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## RLUIPA Is A Bridge Too Far: Inconvenience Is Not Discrimination

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## RLUIPA IS A BRIDGE TOO FAR: INCONVENIENCE IS NOT *DISCRIMINATION*

*Marci A. Hamilton\**

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\* Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University. All rights reserved. Thanks to the Local Government Section of the AALS for inviting me to deliver the speech that is the basis of this Article, and to my outstanding research assistant team, Lana Seligsohn, Jordan Walsh, Eric Babbitt, Erin Smith Dennis, Sara Liss, Jaclyn D'Arminio, Agatha Cole, and Michelle Fox.

“[N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>1</sup>

### INTRODUCTION

The Supreme Court and lower federal courts following Supreme Court doctrine have held consistently that local land use priorities are most appropriately decided by local governments.<sup>2</sup> Local land use regulation is a crucial element of the federalism that is a fundamental basis of the United States’ constitutional structure.<sup>3</sup> After all, if there is anything that is truly local, it is land use. In addition, the Supreme

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1. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963) (quoting *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947)).

2. See Marci A. Hamilton, *The Constitutional Limitations on Congress’s Power over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional*, 2 ALB. GOV’T L. REV. 366, 368 (2009) [hereinafter *Constitutional Limitations on Congress’s Power over Local Land Use*]; see, e.g., *Kelo v. City of New London*, 545 U.S. 469, 482–84 (2005) (emphasizing the great respect the federal government owes to state legislatures and state courts in local land use); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (“[R]egulation of land use [is] a function traditionally performed by local governments.” (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994))); *Fed. Energy Regulatory Comm’n v. Miss.*, 456 U.S. 742, 767 n.30 (1982) (“[R]egulation of land use is perhaps the quintessential state activity.”); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (“The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.”); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 402 (1979) (“The regulation of land use is traditionally a function performed by local governments.”); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263–65 (1977); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Gorieb v. Fox*, 274 U.S. 603, 608–09 (1927) (stating that local government is best equipped to deal with the land use regulation); *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 348 (2d Cir. 2005) (“Requiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary’s appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.”); *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002) (“[L]and use law is one of the bastions of local control, largely free of federal intervention.”); *Sameric Corp. of Del. v. City of Phila.*, 142 F.3d 582, 598 (3d Cir. 1998) (stating that local authorities are better positioned than courts to make land use decisions); *Hoehne v. Cnty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (“We also emphasize that ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land-use decisions.”); *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989) (“We stress that federal courts do not sit as zoning boards of review . . . .”); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) (expressing concern “that federal courts not sit as zoning boards of appeals”).

3. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“[The Religious Freedom Restoration Act] contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

Court repeatedly has ruled that financial preferences for religious organizations violate the Establishment Clause.<sup>4</sup> Neither of these two

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4. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696–97 (1994) (finding that delegation of state authority to a religious group, via school zone creation, violated the principal of neutrality towards all religions and between religion and non-religion required by the Establishment Clause); Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 391 (1990) (“[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant.”); *id.* at 393 (“The Establishment Clause prohibits ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” (citation omitted)); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989) (“Whether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’” (citations omitted)); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (“[G]overnment . . . may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.”); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976) (“Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. . . . The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.”); *Buckley v. Valeo*, 424 U.S. 1, 92 (1976) (“The government may not aid one religion to the detriment of others or impose a burden on one religion that is not imposed on others, and may not even aid all religions.”); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 482 (1973) (finding the Establishment Clause is violated where a statute authorizes a state to reimburse nonpublic schools for expenses relating to internal testing and examinations, which potentially contained religious instruction); *Sloan v. Lemon*, 413 U.S. 825, 830 (1973) (finding a state law that provided funds to reimburse parents for a portion of tuition expenses incurred in sending children to nonpublic schools violated the Establishment Clause, as the program impermissibly advanced religion); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973) (stating that the Establishment Clause protects against three main evils: “sponsorship, financial support, and active involvement of the sovereign in religious activity”) (citations omitted); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (creating a three-pronged test to ensure a statute does not violate the Establishment Clause: “[f]irst, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”) (citations omitted); *Waltz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 668 (1970) (“It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) (“Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to

lines of cases is in serious question, yet, when Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000,<sup>5</sup> it managed to cross both constitutional boundary lines without taking either into account.

Congress ran roughshod over the Supreme Court's established doctrine on local land use and the Establishment Clause when it enacted RLUIPA, which applies the heavy hand of the federal government to manufacture new and special privileges for religious landowners to override local land use priorities and interests. It is a "free exercise" statute that too often strong-arms local governments to prioritize a particular religious applicant's private vision over all other interests in the community.

RLUIPA purportedly was passed to redress religious discrimination in the land use process. The Conference Report stated:

Churches in general, and new, small or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.<sup>6</sup>

Regardless of its proponents' outlandish claims, this is a statement with a pro-religion bias and few facts to support it. In a previous article, I discredited the notion that there was meaningful evidence of discrimination against churches in the land use process before Congress when it decided to intermeddle in ordinary local land use dis-

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any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968) (stating that the Establishment Clause was intended to protect against abuses of governmental power, particularly the use of the taxing and spending power to favor or support one religion over another); *Schempp*, 374 U.S. at 216 ("[N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." (quoting *Eversson*, 330 U.S. at 15) (internal quotation marks omitted)); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (holding that the Establishment Clause is violated "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief").

5. 42 U.S.C. § 2000cc (2006).

6. 146 CONG. REC. S7774-01, S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

putes involving religious landowners with RLUIPA.<sup>7</sup> There was no alleged evidence of discrimination offered by anyone other than a self-interested religious organization.<sup>8</sup> The idea that religious institu-

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7. 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, 346–48 (2003) [hereinafter *Federalism and the Public Good*]; see also Marci A. Hamilton, *The History of RLUIPA*, in RLUIPA READER: RELIGIOUS LAND USES, ZONING AND THE COURTS 31 (Michael S. Giamo & Lora A. Lucero eds., 2009); 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, 2393 (2002) (claiming RLUIPA is unconstitutional because the evidence presented by Congress did not “rise[] to the level of a ‘pattern or practice’ of discrimination” and “the legislative record depicts only sporadic conflicts between religious institutions and zoning boards”); Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 863–65 (2007) (looking at an empirical study of land use decisions in New Haven, Connecticut prior to the enactment of RLUIPA, which revealed no evidence of bias or discrimination based on religion); 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, 583–84 (2003) (finding that “RLUIPA is an unconstitutional exercise of Congress's Section 5 authority because there is no convincing evidence of a widespread and persisting pattern of constitutional violations toward religious landowners”); Ariel Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 501 (2005) (discrediting the Brigham Young University study relied on by Congress during the legislative hearings on RLUIPA, claiming that the study “does not support the existence of a prevalent, nationwide pattern of discrimination against minority religions in the land use context”).

8. See Geller, *supra* note 7, at 578 (explaining that the Christian Legal Society prepared Representative Hyde's evidence) (citing 146 CONG. REC. E1564 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde)); see also *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 151 (1999) (statement of Steven T. McFarland, Center for Law and Religious Freedom, Christian Legal Society) (stating that churches are being zoned out of cities because their ministries to the homeless are being reclassified as social service agencies); *id.* at 91–95 (testimony of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism); *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 57–65 (1998) (prepared statement of Marc D. Stern, Director, Legal Department, American Jewish Congress) (discussing distinctions drawn by land planners between tax-generating and tax-exempt properties); *id.* at 137–38 (prepared statement of W. Cole Durham, Jr., Brigham Young University Law School) (“The difficulty is that in far too many cases, as noted in the Schwab case quoted above, land use decisions are wrapped in neutral sounding language about parking, setbacks, traffic impacts, and the like, which may constitute substantial and tangible harm to surrounding property owners, but in too many cases merely serves as an empty verbal mask hiding illicit discriminatory conduct aimed at the exercise of religion. Thus, a lack of parking facilities that results in constant overparking of a narrow street, disrupting traffic and blocking neighboring driveways may constitute a genuine problem, but it does not justify ex-

tions have been especially discriminated against in the land use context is certainly not an assumption that everyone takes for granted.<sup>9</sup> For instance, there is evidence that what Congress has termed “religious discrimination” is no different than the burdens that secular land users face “navigating the discretionary zoning process.”<sup>10</sup> That stands to reason in a society that is as solicitous of religious exercise as the United States has been.<sup>11</sup>

Even putting the lack of actual evidence of discrimination aside, RLUIPA was always a cure in search of a disease. The First Amendment was and continues to be more than satisfactory to punish and deter the type of discrimination that supposedly spurred Congress to take action. Moreover, RLUIPA has proven dangerous, providing

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cluding a religious use from an area if adequate on-site parking is provided (as was the case in *Islamic Center*) or if the religious use is needed at the location in question precisely because of religious requirements that participants must walk to the service. References to increased traffic flows may constitute a genuine risk to safety, or they may simply reflect moderate increases as likely to result without the religious use. Rigid insistence on setback or bulk requirements may be unnecessary or may reflect an aesthetic concern that should give way to weightier religious freedom concerns. Building code problems may constitute substantial health and safety risks, or they may relate to matters that are routinely waived in a community.”); *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. 15 (1998) (statement of Mark E. Chopko, General Counsel, United States Catholic Conference) (discussing an instance in which a county applied the operational hours for commercial facilities to churches, which would prevent a church from holding sunrise services or conducting an Easter vigil mass); *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 41–49 (statement and prepared statement of Richard Robb, Ypsilanti, Michigan) (discussing the effect of local landmarking laws on churches).

