular formulation).

154 342 F.2d 752 (7th Cir. 2003).

155. *Id.* at 761. The Seventh Circuit now defines the term "substantial burden" under RLUIPA as "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively *impracticable*." *Id.* (emphasis added).

156. *See id.*

157. *See id.*

158. *Id.*

159. *See id.*

160. Only two years later, the Seventh Circuit appeared to retreat from *C.L.U.B.* in *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), when it applied a broader definition of the term substantial burden, holding that a local zoning board imposed a substantial burden when it denied a religious organization's zoning permit, which would require rezoning a residential zone to allow for religious uses. *Id.* at 901. For the court, having to restart the permit process constituted a substantial burden, in part because it would cause delay, uncertainty, and expense. *Id.* at 900–01. The court held this despite the fact that earlier case law, including the *C.L.U.B.* decision, indicated that delay, inconvenience, and expense *did not* amount to a substantial burden. *C.L.U.B.*, 342 F.3d at 761 (emphasis added). Several years later, the Seventh Circuit reaffirmed its definition of the term substantial burden applied in *C.L.U.B.*, clarifying that the *City of New Berlin* decision did nothing to modify the earlier definition. *See* Vision Church v. Village of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006).

fact, greater immunization of religious land use is not entirely unforeseeable if the courts read the provisions of RLUIPA with Congress's instruction to construe the federal statute in favor of a broad free exercise protection in mind.[161]

In sum, not only has RLUIPA obscured the role of the courts, inviting them to interpret far more than is prudent in terms of consistency and fairness to other interests at stake, but it has also debilitated the ability of local governments to effectively enforce land use regulations against religious institutions. These effects are significant and implicate a related concern over the effect and scope of RLUIPA in a modern religious society, where the establishment of a church is not as simple as it once was. As discussed in the next Part, it may be only a matter of time before religious institutions are able to secure heightened federal protection for non-religious amenities that are only tangentially related to the institution's religious, educational, or charitable mission.[162]

IV. THE PROLIFERATION OF MEGA-CHURCHES: A MODERN CHALLENGE FOR LOCAL REGULATORS

The term mega-churches is generally used to refer to any Protestant congregation with a sustained average weekly attendance of 2,000 persons (children and adults) or more in its worship services.[163] According to studies conducted by the Hartford Seminary and Institute for Religious Research, the average mega-church has a weekly attendance of 3,857 people.[164] The largest mega-church in the United States, Lakewood Church in Houston, Texas, averages 43,500 in attendance.[165]

Although mega-churches have existed for centuries throughout Christian history,[166] cities across the United States have witnessed a

161. *See* 146 CONG. REC. S7774, S7780 (2000). There is an inherent contradiction between this instruction and a separate section of the legislative history: "This Act does not provide religious institutions with immunity from land use regulation . . . ." *Id.* at S7776.

162. *See* Galvan, *supra* note 44, at 209.

163. Hartford Seminary, *supra* note 14. For the purposes of this Comment, this definition will be used because it is the definition used in the research conducted by the Hartford Seminary and Institute for Religion Research. *Id.* This definition is not all-inclusive, and there are many—roughly 3000—very large Catholic churches in existence as well. *Id.*

164. *Id.*

165. *Id.* (go to searchable database and search congregations by size).

166. SCOTT THUMMA, DAVE TRAVIS & WARREN BIRD, MEGACHURCHES TODAY 2005: SUMMARY OF RESEARCH FINDINGS 1 (2005) [hereinafter THUMMA, TRAVIS, & BIRD,

massive increase in the number and size of mega-churches since the 1970s.[167] In 1970, there were only ten mega-churches nationwide,[168] but by 2005, the number of mega-churches had jumped to more than 1,200.[169] According to an eight-year long study published in August 2008, the growth of mega-churches is likely to continue as churches show a steady increase in the number of people they attract.[170] The average growth rate for five years was a 50 percent increase in attendance.[171]

Although size is the most definitive characteristic of mega-churches, location is also significant in distinguishing mega-churches from the more traditional church model. Most mega-churches are located in "suburban areas of rapidly growing sprawl cities such as Los Angeles, Dallas, Atlanta, Houston, Orlando, Phoenix and Seattle."[172] While mega-churches have historically been contained to certain geographic areas, studies indicate that mega-churches are institutes in transition and are continuously expanding their worship and services to new suburban cities.[173]

A. Common Mega-Church Traits

Mega-churches generally share many traits. For instance, most mega-churches have one dominant male pastor, considerable support staff, large community congregation, and a significant percentage of anonymous spectators.[174] A vast majority of mega-churches share a "contemporary worship style," as indicated by the use of "electric guitars, keyboards, drums and visual projection equipment."[175] Some commentators have attributed the immense popularity of mega-churches to a shared, unique worship style.[176] Congregants prefer

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MEGACHURCHES TODAY], *available at* http://hirr.hartsem.edu/megachurch/megastoday2005_Summaryreport.html.

167. Hartford Seminary, *supra* note 14.

168. Kris Axtman, The Rise of the American Megachurch, CHRISTIAN SCI. MONITOR, Dec. 30, 2003, *available at* http://www.csmonitor.com/2003/1230/p01s04-ussc.html.

169. Hartford Seminary, *supra* note 14.

170. *See* SCOTT THUMMA & WARREN BIRD, CHANGES IN AMERICAN MEGACHURCHES: TRACING EIGHT YEARS OF GROWTH AND INNOVATION IN THE NATION'S LARGEST-ATTENDANCE CONGREGATIONS 5 (2008) [hereinafter THUMMA & BIRD, TRACING EIGHT YEARS], *available at* http://hirr.hartsem.edu/megachurch/megastoday2008_Summary report.html.