9. See, e.g., Matthew T. Sutter, *Residential Religious Nuisance, RLUIPA, and Sic Utere Tuo Ut Alienum Non Laedas: “Like A Pig in the Parlor”*, 5 RUTGERS J.L. & RELIGION 6, 34 (2003) (finding that prior to RLUIPA, zoning boards actually had a strong preference for religious uses in the community); Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act Of 2000: Congress’ New Twist on “Speak Softly and Carry a Big Stick”*, 34 URB. LAW. 829, 851 (2002) (“Regardless of whether RLUIPA is constitutional or not, it is difficult to accept that there is a pervasive and widespread discrimination against religious entities attempting to build, buy, or rent adequate space in which to exercise their faith. After all, it is difficult to reside in a community without being within a short driving distance of a community church or mega-church that occupies several acres of land.”).

10. Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lesson from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 754 (2008) (noting that what Congress might have termed “religious discrimination” is actually no different than any land-user navigating the discretionary zoning process, who might encounter discrimination, inconsistency, and corruption in land use regulation).

11. See generally MARCI A HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005).

religious plaintiffs an outside advantage in zoning disputes to the detriment of local communities, neighbors, and residential neighborhoods.

In this Article, I will demonstrate how lower courts struggling to interpret RLUIPA's reach have transformed it into a weapon against mere inconvenience and expense. This result—wherein religious developers utilize the statute to avoid generally applicable zoning and land use regulations by claiming that compliance would be expensive or time consuming—is not just a violation of federalism in the one arena that is truly local.<sup>12</sup> It is also an unjustifiable financial boon to religious land developers, and therefore a violation of the Establishment Clause.<sup>13</sup>

The threshold question in every free exercise case, whether statutory or constitutional, is whether the law imposes a “substantial burden” on religious exercise. The believer or organization bears the burden of proving that the law imposes a substantial burden.<sup>14</sup> The

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12. See *Constitutional Limitations on Congress's Power over Local Land Use*, *supra* note 2, at 426–30; see also Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1, 32 (2001) (raising federalism concerns with RLUIPA, stating that “[l]ocal governments are generally better able to respond to their constituents' concerns over land use issues than Congress or federal executive agencies,” and “Congress, by passing land use legislation, risks interfering with an area of law designed to be controlled at the state and local level”); Julie M. Osborn, *RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to City of Boerne*, 28 ENVIRON. ENVT. L. & POL'Y J. 155, 173–74 (2004) (finding that the primary goal of RLUIPA is to promote the “public health and safety” and that it is inappropriate for Congress to “regulate the manner in which states regulate those activities”); Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 Is Unconstitutional*, 23 U. HAW. L. REV. 479, 481 (2001) (arguing that RLUIPA is a “significant and undue intrusion into the authority of the judiciary and the states in violation of fundamental notions of separation of powers and federalism”); Lara A. Berwanger, Note, *White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2399 (2004) (explaining that by “enacting RLUIPA, Congress encroached upon territory that states had traditionally regulated—local zoning laws”); Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 201 (2001) (explaining that RLUIPA violates the separation of powers and “commandeers state and local governments to enforce federal legislation” as land use is a power that is traditionally left to state and local governments).

13. See *supra* text accompanying note 4.

14. See *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384–85 (1990) (“Our cases have established that “[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.” (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989))).



RLUIPA legislative history states that the term was intended to hold the same meaning under RLUIPA as it does under the Free Exercise Clause.

The Act does not include a definition of the term “substantial burden” because it is not the intent of this Act to create a new standard for the definition of “substantial burden” on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. . . . The term “substantial burden” as used in this Act is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden or religious exercise.<sup>15</sup>

Before the Religious Freedom Restoration Act (RFRA)<sup>16</sup> and RLUIPA, the vast majority of courts concluded that the religious claimant could not prove a “substantial burden” merely by showing inconvenience or increased expense flowing from a government regulation or law. Since these two statutes have been inserted into free exercise doctrine, however, there has been a significant increase in the number of cases where courts have found a “substantial burden” based on mere inconvenience and cost. The thesis of this Article is that this interpretation of “substantial burden” is unconstitutional.

#### I. THE PRE-EXISTING CONSTITUTIONAL PROTECTIONS FOR LANDOWNERS IN THE LAND USE PROCESS, AND THE MOVEMENT UNDER RLUIPA TOWARD MAKING COST AND CONVENIENCE SUFFICIENT TO AVOID LOCAL LAND USE LAWS

Land developers facing barriers in the land use process have had several theories on which to rely, including due process. Religious landowners also have been able to rely upon the First Amendment. The record behind RLUIPA ignored due process and misleadingly downplayed the First Amendment.<sup>17</sup> RLUIPA’s proponents have

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RLUIPA states that “the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff’s exercise of religion.” 42 U.S.C. § 2000cc-2(b) (2006).

15. 146 CONG. REC. S7774-01, S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

16. The Religious Freedom Restoration Act of 1993 is codified at 42 U.S.C. § 2000bb *et seq.* (2006 & Supp. IV 2011).

17. *See, e.g.*, 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, 931 (2001) (“The lower

engaged in hyperbole while ignoring the availability of state and federal arguments against arbitrary or irrational decisionmaking in the land use context.

The focus of this Article is on the prerequisite to free exercise claims in both the constitutional and statutory arena: whether the law imposes a “substantial burden” on the believer or organization.<sup>18</sup> A *de minimis*<sup>19</sup> or incidental burden<sup>20</sup> is insufficient to trigger free exercise protection. In numerous land use cases, the defense against application of land use laws is that it would result in inconvenience or cost. This defense has been rejected in the due process cases, while there is a split in authority in the free exercise cases.

#### **A. Due Process for All Land Developers: Inconvenience and Cost Are Insufficient to Overcome Land Use Law**

Religious landowners, like all other landowners, can invoke due process when they face barriers from local land use decision-makers. No landowner has *carte blanche* to shape the land use plan or law to their private ends, but governments may not act arbitrarily under state law<sup>21</sup> or under federal due process cases.<sup>22</sup> Courts have been cautious in interfering with local zoning decisions unless the locality’s action “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare.”<sup>23</sup> If

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courts’ application of First Amendment principles have left churches vulnerable to even the most irrational zoning regulations.”)

18. *See, e.g.*, 42 U.S.C. § 2000cc-2(b); *Jimmy Swaggart Ministries*, 493 U.S. at 384–85.

19. *See* *Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004); *Rapier v. Harris*, 172 F.3d 999, 1006 n.4 (7th Cir. 1999); *Walsh v. Louisiana High Sch. Athletic Ass’n*, 616 F.2d 152, 158 (5th Cir. 1980).

20. *See* *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006); *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988).

21. *See* *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So.2d 154, 159 (Ala. 2000); *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 53 (N.Y. 1996); *C & M Developers, Inc. v. Bedminster Twp. Zoning Bd.*, 820 A.2d 143, 150–51 (Pa. 2002); *Schuback v. Silver*, 336 A.2d 328, 335 (Pa. 1975).

22. *See* *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1373 (11th Cir. 1993).