171. *Id.*

172. Hartford Seminary, *supra* note 14.

173. *See* THUMMA & BIRD, TRACING EIGHT YEARS, *supra* note 170, at 2.

174. Hartford Seminary, *supra* note 14.

175. THUMMA & BIRD, TRACING EIGHT YEARS, *supra* note 170, at 2.

176. *See id.* at 2–3, 9–10.

mega-churches' innovative use of uplifting songs and motivational speeches to traditional religious dogma, rituals, and symbols.[177]

Another notable characteristic among several mega-churches is their involvement in American politics.[178] When George W. Bush ran for president in 2000, an influential mega-church pastor from Texas, Rev. John C. Hagee of Cornerstone Church, made an early endorsement that helped him win the much-needed votes of evangelic conservatives.[179] In 2006 and 2007 respectively, Senators Barack Obama and Hillary Clinton each spoke on separate occasions at Rick Warren's Saddleback Church.[180] In 2008, in another forum hosted by Rick Warren's Saddleback Church, Senators Barack Obama and John McCain both seized the opportunity to obtain additional evangelical votes by speaking at the mega-church's high-profile forum.[181] Not surprisingly, President Barack Obama even chose mega-church Pastor Rick Warren to deliver the invocation at his 2008 inauguration ceremony.[182]

B. Non-Religious Amenities of Mega-Churches

The most notable trait of mega-churches is the number of non-religious amenities that they offer. Mega-churches are increasingly adding non-traditional, non-worship amenities to their list of church services in order to attract and keep new congregants.[183] These

177. Axtman, *supra* note 168; *see also* Charles Truehart, *Welcome to the Next Church*, THE ATLANTIC MONTHLY, Aug. 1996, *available at* http://www.theatlantic.com/issues/96aug/nxtchrch/nxtchrch.htm ("Centuries of European tradition and Christian habit are deliberately being abandoned, clearing the way for new, contemporary forms of worship and belonging.").

178. *See generally* Sarah Pulliam, *The Megachurch Primaries*, 52 CHRISTIANITY TODAY, Feb. 2008, at 66–67; Daniel Burke & Cecile S. Holmes, *Black Churches Torn Between Clinton, Obama*, 125 CHRISTIAN CENTURY, Jan. 29, 2008, at 14–15 (stating that "the road to the White House in South Carolina runs straight through black churches").

179. Laurie Goodstein, *Spotlight Recasts Church Leaders and Their Support*, N.Y. TIMES, May 24, 2008, at A12. Numerous political scientists credited Bush's successful reelection to the "78 percent of white evangelicals who voted for him, compared to the 21 percent who voted for [Senator] John Kerry." Pulliam, *supra* note 178, at 66.

180. *See* Pulliam, *supra* note 178 at 66–67. Hillary Clinton also employed Pastor Darrell Jackson Sr. of the Bible Way Church as a paid consultant as part of her 2008 presidential campaign. Burke & Holmes, *supra* note 178, at 14.

181. Katharine Q. Seelye, *Obama Selects California Evangelist for Invocation at His Inauguration*, N.Y. TIMES, Dec. 18, 2008, at A18.

182. *Id.*

183. *See supra* notes 16–20 and accompanying text.

amenities span a wide range of secular activities,[184] prompting some observers to refer to the churches as being "full service '24/7' sprawling village[s] . . . [where] [i]t is possible to eat, shop, go to school, bank, work out, scale a rock-climbing wall and pray there, all without leaving the grounds."[185] Some commentators assert that the success of mega-church amenities reflects a cultural shift in American religion.[186] If this observation is true, it is relevant to the assessment of the likelihood that mega-churches will continue to add bigger and better amenities to their repertoire. Already, mega-churches view every additional location and amenity as an investment, literally.[187]

For example, the largest mega-church in the United States, Lakewood Church, is one of many mega-churches that continues to add amenities in order to increase its visibility, and profitability.[188] In 2003, Lakewood Church leased the Compaq Center, former home of the NBA Houston Rockets, to serve as the worship center for its growing congregation.[189] Another prominent mega-church, World Changers Ministries, operates a music studio, publishing house, computer graphic design suite, and its own record label.[190] For Lakewood Church, World Changers Ministries, and similar religious institutions, increased locations and amenities are viewed as religious in nature and as an opportunity to evangelize.[191]

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184. A few examples of prevalent mega-church activities include sports arenas/gyms, dining facilities, radio/music stations, shopping centers, credit unions, movie theatres, and apartment complexes. *See* Brown, *supra* note 16; *see also* Salkin & Lavine, *supra* note 151, at 224 (citing Diana B. Henriques & Andrew W. Lehren, *Megachurches Add Local Economy to Mission*, N.Y. TIMES, Nov. 23, 2007, at A1).

185. Brown, *supra* note 16.

186. *See id.* ("By making it nearly possible to inhabit the church from morning to night, cradle to grave, these full-service churches can shelter congregants . . . from 'a broader society that seems unsafe, unpredictable and out of control, underscored by school shootings and terrorism.'").

187. The average annual income for mega-churches in 2005 was six million dollars. THUMMA, DAVIS & BIRD, MEGACHURCHES TODAY, *supra* note 166, at 4.

188. Luisa Kroll, *Christian Capitalism: Megachurches, Megabusiness*, FORBES.COM, Sept. 17, 2003, *available at* http://www.forbes.com/2003/09/17/cz_lk_0917megachurch_print.html.