23. *Nectow v. City of Cambridge*, 277 U.S. 183, 187–88 (1928); *see also Euclid*, 272 U.S. at 395.

the landowner can establish a protected interest in property,<sup>24</sup> he can challenge a denial if it is arbitrary and capricious,<sup>25</sup> fails rational basis review,<sup>26</sup> if there is significant animus,<sup>27</sup> or if it shocks the conscience.<sup>28</sup>

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24. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (“Property interests are not created by the Constitution, ‘they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’” (citation omitted)); *Warth v. Seldin*, 422 U.S. 490 (1975) (holding that nonresidents had no standing to challenge the town’s exclusionary zoning); *Pater v. City of Casper*, 646 F.3d 1290, 1293–94 (10th Cir. 2011); *Kuster v. Foley*, 438 F. App’x 543, 545 (9th Cir. 2011); *Conde v. Town of Sharon*, 421 F. App’x 26, 27 (2d Cir. 2011); *White Oak Prop. Dev., LLC v. Washington Twp.*, 606 F.3d 842, 853, 854 (6th Cir. 2010); *Horne v. Mayor & City Council of Balt.*, 349 F. App’x 835, 838 (4th Cir. 2009); *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 435 (6th Cir. 2005) (“[T]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))); *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002); *Tri-Corp Mgmt. Co. v. Praznik*, 33 F. App’x 742, 747 (6th Cir. 2002) (citing *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992)); *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Circa Ltd. v. City of Miami*, 79 F.3d 1057, 1060 (11th Cir. 1996); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *Kim Constr. Co., Inc. v. Bd. of Trs. of Mundelein*, 14 F.3d 1243, 1245 (7th Cir. 1994); *Patterson v. Omnipoint Commc’ns, Inc.*, 122 F. Supp. 2d 222, 229 (D. Mass. 2000) (finding an aesthetically pleasing view does not constitute a protectable property interest); *Burnham v. City of Salem*, 101 F. Supp. 2d 26, 33 (D. Mass. 2000); *Dubuc v. Green Oak Twp.*, 642 F. Supp. 2d 694, 700 (E.D. Mich. 2009); *DC3, LLC v. Town of Geneva*, 783 F. Supp. 2d 418, 421 (W.D.N.Y. 2011); *Bletter v. Inc. Vill. of Westhampton Beach*, 88 F. Supp. 2d 21, 25 (E.D.N.Y. 2000); *Scott v. City of Seattle*, 99 F. Supp. 2d 1263, 1267 (W.D. Wash. 1999).

25. See, e.g., *Euclid*, 272 U.S. at 395 (holding zoning regulations will survive a substantive due process challenge unless they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare”).

26. See *Nectow*, 277 U.S. at 187–88 (stating that courts should not interfere with local zoning decisions unless the locality’s action “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare”); *Euclid*, 272 U.S. at 395 (finding that zoning regulations will survive substantive due process challenge unless they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare”); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244 (1st Cir. 1990) (“In adjudicating substantive due process challenges to zoning ordinances, a court asks only whether a conceivable rational relationship exists between the zoning ordinance and legitimate governmental ends.”); *Sinaloa Lake Owners Ass’n. v. Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (“To establish a violation of substantive due process, the plaintiffs must prove that the government’s action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” (internal quotation omitted)); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (A deprivation of a property interest is said to be of constitutional

magnitude if it is undertaken “for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis”); *La Salle Nat’l. Bank of Chi. v. Cnty. of Cook*, 145 N.E.2d 65, 69 (Ill. 1957) (highlighting the following factors in determining whether zoning laws are arbitrary and capricious: (1) the character of the area where the restricted property is located, including existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the challenged regulation; (3) the purpose of the regulation, and the extent to which the destruction of private property values promotes the public health, safety and general welfare; (4) the balancing of public and private interests (i.e. the relative gain to the public as compared to the hardship imposed upon the individual property owner); (5) the suitability of the property for the permitted purposes; (6) the length of time that the property has been vacant as zoned considered in the context of land development in the vicinity of the subject property; (7) whether there exists a comprehensive plan; (8) whether the challenged regulation is in harmony with the comprehensive plan; and (9) whether the community needs the proposed use); *ACCO Unlimited Corp. v. City of Johnston*, 611 N.W.2d 506, 510 (Iowa 2000) (“When the right infringed is not fundamental, substantive due process demands no more than ‘a ‘reasonable fit’ between government purpose . . . and the means chosen to advance that purpose.” (quoting *In re C.S.*, 516 N.W.2d 851, 861 (Iowa 1994))); *Robinson v. City of Seattle* 830 P.2d 318 (Wash. 1992) (finding generally, landowner must show facts evidencing totally irrational or egregious conduct on part of zoning officials in applying particular land use regulation to owner’s property).

27. *See Mikels Motors, Inc. v. Twp. Of Stroud*, 48 F. App’x 844, 846 (3d Cir. 2002); *Sameric Corp. of Del., Inc. v. City of Phila.*, 142 F.3d 582, 590 (3d Cir. 1998); *Tri Cnty. Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (finding “grave unfairness,” as a result of “substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that tramples significant personal or property rights” violates due process); *Midnight Sessions, Ltd. v. City of Phila.*, 945 F.2d 667, 683 (3d Cir. 1991) (finding a due process violation when government actions are motivated by “bias, bad faith, improper motive, racial animus, or the existence of partisan political or personal reasons”); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988); *Rymer v. Douglas Cnty.*, 764 F.2d 796, 801 (11th Cir. 1985); *Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 264 (D.D.C. 1995); *Moore v. City of Tallahassee*, 928 F. Supp. 1140, 1145 (N.D. Fla. 1995); *L.C. Dev. Co., Inc. v. Lincoln Cnty.*, 996 F. Supp. 886, 888 (E.D. Mo. 1990); *John E. Long, Inc. v. Borough of Ringwood*, 61 F. Supp. 2d 273, 284 (D.N.J. 1998) (finding that “discourteous, rude, and abrasive” comments and actions are not enough to constitute a substantive due process violation); *Omnipoint Commc’ns. Enter. v. Zoning Bd. of Easttown Twp.*, 72 F. Supp. 2d 512 (E.D. Pa. 1999) (finding that the failure to base a decision on substantial evidence is not enough to state a substantive due process violation); *Omnipoint Commc’ns., Inc. v. Foster Twp.*, 46 F. Supp. 2d 396, 410 (M.D. Pa. 1999); *see also Steven J. Eagle, Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 *BYU L. REV.* 899, 949 (2007) (“With respect to the denial of land development approval, substantive due process constrains only ‘grave unfairness,’ such as ‘a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights . . . .’” (quoting *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003))).

28. *See Baker v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000) (finding that “abuse of power that shocks the conscience, or action that is legally irrational” violates substantive due process); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 184 (3d Cir. 1999) (finding that “‘only the most egregious official conduct can be said to be arbitrary in the constitutional sense.’ To generate liability, executive action must

As one might expect, land developers have bristled at the inevitable delays and costs of the land use process, which routinely requires applications, studies to justify circumventing land use requirements, application fees, and public hearings.<sup>29</sup> In addition, the land use plan, which takes into account multiple interests and values in the community, may well decrease property values, disappoint expectations about re-zoning, or impose requirements that keep the property from achieving its highest valuable use. Thus, there has been a line of cases addressing the argument that local governments may not impose in-

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be so ill-conceived or malicious that it ‘shocks the conscience.’”); *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994) (“A viable substantive due process claim requires proof that the state action was ‘in and of itself . . . egregiously unacceptable, outrageous, or conscience-shocking.’” (internal citation omitted)); *Harris v. City of Akron*, 20 F.3d 1396, 1405 (6th Cir. 1994); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992) (finding federal relief is available only “in truly horrendous situations”); *G.M. Eng’rs & Assocs., Inc. v. W. Bloomfield Twp.*, 922 F.2d 328, 332 (6th Cir. 1990); *McDonald’s Corp. v. City of Norton Shores*, 102 F. Supp. 2d 431, 437 (W.D. Mich. 2000) (finding that an action shocks the judicial conscience if it is an “irrational decision or one directed toward illegitimate objectives”); *Burnham v. City of Salem*, 101 F. Supp. 2d 26, 37 (D. Mass. 1999); *Brooks v. Saucedo*, 85 F. Supp. 2d 1115, 1125 (D. Kan. 2000); *Scott v. City of Seattle*, 99 F. Supp. 2d 1263, 1270 (W.D. Wash. 1999) (To establish a violation of substantive due process, the plaintiffs must show that the City deprived their liberty or property interests in such a way that “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty.”); *Watson v. City of Kansas City*, 80 F. Supp. 2d 1175, 1189 (D. Kan. 1999); *Welch v. Paicos*, 66 F. Supp. 2d 138, 166 (D. Mass. 1999) (“In the rough-and-tumble politics of land use planning, very little can shock the constitutional conscience.”); *Leisure Time Cruise Corp. v. Town of Barnstable*, 62 F. Supp. 2d 202, 209 (D. Mass. 1999); *Keys Youth Servs., Inc. v. City of Olathe*, 38 F. Supp. 2d 914, 926 (D. Kan. 1999) (“[A] degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.”); *Equus Assocs. Ltd v. Town of Southampton*, 975 F. Supp. 454, 459 (E.D.N.Y. 1997) (stating that substantive due process protects against behavior which is “arbitrary, conscience shocking, or oppressive in a constitutional sense, but not against action that is ‘incorrect or ill-advised.’”); *see also* *Eagle*, *supra* note 27, at 956, n.347 (noting that “many circuits have adopted the ‘shocks the conscience’ standard,” and citing *Torroneo v. Town of Fremont*, 438 F.3d 113, 118 (1st Cir. 2006) (“We recently explained the limits on substantive due process claims arising from land-use disputes: . . . ‘[S]ubstantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience . . . .’” (quoting *SFW Arcicibo Ltd. v. Rodríguez*, 415 F.3d 135, 141 (1st Cir. 2005)))).

29. *See* Pamina Ewing, Note, *Impact Fees in Pennsylvania: Requiring Land Developers to Bear Development-Related Costs*, 50 U. PITT. L. REV. 1101, 1102 (1989) (discussing how impact fees have shifted “development-related costs from taxpayers to developers and new residents”); Carolyn W. Poulin, Comment, *Land Use Applications Not Acted upon Shall Be Deemed Approved: A Weighing of the Interests*, 57 UMKC L. REV. 607, 613 (1989) (discussing how the ad hoc imposition of requirements by approving agencies can cause costly delays for the developer). *See generally* Orlando E. Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29 (1980).

convenience or expense on developers without reference to the developers' identity.

In these cases, inconvenience and expense arguments have been insufficient for landowners seeking to overturn negative zoning or land use decisions. All landowners object to decreased property values and to barriers to achieving the highest and most valuable use of a piece of property, but these objections do not establish a due process violation.<sup>30</sup>

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30. See *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 567 (6th Cir. 2008) (finding no constitutional violation where rezoning petition for future use of agriculturally zoned property for residential purposes was denied, though plaintiffs argued that only residential housing would be economically viable); *Mongeau v. City of Marlborough*, 492 F.3d 14, 15 (1st Cir. 2007) (holding that city official's insistence on mitigation payment for issuance of building permit did not run afoul if the constitution); *360 Degrees Comm. Co. of Charlottesville v. Board of Sup'rs of Albemarle Cnty.*, 211 F.3d 79, 81 (4th Cir. 2000) (finding no unconstitutional prohibition where wireless telecommunications services provider was required to build communications tower on particular site at costs far above the industry-wide norm); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 682 (3d Cir. 1980) (holding that no constitutional violation existed where zoning amendments reduced permissible population density in district, thereby causing delay in construction of condominium project); *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 254 (9th Cir. 1974) (holding that city was not required to show compelling interest to justify large-lot zoning ordinance, even if ordinance created difficulty for poor populations to access work and social services); *American Univ. v. Prentiss*, 113 F.Supp. 389, 392-93 (D.C. Cir. 1953) (striking down a zoning application submitted by a group of neighbors who argued that construction of a hospital would result in a serious invasion of privacy, create traffic congestion, generate noises, and impair property values, on the basis that such rezoning would not further the general welfare of the community); *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm.*, 553 P.2d 546, 553 (Cal. 1976) (finding that developer had no vested right to build further, despite having incurred liabilities of \$740,000, because developer never applied for building permit before change in zoning became effective); *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d 972, 994 (D. Nev. 2004) (holding that scenic review ordinance did not violate Constitution, even though property owners asserted that enforcement of ordinance would result in \$100 million in lost property value and interfere with their investment-backed expectations); *Rumpke Waste, Inc. v. Henderson*, 591 F. Supp. 521, 533 (S.D. Ohio 1984) (finding no constitutional violation where zoning law precluding development of landfill on property of religious Protestants, even though landowners had been attempting to sell property for at least ten years prior to purchase offer by proposed sanitary landfill developer, and where land would have had higher value if landfill could be developed); *Omnipoint Commc'ns. Enter., L.P. v. Warrington Twp.*, 63 F. Supp. 2d 658, 662 (E.D. Pa. 1999) (finding that Township's insistence that applicant disguise communication tower as tree did not violate Telecommunications Act's proscription against local zoning authorities' prohibition of personal wireless services, even though it added an estimated \$150,000 to cost of tower estimated at between \$134,000 and \$444,000); *Sun Oil Co. v. Clifton*, 84 A.2d 555, 557 (N.J. Super. Ct. 1951) (finding no vested right for gas company to obtain service station permit for filling station, despite gas company's incurrence of expenses in cutting curbs and installing gas tanks); *Champion Builders v. City of Terrell Hills*, 70 S.W.3d 221, 224

**B. Free Exercise for Religious Landowners: There Is a Split in Authority Regarding Whether Inconvenience and Expense are Sufficient to Prove a Substantial Burden on Religious Exercise**

The legislative history of RLUIPA tells courts to interpret “substantial burden” as it was interpreted under the First Amendment.<sup>31</sup> Most Free Exercise Clause decisions rejected inconvenience or expense as sufficient to prove a substantial burden. The RLUIPA decisions, however, have departed from the earlier doctrine by permitting inconvenience and expense to be sufficient in a number of cases to prove substantial burden. There is now a split in authority across many courts.

*1. Under the First Amendment, Inconvenience and Expense Have Been Insufficient to Prove a Substantial Burden on Religious Exercise in Land Use Cases*

At the time that RLUIPA was enacted in 2000, the vast majority of First Amendment-based free exercise cases had held that cost and/or inconvenience are insufficient to prove substantial burden. In that era, courts deciding land use cases routinely held that a religious claimant could not prove the threshold requirement of a free exercise claim—that the government had imposed a “substantial burden” on the free exercise of religion—simply on evidence that the land use process imposed either cost or inconvenience.<sup>32</sup> For example, in

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(Tex. App. Ct. 2001) (finding no constitutional violation where zoning ordinance increased minimum square footage requirements for single-family apartment units from 800 to 1200, and finding further that constitutional violation only occurred where ordinance actually denied all economically viable use of property).

31. See *supra* text accompanying note 15.

32. See, e.g., *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. The City of N.Y.*, 914 F.2d 348, 355 (2d Cir. 1990) (holding landmarks law constitutional despite restriction on Church's ability to raise revenues and noting “we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause”); *Christian Gospel Church, Inc. v. City and Cnty. of S.F.*, 896 F.2d 1221, 1224 (9th Cir. 1990) (finding zoning ordinance forbidding church to build in residential neighborhood did not create substantial burden, but only created “minimal” burden relating to convenience and expense); *Messiah Baptist Church v. Cnty. of Jefferson*, 859 F.2d 820, 825 (10th Cir. 1988) (finding no free exercise violation where zoning regulation merely added expense to the practice of religion); *Grosz v. City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983) (finding no burden on free exercise where law only indirectly affects religious practice, or where law has secular purpose); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306 (6th Cir. 1983) (finding religious exercise was not unduly burdened just because zoning laws forced church to build on more expensive land, and holding that “inconvenient economic burdens on religious freedom do not rise to a constitutionally im-

*Christian Gospel Church, Inc. v. City and County of San Francisco*, the Ninth Circuit held that the denial of a conditional use permit to establish a house of worship only amounted to a “burden[] . . . of convenience and expense.”<sup>33</sup> While the church emphasized its desire to practice “home worship,” the denial only prevented home worship in a particular location.<sup>34</sup> The burden only required the church to find another home or venue for worship.<sup>35</sup>

Another pre-RFRA case, *Messiah Baptist Church v. County of Jefferson*,<sup>36</sup> involved an agricultural regulation that prohibited churches within the A-2 zone. The plaintiffs’ free exercise challenge failed, as the neutral regulation merely added expense to the practice of religion and thus did not substantially affect a liberty interest because the economic burden was incidental.<sup>37</sup> The Tenth Circuit found that the regulation only implicated property interests and had a substantial relationship to the general welfare of county residents.<sup>38</sup> Therefore, the prohibition was constitutional.<sup>39</sup> Similarly, the Sixth Circuit found

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permissible infringement of free exercise”); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1297, 1302 (Alaska 1982) (finding that mere inconvenience and greater expense of complying with the zoning regulations as related to the location of a parochial school is not enough to force a locality to bend its regulations in favor of the church); *Abram v. City of Fayetteville*, 661 S.W.2d 371, 373 (Ark. 1983) (finding that the inconvenience or economic burden was caused by the church’s failure to comply with valid zoning regulations); *Bd. of Zoning v. Decatur Ind. Co. of Jehovah’s Witnesses*, 117 N.E.2d 115, 118, 121 (Ind. 1954) (holding that zoning ordinance regarding property setbacks lines did not violate church’s free exercise, but that enforcement of off-street parking restriction would infringe upon right to freedom of worship and assembly); *Hope Evangelical Lutheran Church v. Iowa Dep’t of Revenue*, 463 N.W.2d 76, 82 (Iowa 1990) (holding that payment of generally-applicable consumer tax imposed no unconstitutional burden on Hope’s sincere religious beliefs because the law merely decreases the amount of money a taxpayer has to spend on its religious activities); *State ex rel. O’Sullivan v. Heart Ministries, Inc.*, 607 P.2d 1102, 1112 (Kan. 1980) (“The compelling interest of the State, as *parens patriae*, is the protection of its children... [to] these requirements the defendants’ free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the State must protect”). *See generally* *San Jose Christian Coll. v. City of Morgan Hill*, 360 F. 3d 1024, 1035–36 (9th Cir. 2004) (finding no substantial burden under RLUIPA because other options for building were available to religious group as interference must be more than mere inconvenience); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1346 (Haw. 1998) (finding that mere expense and inconvenience are not enough to constitute a substantial burden).