189. *Id.* The renovations on the stadium cost Lakewood Church ninety-five million dollars and included two waterfalls and enough carpeting to cover nine football fields. John Leland, *A Church that Packs them in, 16,000 at a Time*, N.Y. TIMES, July 18, 2005, at A1. The renovated church opened in 2005 to serve a congregation that has revenues of over fifty-five million dollars and a television audience of millions. *Id.*

190. *Id.*

191. *See id.* Dave Stone, the associate minister of Southeast Christian Church in Louisville, Kentucky calls his church a "refueling station," stating "[i]f we can get

Quite obviously, the rapid growth of mega-churches has also led to an increase in the secondary effects these institutions impose on the communities where they are located.[192] Mega-churches are not unlike other large-scale institutions which provide the same secular amenities, in that they both increase traffic, noise, and sanitation issues and diminish available land for other uses.[193] The profound and intrusive effect that mega-churches have had on surrounding communities has led to an increase in "not-in-my-backyard" sentiments among local communities and governments.[194]

Negative responses towards mega-churches have prompted some local governments to seek out new was to regulate mega-churches and similar institutions to minimize the burdens associated with their activities.[195] In spite of these local efforts, RLUIPA provides added protections to religious institutions who seek to use the land in ways that may run contrary to the values and intentions of local communities and governments.[196] Presumably, RLUIPA protects some, if not all, of the activities of mega-churches, even if those activities run contrary to or interfere with a local government's zoning, planning, historical preservation or other generally applicable law. This result is and should be of great concern to all communities whether or not they are affected by mega-churches, given our nation's historical deference to state and local governments in the area of land use.

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people to come to our gym . . . it's only a matter of time before we can get them to visit our sanctuary." Brown, *supra* note 16. The business of mega-churches is such a booming market, that new businesses have been created with the sole purpose of helping churches grow. Kroll, *supra* note 188. One such business, Kingdom Ventures, is a publicly traded company whose sole mission is to help faith-based organizations get bigger. *Id.* According to the company, at least 10,000 churches use its services. *Id.* The business of turning churches into corporations has become so successful for Kingdom Ventures that it has prompted the company to publish a book, which teaches pastors to think like entrepreneurs. *Id.* Lessons on how to use partnerships and marketing events to increase membership are just a few components of the mega-church transformation. *Id.*

192. *See, e.g.*, Hamilton, *Struggling with Churches as Neighbors*, *supra* note 1.

193. *See id.*

194. *See id.*

195. *See id.*

196. *See* Hamilton, *Federalism and the Public Good*, *supra* note 42, at 341 ("Neither the tradition of deference [to local land use laws] nor the values behind such deference were discussed or even intimated during the recorded oral or written testimony on land use and RLPA.").

V. LOCAL LAND USE AND THE IMPACT OF MEGA-CHURCHES

A. A Brief History of Land Use Regulation in the United States

Historically, "[l]and use law has . . . been a creature of state and local law."[197] Land use controls include zoning, subdivision regulation, building codes, and growth controls.[198] Zoning is defined as the "dividing [of] the land within its corporate limits into 'zones' and defining, within each zone, the permitted land uses (such as residential, commercial, office, and industrial) and other development rights and restrictions (such as height and density)."[199]

Government regulation of land use can be traced back to colonial America and earlier.[200] The colonists treated land as a community resource and imposed restrictions on private property in order to serve the public interest.[201] Several laws "restricted the location of dwellings, imposed affirmative obligations of use, compelled the fencing of agricultural land, required owners of wetlands to share the cost of drainage projects, and allowed the public to hunt on private land."[202] Although substantively distinguishable, these laws resemble modern zoning regulations in that both are enacted by local governments and restrain a private individuals' use of land in order to extract greater positive benefits for the community as a whole.[203]

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197. Hamilton, *Federalism and the Public Good*, *supra* note 42. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386, 390–95 (1926) (upholding a local zoning ordinance, excluding apartment houses, business houses, retail stores, and shops from residential districts) ("Building zone laws are of modern origin. They began in this country about 25 years ago."); Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) (upholding a local zoning ordinance as a valid exercise of state police power); FERC v. Mississippi, 456 U.S. 742, 768 n.30 (1982) ("[The] regulation of land use is perhaps the quintessential state activity.").

198. Julian Conrad Juergensmeyer & Thomas E. Roberts, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 46 (2d ed. 2007).

199. Matthew E. Norton, *Land Use and Development*, 558 PLI: REAL EST. L. & PRAC. 999, 1003 (2008).

200. Juergensmeyer & Roberts, *supra* note 198, at 43.

201. *Id.* at 43–44. For example, a 1632 Cambridge, Massachusetts ordinance included the following provisions: "[N]o buildings could be built in outlying areas until vacant spaces within the town were developed. Roofs had to be covered with slate or board rather than thatch. Heights of all buildings had to be the same. Lots were forfeited if not built on in six months. Finally, buildings could only be erected with the consent of the mayor." *Id.* at 44.