33. *Christian Gospel Church*, 896 F.2d at 1224.

34. *See id.*

35. *See id.*

36. 859 F.2d 820 (10th Cir. 1988).

37. *See id.* at 825.

38. *See id.*

39. *See id.*



that a city's refusal to grant a zoning exception to the Congregation of Jehovah's Witnesses did not infringe upon its freedom of religion.<sup>40</sup> While the denial required the Congregation to build in a more expensive location where such buildings complied with zoning requirements, "the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to its churches."<sup>41</sup>

Likewise, in the single case involving religious practices and restrictions on the land that the Supreme Court decided in 1988—before RFRA and RLUIPA—the Court explicitly stated that even a severe incidental burden may not establish a substantial burden on the free exercise of religion.<sup>42</sup> In that case, the Court declined to halt development on federal lands despite the location of burial grounds sacred to the plaintiff on the property.<sup>43</sup>

The Supreme Court's free exercise cases not involving land also have followed the principle that cost and inconvenience are insufficient to establish a "substantial burden" for purposes of the Free Exercise Clause.<sup>44</sup> "At bottom, though we do not doubt the economic cost to appellant of complying with a generally applicable sales and use tax, such a tax is no different from other generally applicable laws

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

41. *Id.*

42. *Lyng v. N.W. Indian Cemetery Protect. Ass'n*, 485 U.S. 439, 451–52 (1988) (rejecting a free exercise claim to halt development of federal lands on land considered sacred even where the burden may be "extremely grave").

43. *Id.* at 447.

44. See *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 389–90 (1990) (holding a general tax which does not condition the receipt of a benefit on behavior proscribed by religious faith was not an unconstitutional burden on free exercise); *Hernandez v. Comm'r*, 490 U.S. 680, 689 (1989) (finding tax law that created separate code for charitable deductions did not violate free exercise because "[the fact] that the taxpayers would 'have less money to pay to the Church, or that the Church [would] receive less money, [did] not rise to the level of a burden on appellants' ability to exercise their religious beliefs'" (citations omitted)); *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (finding that the nature of a burden is relevant to the standard government must meet to justify the burden, and holding that forcing welfare applicants to make choices does not affirmatively compel action counter to religious tenets); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983) (holding not all burdens on religion are unconstitutional and some may be justified by an overriding governmental interest, and finding that the interest in eradication of racial discrimination in education substantially outweighs the financial burden of denying tax benefits); *Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961) (holding that the Sunday closing law serves a compelling state interest and is not an unconstitutional burden on free exercise, despite economic consequences for Orthodox Jewish business owners).

and regulations — such as health and safety regulations — to which appellant must adhere.”<sup>45</sup>

A split in authority in land use cases was developing, however, with a small number of lower courts holding that cost and/or inconvenience could be sufficient to establish a substantial burden.<sup>46</sup> For instance, in *Islamic Center of Mississippi v. City of Starkville*, the Fifth Circuit found that the City’s zoning law, which required a mosque to be built in a location only accessible by automobile and expensive for all observers to get to, constituted a substantial burden on free exercise.<sup>47</sup> The court also noted, however, that incidental economic burdens where there is an *alternative opportunity* for religious conduct would not qualify as an undue burden on free exercise.<sup>48</sup>

In another land use decision, *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Village of Roslyn Harbor*, the New York Court of Appeals declared unconstitutional a village zoning ordinance that required all religious buildings located in residential areas to be set back at least one hundred feet because the cost of moving plaintiff’s synagogue or constructing new facilities was so great that it would be tantamount to a denial of the use permit.<sup>49</sup> Similarly, in *Munns v. Martin*, the Supreme Court of Washington held that a demolition permit ordinance, which had the potential to cause a fourteen-month delay in a Catholic bishop’s plans to demolish a school build-

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45. *Jimmy Swaggart Ministries*, 493 U.S. at 391.

46. See *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225, 1228 (Ind. 1978) (holding a photo identification requirement for a driver’s license is an unconstitutional infringement on church members’ religious beliefs because the state can ensure driver competency and public safety through less intrusive means); *Blount v. Dep’t of Educ. & Cultural Servs.*, 551 A.2d 1377, 1380 (Me. 1988) (finding that the state approval process for homeschooling places a substantial burden on free exercise where the individuals believe that such process would be “an act of apostasy”); *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Vill. of Roslyn Harbor*, 342 N.E.2d 534, 540 (N.Y. 1975) (holding a zoning ordinance which regulates religious organizations but does not leave room for adaptations is unconstitutional when applied to a synagogue where the cost of building a new facility is tantamount to denial of permit); *Stajkowski v. Carbon Cnty. Bd. of Assessment & Revision of Taxes*, 541 A.2d 1384, 1386–87 (Pa. 1988) (holding that an occupation tax imposed on a Roman Catholic priest places an impermissible burden on the free exercise of religion); *Munns v. Martin*, 930 P.2d 318, 324–25 (Wash. 1997) (holding that a potential delay created an unconstitutional burden since the delay created additional costs and the only purpose of the delay was to allow opponents to the variance to come forward).

47. 840 F.2d 293, 302 (5th Cir. 1988).

48. See *id.*

49. 342 N.E.2d at 540.

ing and construct a pastoral center, violated the church's right of free exercise of religion as guaranteed by the state's constitution.<sup>50</sup>

It is accurate to say, in the end, that the vast majority of First Amendment land use cases have held that inconvenience and expense are insufficient to meet the plaintiff's burden of proving a substantial burden on religious exercise.<sup>51</sup> RLUIPA changed that.

*2. After RLUIPA, More Courts Have Held That Inconvenience and Expense Are Sufficient Proof of Substantial Burden in Land Use Cases*

After RLUIPA was injected into the free exercise mix, the small split in authority over the use of cost and convenience in free exercise land use cases became more pronounced. At this point, it is difficult for local governments to be certain of their liabilities and obligations with respect to religious applicants in land use cases because of the split on the sufficiency of cost and/or inconvenience to trigger free exercise protection under RLUIPA. Indeed, in circuits where the issue has arisen repeatedly, there are even intra-circuit splits.<sup>52</sup>

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50. 930 P.2d at 325.

51. A few cases outside of land use also held that cost and/or inconvenience could be sufficient to establish a substantial burden. For example, in *Pentecostal House of Prayer, Inc.*, 380 N.E.2d at 1229, the Supreme Court of Indiana found that a statute requiring driver's licenses to bear a photograph of the licensee was unconstitutional as applied to members of the Pentecostal church whose religious beliefs prohibit them from owning, posing for or otherwise participating in any form of photography. The Supreme Court of Pennsylvania also found that costs associated with a county occupation tax violated priests' First Amendment rights in *Stajkowski*, 541 A.2d at 1387.

52. *Compare* Int'l Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037, 1046 (9th Cir. 2011) (paying lip service to the principle against finding substantial burden based on inconvenience but finding the potential for substantial burden where there were no properties currently on the market available to the church), *with* San Jose Christian Coll. v. City of Morgan Hill, 360 F. 3d 1024, 1031–32 (9th Cir. 2004) (finding no substantial burden under RLUIPA because other options for building were available to the religious group and the burden must be more than mere inconvenience), *and* Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 988–89 (9th Cir. 2006) (noting that laws must place more than a mere inconvenience on free exercise to constitute substantial burden). *Compare* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851–52 (7th Cir. 2007) (finding no substantial burden where other land was available), *and* Vision Church, United Methodist v. Vill. of Long Grove, 468 F.3d 975, 993–94 (7th Cir. 2006) (rejecting inconvenience as a factor to prove substantial burden), *with* Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005) (finding a substantial burden where zoning laws would have required a church to look for other land and the process could cause delay, uncertainty, and expense).