202. *Id.*

203. *See id.* at 43–44; *see also* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1030–31 (2000)

Eventually, the doctrine of nuisance law gave rise to the first zoning regulations imposed by local governments in large cities.[204] The common law classifications, such as public, private, nuisances per se, or nuisances in fact, embody basic concepts of reasonable use and afford an individual landowner remedies for any unreasonable interferences with the use and enjoyment of his or her land.[205] In general, nuisance law weighs the gravity of the harm to the plaintiff against the utility of the defendant's use.[206]

In 1916, New York City implemented the nation's first comprehensive zoning ordinance using basic concepts of nuisance law.[207] The success of New York City's zoning ordinance, combined with the need to regulate land use, prompted large cities across the nation to enact zoning ordinances similar to New York.[208] The immense popularity of zoning also led to the release of the Standard State Zoning Enabling Act in 1924 under the Herbert Hoover Administration.[209] The Standard Act became the model for land use regulations nationwide and eventually all fifty states adopted enabling acts patterned on the Standard Act.[210]

In 1926, the Supreme Court handed down a seminal land use decision that upheld as constitutional the practice of zoning. In *Village of Euclid v. Ambler Realty Co.*,[211] the Court confirmed that it is a vested right of local governments to enact land use regulations to protect the "public health, safety, morals, or general welfare" of communities.[212] The Court considered local restrictions on land use

(explaining how land use laws emphasized serving the community from as far back as 1776).

204. DANIEL R. MANDELKER, LAND USE LAW § 1.04 (5th ed. 2003).

205. Juergensmeyer & Roberts, *supra* note 198, at 621.

206. *See id.* at 623.

207. MANDELKER, *supra* note 204, § 1.01. The New York legislature and courts understood the importance of regulating nuisances in fact, or activities and operations that constitute a nuisance only because of location, surroundings, or manner of operation. *See id.*

208. *See* Juergensmeyer & Roberts, *supra* note 198, at 23.

209. *Id.* at 47.

210. MANDELKER, *supra* note 204, § 1.01.

211. 272 U.S. 365 (1926).

212. *Id.* at 392, 395 (upholding the general validity of an ordinance that set use, height, and bulk restrictions for an entire town). By the time the Court upheld the practice of zoning as constitutional, approximately 564 cities and towns had enacted comprehensive zoning regulations similar to the regulations sustained in *Euclid*. Juergensmeyer & Roberts, *supra* note 198, at 44.

as necessary and as a valid means for local governments to meet the complex and constantly developing conditions of society.[213]

Following *Euclid*, the Court consistently affirmed the inherent right of local governments to regulate land use, later adding that the authority to develop and implement regulations is expansive.[214] For example, in *Village of Belle Terre v. Boraas*,[215] the Court held that the power of local governments is "not confined to elimination of filth, stench, and unhealthy places," but rather, "[i]t is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people."[216]

The fundamental principle of zoning, or "Euclidean zoning" as it has been commonly referred to after *Euclid*, is that "everything has its place."[217] Based on this theory, local governments develop comprehensive zoning regulations that relegate each land use to its proper place and place limitations on certain types of land use.[218] The purposes of zoning often include, but are not limited to: preservation of property values, preservation of character, traffic safety, public health, regulation of business competition, economic planning, and promotion of morals.[219]

Moreover, a single zoning regulation may serve several purposes, and the purposes often overlap with one another.[220] The distinctions between different zoning regulations often reflect the unique differences in the type of land that the regulation is meant to address or the needs of the community where the regulation is enforced.[221] In fact, in *Euclid*, the Supreme Court recognized that variations in land use regulations were legitimate, if not inherent, when it stated that, "[a] regulatory zoning ordinance, which would be clearly valid as

213. *Euclid*, 272 U.S. at 386–87 ("Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.").

214. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 5, 9 (1974); Rapanos v. United States, 547 U.S. 715, 737–38 (2006).

215. 416 U.S. 1.

216. *Id.* at 9 (upholding a local zoning ordinance, which limited the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons).

217. Juergensmeyer & Roberts, *supra* note 198, at 69. This type of zoning is said to be Euclidean "in two senses—the kind of zoning adopted was similar to that used in the Village of Euclid—and the landscape was divided into a geometric pattern of use districts." *Id.* at 44–45.

218. *See id.* at 53–91.

219. *See id.*

220. *Id.* at 54.

221. *See* Salkin & Lavine, *supra* note 151, at 215.

applied to the great cities, might be clearly invalid as applied to rural communities."[222] Based on this rationale, it would not be surprising to find that zoning regulations across the nation would vary greatly from one another.[223] However, RLUIPA does not address, nor does it incorporate the critical differences in the land that it regulates.

B. The Intersection of Religious Conduct and Land Use Regulation

The history of land use regulation in the United States underlies the substantial value of zoning to local governments and communities. Zoning is a means for local governments' to govern the use of its land and the development of its community, and how a local government chooses to incorporate religious land use into its zoning regulation has been and continues to be particularly important. When land use regulations were first imposed, local governments viewed religious land uses as "inherently beneficial," and communities encouraged the presence of churches and synagogues in residential neighborhoods because they provided the neighborhood with a positive "moral tone" and served as a center of community activity.[224] Neighbors also favored local churches and synagogues because they typically served those living nearby.[225] Overall, communities did not view them as intruding upon the neighborhood and regulators did not view them as disturbing the overall land use scheme.[226]

Over time, however, this positive perception of religious institutions and religious land use has been replaced by a more negative, skeptical perception.[227] Local communities and regulators no longer view religious institutions preferentially, but they are increasingly concerned about the adverse effects of religious land use.[228] As a natural result of this shift, friction between religious institutions and local zoning regulations has steadily increased.[229]

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222. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

223. The nuances that differentiate zoning regulations in the many state and local jurisdictions across the United States is beyond the scope of this Comment.

224. Juergensmeyer & Roberts, *supra* note 198 at 486. Local communities rarely tried to exclude religious uses from residential areas. *Id.* In the few cases where a city tried to exclude a religious institution from a neighborhood, the courts usually held that such exclusions were arbitrary. *Id.* (citing State *ex rel.* Lake Drive Baptist Church v. Village of Bayside Bd. of Trustees, 108 N.W.2d 288, 300 (Wis. 1961)).