Many decisions have followed the dominant doctrine established under the First Amendment and have held that cost and inconvenience are not sufficient to prove substantial burden in the land use context.<sup>53</sup> These courts delimited their interpretation of “substantial

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53. See *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531, 539 (7th Cir. 2009) (finding the designation of a building as a historic landmark was not a substantial burden, despite the church’s complaints of lost rents and lack of economic viability for residential use); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (finding that purely subjective burdens such as spiritual feelings and inconveniences cannot be deemed substantial); *Petra Presbyterian Church*, 489 F.3d at 851 (finding a zoning ordinance preventing a church from building in an industrial zone did not amount to a substantial burden under RLUIPA because there was other land the church could obtain; the further right to build is not a right, it is a privilege); *Vision Church*, 468 F.3d at 999 (finding the village’s zoning ordinance did not present a substantial burden to churches—despite construction restrictions, size and capacity limitations, and special use permits for construction of new churches—and holding that a law is not unconstitutional if the burden imposed is mere inconvenience); *Guru Nanak Sikh Soc’y of Yuba City*, 456 F.3d at 989 (finding a substantial burden under RLUIPA because the city’s rejection of observers church construction was inconsistently determined and also made it very difficult for the church to potentially build in the future, but still averring that the law must place more than a mere inconvenience on free exercise to constitute a substantial burden); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006) (interpreting substantial burden by reference to the Religious Freedom Restoration Act of 1993 (RFRA)); *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1323–24 (11th Cir. 2005) (finding no substantial burden under RLUIPA where zoning laws required a Rabbi to apply to the zoning board for an ordinance because this did not prohibit his religious activity); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (finding no substantial burden under RLUIPA where synagogues were excluded from being built in the business district because the burden has to be more than inconvenience or incidental effect); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (finding scarcity of affordable land for development, costs, procedural requirements, and inherent political aspects of zoning processes did not give rise to a substantial burden under RLUIPA); *San Jose Christian Coll.*, 360 F.3d at 1035–36 (finding no substantial burden under RLUIPA because other options for building were available to the religious group and interference must be more than mere inconvenience); *Church of Scientology of Georgia v. City of Sandy Springs*, No. 1:10-CV-00082-AT, 2012 WL 500263, at \*19–21 (N.D. Ga. Feb. 10, 2012) (explaining that no substantial burden exists “where the government action may make religious exercise more expensive or difficult but does not place substantial pressure on a religious institution to violate or forego its religious beliefs and does not effectively bar a religious institution from using its property in the exercise of its religion”); *Calvary Christian Ctr. v. City of Fredericksburg*, 800 F. Supp. 2d 760, 774 (E.D. Va. 2011); *Wesleyan Methodist Church of Canisteo v. Vill. of Canisteo*, 792 F. Supp. 2d 667, 673–74 (W.D.N.Y. 2011) (holding that expenditure of funds, delay and expense do not constitute substantial burden where the plaintiff did not purchase the property and knew all along that the city zoning code did not permit churches in the light industrial zone); *Roman Catholic Bishop v. City of Springfield*, 760 F. Supp. 2d 172, 188 (D. Mass. 2011) (finding no RLUIPA violation because the requirement that plaintiff submit an application for a certificate of appropriateness, non-applicability, or hardship to the city historical commission before altering church’s external architectural

burden” to a regulation that either prevents the religious adherent’s “engaging in conduct or having a religious experience which the faith mandates” or compels the individual to engage in behavior his faith eschews at all times; “[t]his interference must be more than an inconvenience.”<sup>54</sup> In *World Outreach Conference Center v. City of Chicago*, the Trinity Evangelical Lutheran Church sought to demolish its current building, which had been previously designated a landmark under the city’s preservation ordinance, in order to build a new Family Life Center.<sup>55</sup> The Seventh Circuit held the city’s refusal to allow the church to demolish the building was at most a modest burden on the church because it did not prevent them from selling the building

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features did not impose a substantial burden on free exercise); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 544–47 (D.D.C. 1994) (discussing substantial burden under RFRA and holding that the operation of a feed-the-homeless program at a church constituted protected religious activity triggering strict scrutiny); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283–84 (Alaska 1994) (finding no substantial burden on free exercise where plaintiff landlord chose to enter into a commercial activity regulated by anti-discrimination laws); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1346 (Haw. 1998) (finding mere “expense and inconvenience” do not constitute substantial burden, especially where the religious group failed to amend plans on file before beginning construction, thus making any burden likely self-inflicted); *Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt. Cnty.*, 962 A.2d 404, 428 (Md. 2008); *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 748 (Mich. 2007); *State of Mont. v. King Colony Ranch*, 350 P.2d 841, 843–44 (Mont. 1960) (finding that non-discriminatory tax on commercial agricultural activities does not interfere with free exercise of religion of commune members); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Sts. v. City of W. Linn*, 111 P.3d 1123, 1130 (Or. 2005) (finding that expenses associated with re-submitting an application “do not constitute substantial burden in and of themselves, nor does the requirement of submitting the application”); *Tran v. Gwinn*, 554 S.E.2d 63, 66–67 (Va. 2001) (finding that substantial burden must be more than minimal or incidental because the constitution tolerates financial costs associated with the permit process or relocation as that would not impact any religious belief or practice); *City of Woodinville v. Northshore United Church of Christ*, 211 P.3d 406, 411 (Wash. 2009) (finding that a burden can be a slight inconvenience without violating free exercise, but holding that although feeding the homeless is not at the “core” of protected worship, a city’s moratorium on all land use permit applications placed a substantial burden on the church in violation of the church’s constitutional right to religious freedom under the Washington State Constitution, Article 1, which here provided greater protections than the U.S. Constitution); *Open Door Baptist Church v. Clark Cnty.*, 995 P.2d 33, 43–44, 46–48 (Wash. 2000) (finding that mere inability to pay for permit requirements does not rise to the level of a cognizable burden, and noting that burdens of convenience or expense are likely not substantial).

54. *San Jose Christian Coll. v. City of Morgan Hill*, No. C091-20857, 2001 WL 1862224, at \*2 (N.D. Cal. Nov. 14, 2001) (citation omitted), *aff’d*, 360 F.3d 1024 (9th Cir. 2004).

55. 591 F.3d at 538–39.

and using the proceeds to build a family life center elsewhere.<sup>56</sup> In *Vision Church v. Village of Long Grove*, Vision Church claimed that the city's building codes were a substantial burden under RLUIPA.<sup>57</sup> The court, however, held that "these conditions—which included limitations on future development, on the use of a particular outdoor area, and on Sunday and weekly activities—are no more than incidental burdens on the exercise of religion" and did not rise to the level of a substantial burden under RLUIPA.<sup>58</sup> In *Konikov v. Orange County, Florida*, a rabbi claimed a local zoning ordinance that required application for a special exception in order to operate a religious organization was a substantial burden under RLUIPA.<sup>59</sup> The Eleventh Circuit rejected the rabbi's claim, holding that an "application for a special exception does not coerce conformity of a religious adherent's behavior" and "does not impose a substantial burden as defined by RLUIPA."<sup>60</sup>

Other decisions show that RLUIPA litigation has opened the door to the expansion of a right to avoid mere inconvenience and expense for religious developers. In *Saints Constantine and Helen Greek Orthodox Church v. City of New Berlin*, Judge Richard Posner reversed the District Court's finding of no discrimination<sup>61</sup> and found that requiring the church in question to search for other parcels of land or to continue to file applications with the city constituted a substantial burden as there would have been "delay, uncertainty, and expense."<sup>62</sup> Additional courts have also held that mere cost and inconvenience in the land use context can be sufficient to prove substantial burden in RLUIPA cases.<sup>63</sup>

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, the court held that the denial of a conditional use permit imposed a substantial burden on the church's religious beliefs when it was prohibited from building "a large and multi-faceted church" sufficient to

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56. *Id.*

57. 468 F.3d at 998–99.

58. *Id.*

59. 410 F.3d at 1322.

60. *Id.* at 1323–24.

61. 396 F.3d 895, 901 (7th Cir. 2005).

62. *Id.*

63. *See, e.g.,* Int'l Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037, 1046–47 (9th Cir. 2011); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007); DiLaura v. Twp. of Ann Arbor, 112 F. App'x 445, 446 (6th Cir. 2004); Reaching Hearts Int'l, Inc. v. Prince George's Cnty., 584 F. Supp. 2d 766, 786 (D. Md. 2008), *aff'd*, 368 F. App'x 370, 373 (4th Cir. 2010); Barr v. City of Sinton, 295 S.W. 3d 287, 296–97, 300–05 (Tex. 2009).

permit its 4000 person congregation to meet in one service and to accommodate its other programs.<sup>64</sup> Similarly, relying on the Church's realtor who testified that no other suitable properties existed, the Ninth Circuit in *International Church of the Foursquare Gospel v. City of San Leandro* found that "when the religious institution 'ha[d] no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the [religious institution's] application might be indicative of a substantial burden.'"<sup>65</sup> The theory that convenience or expense can constitute a substantial burden triggering free exercise protection was not novel in RLUIPA cases, as discussed above, but it has become more prevalent.

Whether cost and/or inconvenience can be sufficient to prove a substantial burden in free exercise land use cases is an important issue for every city, town, village, municipality, county, state, and locality in the United States. Cost and convenience are factors that affect every land use applicant, religious or not. If cost and/or inconvenience are sufficient to trigger free exercise protection, local governments need to know. But, more importantly, these criteria make RLUIPA plainly unconstitutional.

## II. PERMITTING RELIGIOUS LANDOWNERS TO AVOID LOCAL LAND USE LAWS BECAUSE THEY CAUSE EXPENSE OR INCONVENIENCE VIOLATES FEDERALISM AND THE ESTABLISHMENT CLAUSE

In another Article, *The Constitutional Limitations on Congress's Power Over Local Land Use*, I established why RLUIPA's section 2(a), authorizing federal interference with local land use decision-making, is unconstitutional—it violates the principles of federalism.<sup>66</sup> In this Article, I focus on an interpretation of one term in RLUIPA and the First Amendment—"substantial burden"—and argue that that this interpretation is unconstitutional.<sup>67</sup>

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64. 218 F. Supp. 2d 1203, 1227 (C.D. Cal. 2002).

65. 634 F.3d at 1046 (quoting *Westchester Day Sch.*, 504 F.3d at 349) (citations omitted).

66. *Constitutional Limitations on Congress's Power Over Local Land Use*, *supra* note 2, at 411–15.

67. It is not clear that the Supreme Court would uphold the land use provision of RLUIPA. Justice Thomas, concurring in *Cutter v. Wilkinson*, wrote that RLUIPA "may well exceed Congress' authority under either the Spending Clause or the Commerce Clause." 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring); *see also*

### A. The Criteria of Inconvenience and Cost to Establish a Substantial Burden in the Land Use Context Violate Federalism

When a court interprets “substantial burden” under either the First Amendment or RLUIPA to hold that cost and convenience are sufficient in a land use case, it impermissibly interferes with and compromises local and state control over land use. While the federal government has imposed upon local and state governments to prevent and deter discrimination based on race, color, national origin, religion, sex, familial status, and handicap (through the Fair Housing Act, for example),<sup>68</sup> its reach has not extended to the sorts of land use issues burdened by RLUIPA. These concerns include setbacks, height restrictions, lot size requirements, and the other standard local issues in these processes, which are unique to each community.

Whether secular or religious, landowners often experience cost and inconvenience as part of the land use process, as most zoning laws are neutral and of general applicability. RLUIPA is only triggered if there has been an individualized assessment.<sup>69</sup> As discussed above,

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*Constitutional Limitations on Congress’s Power over Local Land Use*, *supra* note 2, at 426.

68. The Fair Housing Act is codified at 42 U.S.C. §§ 3601–3619 (2006).

69. *See, e.g.*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 273–74 (3d Cir. 2007) (following the Tenth Circuit’s approach to individualized assessments and finding that even if a zoning ordinance allows for some individualized determinations, it does not trigger strict scrutiny under the Free Exercise Clause if it is secularly motivated and it affects all landowners seeking land in the area equally); *Westchester Day Sch.*, 504 F.3d at 354 (finding RLUIPA’s jurisdictional element met under the Commerce Clause in response to plaintiff’s assertion “that the substantial burden on its religious exercise affects interstate commerce and that it is imposed through formal procedures that permit the government to make individualized assessments of the proposed uses for the property involved,” but not reaching the question of the 14th Amendment’s Section 5 powers); *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 987 (9th Cir. 2006) (finding RLUIPA applicable because the zoning board’s determination of whether to grant a permit was an “individualized” assessment, as it took into account the particular details of the applicant before it); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654–55 (10th Cir. 2006) (discussing the “individualized exceptions” inquiry under the Free Exercise Clause and noting that exemption-free laws are considered generally applicable and religious groups cannot claim a right to exemption, but when the law has secular exemptions, a challenge by a religious group becomes possible because subjective assessment systems inviting consideration of the particular circumstances behind an applicant’s actions triggers strict scrutiny); *Reaching Hearts Int’l, Inc. v. Prince George’s Cnty.*, 584 F. Supp. 2d 766, 784 (D. Md. 2008), *aff’d*, 368 F. App’x 370, 373 (4th Cir. 2010) (noting numerous individual assessments made “over the course of the three years in which RHI presented applications to build its church in conformity with the applicable laws at the time” and discussing RLUIPA’s legislative history).



cost and inconvenience have been insufficient to show a due process violation for the secular landowner.<sup>70</sup>

Courts have been hesitant to apply the cost or convenience standard in due process claims because:

[E]very appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or “distorted” its legal authority in some manner, often for some allegedly perverse (from the developer’s point of view) reason. For that reason, we have generally been hesitant to “involve federal courts in the rights and wrongs of local planning disputes’ unless there is a ‘truly horrendous situation [ ]’<sup>71</sup>

There is no better argument in the free exercise context. The use of these criteria to trigger free exercise protection is in direct conflict with the long line of Supreme Court cases that have held that the courts should not interfere with local land use decisions.<sup>72</sup>

In contrast, the circuits that have rejected convenience and expense have crafted standards that are consistent with federalism. For in-

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70. See *supra* notes 44–53 and accompanying text.

71. *Mongeau v. City of Marlborough*, 492 F.3d 14, 19 (1st Cir. 2007) (quoting *Creative Env’ts v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) and *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992) (internal citations omitted)).

72. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 482–83 (2005) (recognizing the deference owed to local officials in exercises in urban planning and development); *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (holding mere enactment of regulations implementing moratoria against all viable economic use of petitioners’ property did not constitute a per se taking under the Fifth Amendment); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps. of Eng’rs.*, 531 U.S. 159, 174 (2001) (noting that States hold traditional and primary power over land and water use); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”); *Fed. Energy Regulatory Comm’n v. Miss.*, 456 U.S. 742, 767 n.30 (1982) (“[R]egulation of land use is perhaps the quintessential state activity.”); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 402 (1979) (“The regulation of land use is traditionally a function performed by local governments.”); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (explaining that because legislators and administrators are properly concerned with balancing numerous competing considerations in zoning decisions, courts should refrain from reviewing the merits of their decisions absent a showing of arbitrariness, irrationality, or proof of discriminatory purpose); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) (“[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities.”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (upholding Congress’s police power over the District of Columbia to enact a redevelopment project to improve public health and safety); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 607 (1908) (deferring to the state and local governments on land use and zoning issues).

stance, the Eleventh Circuit has found that a substantial burden must genuinely disrupt a religious landowner from engaging in his religion.

[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. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.<sup>73</sup>

This is the sort of standard that can divide the potentially discriminatory from the non-discriminatory cases. If the religious adherent is not experiencing a substantial burden in this vein, free exercise is *carte blanche* for religious entities to use their status to game the land use system.

#### **B. The Criteria of Cost and Inconvenience in the Land Use Context Violate the Establishment Clause**

Secular land developers have been incentivized to factor cost and convenience associated with land use into their calculations when they undertake a major project. They have due process rights against arbitrary and capricious or irrational decisions, and against decisions that “shock the conscience,” but they must also factor the ordinary costs of development into their calculations.<sup>74</sup> Until RLUIPA, religious landowners had the same incentives to handle their financial affairs. Now the courts have created the possibility that in some jurisdictions they will be able to overcome local land use law even if the only burden is the ordinary burden of all developers.

This is a financial privilege that violates the Establishment Clause. First, it is financial support for religious exercise, including worship and mission.<sup>75</sup> “The Establishment Clause prohibits ‘sponsorship, fi-

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73. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

74. *See supra* text accompanying notes 25, 28.