225. Juergensmeyer & Roberts, *supra* note 198, at 486.

226. *Id.*

227. *Id.*

228. *Id.* at 486–87.

229. *See id.* at 487.

The rise in mega-churches exacerbates this friction because it presents new and distinct challenges for local regulators.[230] A mega-church functions as "the religious version of the gated community."[231] Not only must local regulators find ways to adapt their regulatory frameworks to address the size and volume of the amenities of mega-churches, but regulators must also balance the competing interests of mega-churches against those of the community.[232] Local governments continually seek to balance these two interests through regulations that harmonize mega-church land use and ameliorate the negative secondary effects that mega-churches impose.[233]

As a result, religious institutions now sometimes face more stringent requirements on their land use.[234] In some cases, this simply means that local governments are treating religious institutions similar to secular institutions that produce the same noise, parking, and traffic problems.[235] In other cases, it means that local governments are treating religious institutions more harsh because of the "intensity of use" of the institution and because of the disharmony that its land use breeds in the community.[236] In the communities where local governments have increased regulation, regulators continue to clash with mega-churches over regulations that apply to an institution's activities that extend beyond traditional church functions, such as homeless shelters, soup kitchens, senior or child day care centers, and schools.[237] This increased conflict has, in turn, generated additional free exercise challenges.[238]

Of the additional challenges raised, many are coupled with or proceed solely upon RLUIPA.[239] This is problematic for local governments seeking to regulate religious land use because RLUIPA

230. *See supra* Part IV.B.

231. Brown, *supra* note 16, at F6 (quoting Dr. Wade Clark Roof, a professor of religion and society at the University of California at Santa Barbara).

232. *See* Juergensmeyer & Roberts, *supra* note 198, at 467–68; *see also* Hamilton, *Federalism and the Public Good*, *supra* note 42, at 338 (emphasizing the complexities of land use law and that each jurisdiction attempts to "find the right mix of factors to maximize optimal and harmonious use").

233. *See* Juergensmeyer & Roberts *supra* note 198, at 467–68.

234. *See id.*; *see also Federalism and the Public Good, supra* note 42, at 338–39 (noting that different jurisdictions use a variety of restrictions and accommodations when addressing religious land use).

235. *See* Juergensmeyer & Roberts, *supra* note 198, at 486.

236. *See id.*

237. Hamilton, *Struggling with Churches as Neighbors*, *supra* note 1.

238. *See, e.g.*, Weinstein, *supra* note 1, at 2–3 (listing types of RLUIPA claims).

239. Juergensmeyer & Roberts, *supra* note 198, at 489.

tends to resolve land use disputes in favor of religious institutions.[240] When invoked by a religious institution, RLUIPA severely undercuts the authority of local governments.

First, the broad protection RLUIPA provides to religious institutions limits the inherent power of local governments to regulate land use, regardless of the religious institution's location or size, and even when the burdens associated with the religious land use are identical to other, regulated land uses.[241] The federal statute's curtailment of a constitutionally recognized power of local governments has reinvigorated the federalism objections that once prevailed against RFRA.[242] Because local land use regulation is "a means [for] individual communities to shape their goals, and [i]s a means [for] experimentation in achieving the elusive public good," it has been said to embody the core "value of federalism."[243] On the other hand, RLUIPA undermines this principle. Federal regulation of land use simply does not adequately account for community input and does not ensure accountability on the part of those responsible for enforcing regulations at the local level.[244]

RLUIPA also limits the plenary authority of state and local governments to regulate religious issues in the area between the Free Exercise Clause and the Establishment Clause of the First Amendment.[245] For the most part, the resolution of religious issues has traditionally been reserved exclusively to the states, free from

240. *See supra* notes 44, 130 and Part III.B; *see also infra* notes 268–69.

241. *See supra* notes 44, 130 and Part III.B; *see also infra* Part V.C.

242. *See, e.g.*, Hamilton, *Federalism and the Public Good*, *supra* note 42, at 320–26, 332–33 (explaining the federalism debate in relation to RFRA); *see also infra* notes 275–79 and accompanying text.

243. *Id.* at 337.

244. *See Schragger*, *supra* note 44, at 1849–50 ("In the context of religious exemptions, those values often invoked in support of a sphere of state autonomy—local control, accountability, experimentation, interjurisdictional competition, and diffusion of political power—are more applicable to local government."); *see also infra* notes 263 (discussing the expectation of citizens that land use decisions will be made by locally elected officials) and 283 (discussing how citizen access to public officials responsible for dealing with local problems promotes democracy).

245. *See* Brief for Respondents at 25–28, Cutter v. Wilkinson, 423 F.3d 579 (6th Cir. 2005) (No. 03-9877), 2005 WL 363713; *see also* Matthew Gaus, Note, Locke v. Davey: *Discretion, Discrimination, and the New Free Exercise*, 54 U. KAN. L. REV. 553, 584–85 (2006) ("[B]y creating the zone of discretion in the religious clauses, the *Locke* [*v. Davey*] court gave at least implied legitimacy to the notion that, within certain limits, the federal government is not authorized to interfere with state religious policy.").

federal interference or limitation.[246] State and local governments have been free to resolve religious issues that fall between the Free Exercise Clause and the Establishment Clause because they are in the best position to balance the competing mandates of the two Clauses.[247] In the land use context, the freedom of local regulators to regulate land use issues allows each locality to develop nuanced and tailored regulation frameworks that neither favor religion nor impose a substantial burden on the exercise of religion.[248]