75. *See, e.g., Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (finding substantial burden on religious Church since they would have been forced to accrue “delay, uncertainty, and expense” by “search[ing] around for other parcels of land . . . or . . . continu[ing] filing applications with the City.”); *Barr v. City of Sinton*, 295 S.W.3d 287, 301–02 (Tex. 2009) (finding Texas zoning law unconstitutional after fact-specific inquiry, conducted from perspective of worshiper, into burden on religious worship).

financial support, and active involvement of the sovereign in religious activity.”<sup>76</sup>

Second, by treating cost and convenience as adequate to show a substantial burden on religious exercise by religious landowners, the treatment of landowners across the community is no longer neutral.<sup>77</sup>

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.<sup>78</sup>

Third, the land use context is a zero-sum game, so that when the religious landowner can trump the local land use laws through RLUIPA, it is pushing back against the interests behind the law. Thus, a religious landowner who circumvents the restrictions in a residential neighborhood undermines the interests of the neighboring homeowners and, actually, all homeowners in the community who face the same scenario in future. The financial privilege that flows from being able to satisfy “substantial burden” with evidence of mere inconvenience or cost thus disables the residential neighbors. In addition, the costs of the process are shifted from the religious landowner to the taxpayers and neighbors. Yet, “government . . . may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.”<sup>79</sup>

Land use cases are most closely analogous to the tax cases, in which the Supreme Court has rejected the argument that opposition to a government expenditure or tax can exempt the religious believer from the obligation to comply with a neutral, generally applicable

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76. *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 393 (1990).

77. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (discussing the “wholesome neutrality” principle which stems from “the teachings of history that powerful sects or groups might bring about a . . . dependency of one upon the other to the end that official support of the . . . Government would be placed behind the tenets of one or of all orthodoxies.”)

78. *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

79. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

law.<sup>80</sup> Similarly, parents who send their children to private, religious schools do not have a corresponding right to avoid paying taxes that support the public schools. Religious believers are required to be contributing members of the community at large, even when they do not agree with all of the government's decisions. RLUIPA has reversed this norm, inviting religious landowners to believe that they do not need to consider, take into account, or be accountable to the impact of their land uses on others. Indeed, in a number of recent cases, they have refused to participate in the process at all.<sup>81</sup>

When non-religious landowners' property values change or the character of their neighborhood or community is altered because of the imposition of the religious organization's religious vision and mission, they suffer from the discrimination that results from the favoritism that RLUIPA fosters. RLUIPA further invites local governments, avoiding expensive litigation, to approve the creation of religiously defined enclaves, which alienate and disenfranchise nonadherents in the community. It is commonplace for existing neighbors concerned about the introduction of an intense religious use to be told that they should not care, because the entering religious believers will buy them out.<sup>82</sup>

These three factors, taken alone or together, violate fundamental principles reflected in the Establishment Clause and promulgated by the Framers themselves: "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."<sup>83</sup>

In drafting the First Amendment, Madison was concerned not only about the union of church and state power, but also the raw accumulation of too much power in the hands of religion.<sup>84</sup> Proponents of

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80. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 260 (1982).

81. *See* *Congregation Anshei Roosevelt v. Planning & Zoning Bd. of Roosevelt*, 338 F. App'x 214, 218–19 (3d Cir. 2009) (holding claim was not ripe for review because Congregation did not even apply for zoning variance prior to bringing RLUIPA claim); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, No. 7:07-CV-06304-KMK (S.D.N.Y. argued May 20, 2009).

82. *See* *AMERICA'S HOLY WAR* (Moon Dance Films 2011); Statement of a neighbor of a Mormon Temple in Belmont, Mass. (on file with author).

83. *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 668 (1970).

84. *See* Ralph L. Ketcham, *James Madison and Religion, a New Hypothesis*, in *JAMES MADISON ON RELIGIOUS LIBERTY* 175, 188 (Robert S. Alley ed., 1985); *id.* at 191 (stating that Madison believed that a "[u]nion of religious sentiments begets a surprising confidence, and ecclesiastical establishments tend to great ignorance and corruption; all of which facilitate the execution of mischievous projects." Madison

RLUIPA argue that there is nothing wrong with allowing religious institutions to stand on “equal” footing with secular institutions. The “cost” and “inconvenience” standard proffered by some courts, however, is hardly equal, and vests religious institutions with an enormous newfound power that secular land owners do not have.

Without RLUIPA, religious landowners could still bring Free Exercise claims under neutral, generally applicable zoning laws that substantially burdened the free exercise of their religion. RLUIPA’s encouragement of a cost or inconvenience analysis, however, is a clear violation of Madison’s Establishment principle. The Establishment Clause was enacted to protect society from religion cloaking itself in state power or leveraging state resources to its own ends.<sup>85</sup> By measuring the level of “inconvenience” of a religious landowner, the federal government has made it possible for religious institutions to commandeer and take advantage of the state and local governments and their relevant communities.

### CONCLUSION

Causing religious organizations to experience inconvenience or expense in the land use context is a far cry from the alleged widespread discrimination that was the purported basis for RLUIPA. When statutes are enacted solely based on one side’s self-interested studies and preferences, as with RLUIPA, the law of unintended consequences has special force.<sup>86</sup> RLUIPA has invaded residential neighborhoods and disabled opponents of ambitious land use projects wherever the developer is a religious entity or person.<sup>87</sup> Part of its invasiveness is a

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also stated that “a variety of sects” is necessary to avoid tyranny resulting where there is a “majority of any sect.”).

85. See generally *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 183–91 (Robert A. Rutland & William M.E. Rachal eds., 1973) (chronicling Madison’s opposition to a Virginia legislative initiative to subsidize religion in the 1780s).

86. See *Federalism and the Public Good*, *supra* note 7 at 333–34 (explaining that after the Court invalidated RFRA, Congress introduced the Religious Liberty Protection Acts of 1998 and 1999 (RLPA), but these acts were withdrawn and instead of holding new hearings to consider RLUIPA, Congress relied on the evidence presented during RLPA’s hearings, and RLUIPA is not supported by an independent Congressional record).

87. See *id.*; see also, e.g., Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 841 (2006) (“[A] statute that Congress meant to be a tool against intentional religious discrimination [has instead been] an impediment to the valid application of local zoning ordinances.”); Kevin M. Powers, *The Sword and the Shield: RLUIPA and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB.

result of unconstitutional interpretations of the plaintiff's burden in proving "substantial burden." Just as the Framers would have expected, an entity with power—in this case, religious landowners—have pushed to obtain even more than they have been given.

The proponents of RLUIPA have tried numerous rhetorical tricks to make it sound as though it was an ordinary statute needed to aid against discrimination. One of those ruses is to characterize it as though it was passed unanimously, which puts pressure on courts to think twice before invalidating it. RLUIPA was not passed unanimously. Rather, it was passed by "unanimous consent," after all members in opposition, and most other members as well, had left for the 2000 summer break. Unanimous consent is a procedure by which the leadership brings bills to the floor with few members present.<sup>88</sup> To label RLUIPA's passage as either a "unanimous vote" or even a "unanimous voice vote" is incorrect and misleading.

It is also misleading to equate inconvenience and expense in the land use context with discrimination. Cost and inconvenience are the price developers pay to obtain approvals. When a religious developer can avoid either simply because it is religious—whether under the First Amendment or the Religious Land Use and Institutionalized Persons Act—the principles of federalism and separation of church and state have been sacrificed.

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INT. L.J. 145, 146 (2004) (noting that RLUIPA is a "potent weapon in the quiver of religious groups"); Note, *Religious Land Use in the Federal Courts After RLUIPA*, 120 HARV. L. REV. 2178, 2179 (2007) (discussing how "RLUIPA has not only restored the right to religious exemptions from land use laws to its pre-Smith status, but also broadened this right considerably."); Corey Mertes, Note, *God's Little Acre: Religious Land Use and the Separation of Church and State*, 74 UMKC L. REV. 221, 234–35 (2005) (crediting RLUIPA's "substantial and negative" impact on city governments to the Department of Justice's "unusually active role" in supporting religious plaintiffs as "part of a larger assault on the wall traditionally separating church and state"); Sara Smolik, Note, *The Utility and Efficacy of the RLUIPA: Was It a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723, 759 (2004) (explaining that RLUIPA has created "an atmosphere in which religious liberty is more easily protected by courts uncertain of how far to push the limits of *Smith*").

88. Letter from Mark Strand, Adjunct Professor of Legislative Politics at George Washington University Graduate School of Political Management, to author (Mar. 5, 2012) (on file with the author).