Finally, RLUIPA unnecessarily preempts the free exercise exemptions already in place at the state and local level.[249] Before the enactment of RLUIPA, a significant number of states had taken steps to protect against government violations of free exercise rights by enforcing flexible and fair regulations tailored to their land.[250] In fact, state and local governments have evidenced a continued interest in strengthening the free exercise rights of individuals and institutions by enacting additional free exercise protections after the Supreme Court's decisions in *Smith*[251] and *City of Boerne*.[252] RLUIPA limits

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246. *See generally* William H. Hurd & William E. Thro, *The Federalism Aspect of the Establishment Clause*, ENGAGE: THE J. OF THE FEDERALIST SOC'Y PRAC. GROUPS, Oct. 2004 at 62 ("[I]n the zone between what the Establishment Clause prohibits and what the Free Exercise Clause requires, the National Government must allow the States to make their own policy choices."); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 at 731 (1833) ("[T]he whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions . . . .").

247. *See* Hurd & Thro, *supra* note 246, at 65 (arguing that when the federal government interferes with states' prerogative to make religious policy decisions, the federal government violates the Establishment Clause).

248. *See* Schragger, *supra* note 44, at 1825 ("[T]he Religion Clauses, as originally conceived, had a diversity-protecting function: they served to protect local approaches to religious liberty then extant in the states."); *see also* Hurd & Thro, *supra* note 246, at 65 (arguing that although RLUIPA favors religious accommodation, it "interfere[s] with State sovereignty no less than if Congress had prohibited such accommodation.").

249. *See* Hamilton, *Federalism and the Public Good*, *supra* note 42, at 335–38; McCusker, *supra* note 77, at 395 n.25 (providing examples of state free exercise exemptions).

250. Juergensmeyer & Roberts, *supra* note 198, at 495. For example, Illinois amended its state RFRA to accommodate religion without interfering with the expansion of Chicago's O'Hare airport, a vital component of the Chicago area. *See* Salkin & Lavine, *supra* note 151, at 258 (citing St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 634–35 (7th Cir. 2007)).

251. *See generally* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 607 & n.4, 608 (1999) (discussing state religious freedom restoration acts).

252. *See* Karen L. Antos, Note, *A Higher Authority: How the Federal Religious Land Use and Institutionalized Persons Act Affects State Control Over Religious Land Use*

the force of state and local religious land use exemptions because its provisions apply more broadly and religious institutions often invoke its protections.[253]

C. *The Inadequacies of RLUIPA*

Although RLUIPA provides a broader swath of free exercise protections, it ineffectively and unfairly resolves land use conflicts between religious individuals and institutions and local governments.[254] Federal legislation is impractical in application and unconstitutional, because it lacks narrow tailoring to individual communities, discourages religious diversity, favors majority religions, and intimates government favoring of religion.[255]

1. Federal Legislation Lacks Narrow Tailoring

As discussed throughout this Comment, a significant benefit derived from local land use regulation is that it results in balanced and fair regulations appropriately geared towards the land being regulated. Conversely, federal legislation applies the same standard to every geographic region, and every local community, government, and religious institution. Uniform standards, like the one embodied in RLUIPA, are ineffective because they lack the narrow tailoring of local legislation, which reflects the "different values, different dominant land uses, and different state constitutional treatment for religious entities" that is inherent in fifty diverse jurisdictions.[256]

Local legislation is quite obviously preferred over federal legislation because local legislation is the product of individual negotiations between members of a community—religious and secular—and the government.[257] In essence, local laws are compromises; local laws are an agreed upon apportioning of benefits and burdens within a community. Each state or local government must accept some of the effects of religious land use on the

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Conflicts, 35 B.C. ENVTL. AFF. L. REV. 557, 567 & n.81 (2008). At least eleven states reinstated the strict scrutiny standard after *City of Boerne*. *Id.*

253. *See supra* notes 1, 5; *see also infra* notes 268–69.

254. *See* Hamilton, *Federalism and the Public Good*, *supra* note 42, at 335–38.

255. *See id.*

256. *Id.* at 338.

257. *See* Schragger, *supra* note 44, at 1848 (discussing the importance of local negotiations as a forum for local communities to deal with religious conflict collectively); *see also* Mark Spykerman, Note, *When God and Costco Battle for a City's Soul: Can the Religious Land Use and Institutionalized Persons Act Fairly Adjudicate Both Sides in Land Use Disputes?*, 18 WASH. U. J.L. & POL'Y 291, 309 (2005).

community and each religious institution must accept some limitations on their conduct.[258] Federal legislation simply cannot strike the same balance.

2. Federal Legislation Discourages Religious Diversity

The negative effects of the disconnectedness of federal legislation also have greater ramifications in that it may actually discourage the successful integration of religion. As discussed in Part III of this Comment,[259] RLUIPA overwhelmingly favors religious land use. In addition, RLUIPA further hedges the interests of religious institutions and local communities by creating an incentive for religious institutions to pursue litigation rather than work with a local community or government to develop fair religious land use accommodations.[260] This knee-jerk resort to litigation[261] deprives local regulators of the opportunity to attempt to integrate religious land use into reasonable and balanced regulations and it completely disrupts a community's overall ability to pursue land use regulations consistent with its own religious policies.

This substantial favoring of religious land use also poses the unanticipated concern that RLUIPA will generate nationwide resentment towards religion.[262] Some commentators have predicted that RLUIPA and similar far-reaching legislation will provoke negative reactions among communities due to its effect of trumping local policies and norms.[263] RLUIPA increases the distinct possibility that communities will become hostile towards unfamiliar religious institutions and instinctively recoil from religious diversity in general

258. *See* Schragger, *supra* note 44, at 1818–20, 1848 ("Instead of a single standard of review for all government actions that touch on religion, the Court should embrace a nuanced approach, one that is attentive to the institutional location of any particular religion-burdening or -benefiting activity.").

259. *See supra* Part III.B–C.

260. *See* Weinstein, *supra* note 1, at 11 (comparing RLUIPA to RFRA and noting that while RFRA "did not produce a large number of challenges to land-use regulation of religious uses," RLUIPA "has resulted in a flurry of threatened, and actual, litigation").

261. *See supra* notes 1, 5 (addressing the prevalence of RLUIPA litigation across the nation); *see also infra* note 269 (discussing the negative effects of RLUIPA litigation).

262. *See* Schragger, *supra* note 44, at 1847.

263. *See id.*; *see also* Lora A. Lucero, *The Evolving RLUIPA Landscape*, 26 No. 10 ZONING & PLAN. L. REP. 1 (2005) (indicating the expectation of most citizens that land use, growth, and development decisions will continue to be made by the elected and appointed officials of their cities).

because of the perceived preferential treatment of religious institutions.[264]

3. Federal Legislation Favors Majority Religions

RLUIPA's failure to effectively integrate religion into communities is doubly problematic because it also is not equipped to achieve its primary purpose of protecting discreet and minority religious institutions. These groups, while usually marginalized by federal legislation, are able to more successfully influence religious accommodations in a local forum.[265] Federal legislation is geared towards large, organized religious organizations that have the resources and support to reach across state and local borders and exercise power in Congress.[266] With RLUIPA, Congress has all but guaranteed that grassroots, minority, and financially weak religious groups no longer have a voice in the dialogue on future religious accommodations in the land use context.

4. Federal Legislation Intimates Government Favoring of Religion

The disproportionate land use benefit that RLUIPA provides to religious institutions, particularly majority institutions, implicates another drawback of federal legislation when it comes to drafting religious accommodations. To add to the Establishment Clause concerns discussed in Part III of this Comment,[267] is the concern that local governments will overreact to RLUIPA and go farther than necessary to protect religious land use to avoid the costs associated with RLUIPA litigation.[268] This trend has already been documented

264. *See* Schragger, *supra* note 44, at 1847; Hamilton, *Struggling with Churches as Neighbors*, *supra* note 1. This argument is buttressed by the fact that Congress failed to adequately take into account the interests of municipalities and states, both of whom were strongly opposed to the statute's passage. *Id.*

265. *See* Schragger, *supra* note 44, at 1870 (citations omitted) (noting that in the context of federal funding, large, national secular and religious nonprofit organizations have received favorable treatment, while minority, grassroots organizations have been marginalized).

266. *See* Schragger, *supra* note 44, at 1845; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 576 n.18 (5–4 decision) (Powell, J., dissenting) ("[W]e have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some Members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation.").

267. *See supra* Part III.B–C.

268. *See* Galvan, *supra* note 44, at 231 (stating that "religious institutions have realized that land use authorities are extremely vulnerable to the threat of litigation"); *see also*

in the many cases that have become public, in which local governments showed a tendency to acquiesce to religious institutions in order to avoid the time, expense, and social cost of continued litigation.[269]

To the extent that RLUIPA trumps local regulations and local governments acquiesce to religious institutions, RLUIPA could come to mean that the amenities of institutions like mega-churches will be are fully protected.[270] To be sure, imposing the highest constitutional standard to review local regulations will most likely result in land use triumphs for religious institutions, all but immunizing religious land use against generally applicable regulations. Although it may not have played out in full yet, the eventual and probable long-term effects of RLUIPA are enough to warrant a discussion of potential alternative solutions to protecting the free exercise of religion in the land use context.

VI. RETURNING LAND USE REGULATION TO STATE AND LOCAL GOVERNMENTS

Although in the nine years since RLUIPA came into effect commentators have discussed the statute's value at length, the discourse has yielded several proposed solutions that arguably fall short in terms of their focus on federal legislation as the appropriate medium for crafting religious accommodations. The purpose of this Comment is not to address every solution or to critique any one solution in particular, but to advance a solution that remedies the flawed assumption underlying RLUIPA, and to provide a sustainable framework for resolving land use conflicts in a rapidly evolving modern religious society.[271]

As discussed in Part V of this Comment,[272] religious accommodations in the land use context are unnecessarily broad and general at the federal level. A workable solution, however, would be to return land use regulation to state and local governments. Our nation is entrenched in a deep history of deferring to state and local governments to regulate land use because local regulation embodies

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Weinstein, *supra* note 1, at 3 (noting that local government reactions range, sometimes being "immediate unconditional surrender at a church's mere mention of RLUIPA").

269. *See* Galvan, *supra* note 44, at 231 (citing examples in Denver, Colorado and Rockaway Township, New Jersey to illustrate the power of RLUIPA outside the courts to shelter auxiliary uses from land use regulations).

270. *See id.*

271. *See supra* notes 177, 186.

272. *See supra* Part V.C.

core federalism principles and because state and local governments are in the optimum position to draft and implement land use regulations that balance all of the interests at stake in a land use dispute. The need for balanced land use regulations will likely be increasingly relevant for all parties involved in land use disputes, as local governments confront the development of mega-churches and other unanticipated religious land use issues.

A. The Traditional Regulatory Authority of State and Local Governments

Returning land use regulation to the local level is consonant with this nation's practice of relegating certain powers and responsibilities to the various state and local governments.[273] Local governments have historically shaped the contours of land use law for several reasons. First, land use regulations are inherently tied to the characteristics of the land, which is unique and relevant only to those who live in the area.[274] Local governments are in the best position to understand and address the subtle distinctions of the land being regulated and those in the community seeking to use the land.[275]

Second, deference to local land use regulation and religious policy is consistent with core federalism principles.[276] Regulating how land is used in each state is a significant component of a state's police power, and the interest of each state in regulating land use without undue interference by Congress is best protected by ensuring state and local sovereignty.[277] The power of local governments to regulate land use is implicated whether the land use is religious or secular in nature, and arguably to a greater extent in cases involving religious land use because of the unique interests at stake.[278] Land use conflicts involving religious issues present new and developing

273. *See supra* Part V.A.

274. *See supra* Part V.A.

275. *See supra* Part V.A.

276. *See supra* notes 240–22 and accompanying text.

277. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 (1985) (discussing the structure of federalism and proposing that the government was "designed in large part to protect the States from overreaching by Congress"); *see also* United States v. Morrison, 529 U.S. 598, 660–61 (2000) (Breyer, J., dissenting) (noting the framers' structural design of the legislative process to protect states from infringement); THE FEDERALIST NO. 46, at 332 (James Madison) (Benjamin Fletcher Wright ed., 1961) (explaining that the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments").

278. *See supra* Part IV.

challenges for local governments[279] and established federalism principles provide the requisite room for local regulators to experiment with innovative and flexible regulations that neither provide too great nor too little religious protection.[280]

This balanced approach is particularly significant in our modern religious society. As mega-churches seek to expand into new and unfamiliar neighborhoods, local governments must retain broad authority to categorically regulate land use that is not inherently religious and which implicates the same concerns as other, secular land use.[281] The Supreme Court ascribes to the notion that land use regulation is a means for urban and rural communities to achieve "a satisfactory quality of life," which translated into meaningful terms today, suggests that local governments must be afforded great latitude to regulate the amenities of mega-churches.[282]

B. A Balanced Approach to Accommodating Religious Land Use

In addition, local land use regulation results in more balanced land use accommodations. At the local level, religious institutions, local communities, and governments frequently interact and communicate with one another. Because local citizens have the most direct access to government officials responsible for creating and implementing land use laws, this discourse will result in more responsive, fair regulations.[283] Continued discourse at the local level will encourage, rather than discourage religious diversity, and even counteract the current, demonstrated negative perception that some people have of religious institutions.[284]

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279. *See supra* Part IV.B.

280. *See San Antonio Metro. Transit Auth.*, 469 U.S. at 567 n.13 (5–4 decision) (Powell, J., dissenting); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("There must be power in the states and the nation to remould [sic], through experimentation, our economic practices and institutions to meet changing social and economic needs."); *see also* THE FEDERALIST NO. 51, at 351–52 (James Madison) (Jacob E. Cooke ed., 1961); Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L. J. 61, 70 (2000) (explaining Madison's belief that federalism was an institutional structure "in which pluralism *can* flourish").

281. *See supra* notes 192–94.

282. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981).

283. *See San Antonio Metro. Transit Auth.*, 469 U.S. at 576 n.18 (Powell, J., dissenting) (arguing that "[t]he Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them"); *see also* THE FEDERALIST NO. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 46, at 316 (James Madison) (Jacob E. Cooke ed., 1961).

284. *See* Schragger, *supra* note 44, at 1847–48.

Local land use regulation also ensures greater compliance with the mandates of the Free Exercise Clause and the Establishment Clause of the First Amendment. The invalidation of RLUIPA would significantly minimize the risk that religious institutions would immediately resort to litigation, and that local governments would overact to religious land use disputes in favor of religious institutions. The same time, expense, and social costs associated with fighting a RLUIPA land use claim would simply no longer exist. In lieu of litigation, religious institutions would be encouraged to work with state and local governments, who could once again focus their time and energy on accommodating religious land use in a balanced manner.[285]

Moreover, local land use regulation minimizes Establishment Clause concerns because local governments would be free to differentiate between those accessory uses that are religious in nature and those that are only tangentially related to the mission of a religious institution. Categorical distinctions between the two uses are subtle, and thus are best recognized by local regulators familiar with the land at issue and the religious institution operating in the community.[286] Individualized land use regulations will likely become more important as religious institutions continue to diversify the activities and amenities that they offer. While it is impossible to predict the religious land use issues that will develop in the future, it is important to advocate a solution where state and local regulators are free to resolve them without undue federal oversight or interference.

VII. CONCLUSION

The recent debate over land use has set the stage for the Supreme Court to once again invalidate an effort by Congress to regulate an area that is reserved to state and local governments. The Supreme Court has consistently recognized that the regulation of land use is an inherent and primary right of local governments, and moreover, that it is a critical component of a community's ability to set priorities, establish character, and meet societal needs.

When Congress passed RLUIPA, it overstepped constitutional bounds and unnecessarily constrained the inherent regulatory

285. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

286. *See supra* Part V.A.

authority of the state and local governments that face innumerable challenges associated with religious land use in a modern religious society. The proliferation of mega-churches distinctively illustrates the need for state and local governments to retain the right to regulate land use broadly, unrestrained by RLUIPA or other similar far-reaching federal legislation. Mega-churches are larger, more intrusive, and retain greater abilities to influence religious accommodations than their predecessors. Most significantly, mega-churches often operate amenities that are not inherently religious in nature and that occupy a great deal of land. With the repeal of RLUIPA, state and local governments will be free to once again experiment with innovative and flexible land use regulations that serve their communities' needs and desires, and that reflect all of the unique interests at stake in land use disputes.

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