

Fordham Urban Law Journal

Volume 39 | Number 4

Article 9

February 2016

The Effect of RLUIPA's Land Use Provisions on Local Governments

Alan C. Weinstein

Cleveland-Marshall College of Law and Levin College of Urban Affairs, Cleveland State University

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Legislation Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provisions on Local Governments*, 39 Fordham Urb. L.J. 1221 (2012).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss4/9>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE EFFECT OF RLUIPA’S LAND USE PROVISIONS ON LOCAL GOVERNMENTS

*Alan C. Weinstein**

Introduction	1221
A. The Legal Context for RLUIPA	1221
B. The Social Context for RLUIPA	1224
C. The Land Use Regulation Context for RLUIPA.....	1228
I. RLUIPA Basics	1230
A. Coverage and Claims	1230
B. Constitutionality.....	1233
C. RLUIPA Litigation.....	1233
D. Role of the Beckett Fund and the U.S. Justice Department in RLUIPA Litigation	1238
II. The Effect of RLUIPA on Local Governments.....	1239
A. What We Do Know – and What We Don’t – About RLUIPA Litigation.....	1239
1. Amount of Litigation	1239
2. Outcomes of RLUIPA Litigation.....	1240
B. How RLUIPA Has Changed Local Land Use Regulation.....	1242
Conclusion.....	1247

INTRODUCTION

A. The Legal Context for RLUIPA

The past three decades have seen startling changes in the way courts approach disputes involving claims by individuals or religious institutions that local land use regulations have infringed on rights protected by the First Amendment’s guarantee of religious freedom.¹

*Associate Professor & Director, Law & Public Policy Program, Cleveland-Marshall College of Law and Levin College of Urban Affairs, Cleveland State University.

1. See U.S. CONST. amend. I. The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” The religion clauses of the First Amendment were held applicable to the actions of state and local government through incorporation in the Fourteenth

Prior to 1983, no federal court of appeals had considered a case involving land use regulation of religious institutions.² Such litigation was confined almost totally to state courts, which analyzed challenges to land use regulations based on a substantive due process analysis.³ State courts split on the issue of whether religious institutions should be treated the same as any other institution, with land use controls subject only to rational basis review when challenged, or whether religious institutions should be entitled to preferential treatment, with challenges to land use controls subjected to heightened scrutiny. The majority of states favored the latter approach.⁴

In 1983, the Sixth and Eleventh Circuit Courts of Appeal each applied a balancing test based on the Supreme Court's free exercise cases to uphold a zoning regulation that excluded a house of worship from a particular zoning district.⁵ In the wake of those decisions, zoning disputes increasingly shifted to the federal courts and several states reconsidered their doctrinal approach to such disputes, either modifying the due process analysis to eliminate preferential treatment for religious institutions or shifting to a free exercise balancing test.⁶

The next significant change came in 1990, when the U.S. Supreme Court unexpectedly abandoned its strict scrutiny standard for free exercise claims. In that year's *Smith* decision, the Court announced that courts should not grant exemptions from neutral laws of general applicability, such as land use regulations, even where these laws substantially burden religious freedom.⁷ The *Smith* decision was widely denounced by religious groups, which lobbied for Congressional action to "restore" the strict scrutiny standard that the Court had discarded in *Smith*.⁸ That effort led to the enactment of the federal Re-

Amendment in *Everson v. Board of Ed.*, 330 U.S. 1, 8 (1947) (establishment clause) and *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (free exercise clause).

2. See Richard J. Roddewig, *Recent Developments in Land Use, Planning and Zoning*, 21 URB. LAW. 769, 806 (1989).

3. See BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* 661 (2011).

4. See *id.* §§ 7.10–7.12.

5. See *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729, 734 (11th Cir. 1983); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 306 (6th Cir. 1983).

6. See BLAESSER & WEINSTEIN, *supra* note 3, at §§ 7:13–14.

7. See *Emp. Div. v. Smith*, 494 U.S. 872, 882 (1990).

8. See *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. 22 (1999) (statement of Von G. Keetch, Counsel, Church of Jesus Christ of Latter-Day Saints); *id.* at 91 (statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism); *id.* at 130 (statement of Oliver S. Thomas,

religious Freedom Restoration Act (RFRA) in 1993;⁹ however, RFRA proved to be short-lived. In 1997, the Court held that the Act was unconstitutional as it applied to state and local governments, ruling that it exceeded the authority of Congress under the enforcement clause of the Fourteenth Amendment and violated separation of powers principles.¹⁰ Although RFRA was gone, a number of states had enacted their own religious freedom statutes in reaction to *Smith* and these were, of course, unaffected by the Court's action.¹¹

In 2000, after two failed efforts,¹² Congress enacted a new religious freedom statute, the Religious Land Use & Institutionalized Persons Act (RLUIPA), which was explicitly drafted to cure the constitutional defects that had doomed RFRA.¹³ As opposed to the broad reach

Special Counsel for Religious and Civil Liberties, National Council of Churches); *Religious Liberty: Hearing Before the S. Comm. on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong. 36 (statement of Michael P. Farris, President, Home School Legal Defense Association); see also *City of Boerne v. Flores*, 521 U.S. 507, 514–15 (1997) (acknowledging that public criticism of the Court's ruling in *Smith* led to the passage of RFRA). The hostility of religious and political groups to the *Smith* decision was not abated in the least by the Court's 1993 ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that facially neutral laws which are found to target religion are not neutral laws of general applicability and remain subject to strict scrutiny.

9. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 5 U.S.C. § 504 (2006), 42 U.S.C. §§ 1988 (2006), 2000(bb) *et seq.* (2006 & Supp. IV 2011)). See generally Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883 (1994).

10. See *Boerne*, 521 U.S. at 508. RFRA remains constitutional as applied to the federal government. See, e.g., *Kikumura v. Hurley*, 242 F.3d 950, 958 (10th Cir. 2001) (holding *Boerne* inapplicable to instances where RFRA was not being applied to States); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000) (holding that the Supreme Court “invalidated RFRA only as applied to state and local law”).

11. See BLAESSER & WEINSTEIN, *supra* note 3, § 7:6. See generally Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 *U.C. DAVIS L. REV.* 755 (1999) [hereinafter Laycock, *State RFRAs*]; Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 *S.D. L. REV.* 466 (2010).

12. See The Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1997), and The Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999). Each would have had the effect of restoring the strict scrutiny test to any state law that came within: (1) Congressional authority under the Commerce and Spending Clauses and (2) the Enforcement Clause test in *City of Boerne v. Flores*. See generally Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 *IND. L.J.* 311 (2003) [hereinafter Hamilton, *Federalism and the Public Good*].

13. See 146 *CONG. REC.* S6678-02, S6687-88 (daily ed. July 13, 2000) (statement of Sen. Hatch). For contrasting views on the need for and constitutionality of RLUIPA, compare Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional*

of the Religious Liberty Protection Acts that had been rejected in 1998 and 1999, RLUIPA, as its name indicated, applied in only two contexts: land use and prisons.¹⁴ As regards land use, it restored the strict scrutiny test for land use regulations that impose a substantial burden on religious expression and added prohibitions on discriminating against or excluding religious institutions.¹⁵ This Article examines the effect of RLUIPA's land use provisions on local governments.¹⁶

B. The Social Context for RLUIPA

The past three decades have seen significant changes to the social context in which disputes occur over the application of local zoning and historic preservation ordinances to houses of worship and other "religious" property. These disputes have become more prevalent.¹⁷

Zoning Practices, 9 GEO. MASON L. REV. 929 (2001) (positive view of statute), with 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 (2009) [hereinafter Hamilton, *Constitutional Limitations*] and Hamilton, *Federalism and the Public Good*, *supra* note 12 (critical views of statute). See also Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1783 n.16 (2010).

14. See Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 207–08 (2008) (discussing reasons the statute only covers land use and institutionalized persons). This Article considers only the land use provisions of RLUIPA.

15. See *infra* Part II.A.

16. In *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005), the Court unanimously upheld the constitutionality of RLUIPA's institutionalized persons provision against a claim that it violated the establishment clause. See generally BLAESSER & WEINSTEIN, *supra* note 3, § 7:6, p. 716.

17. The author conducted three searches of the Westlaw ALLCASES database on February 7, 2012. The first, using the terms "Religious Freedom Restoration Act" and "zon!" with a date restriction of 1993–1997 to cover the period when RFRA was in force, produced forty-eight citations, with fewer than twenty involving a religious institution's challenge to a land use regulation. The second search, using the terms "Religious Land Use & Institutionalized Persons Act" and "zon! % inmate! prison!" with a date restriction of 2000–2004, covering a period from the enactment of RLUIPA roughly similar to the time RFRA was in force, produced sixty citations, fifty-nine of which were cases involving a religious institution's challenge to a land use regulation. In short, the number of challenges to land use regulations during the first four years RLUIPA was in force was 200 percent greater than the number of challenges during the four years RFRA was in force. A third search, using the terms "Religious Land Use & Institutionalized Persons Act" and "zon! % inmate! prison!" with a date restriction of 2000–2012, produced 261 citations, a number of them involving the same claim at different procedural steps, almost all of which were cases involving a religious institution's challenge to a land use regulation.

Obviously, the enactment of RLUIPA itself has played a major role in that escalation,¹⁸ but there are larger factors at work that predate RLUIPA.

First, houses of worship today are more likely to be perceived as inflicting negative effects on neighboring properties. New churches, and older ones seeking to expand an existing use, are often significantly larger than the churches of earlier eras and use their facilities more intensively. In addition to religious services, many churches sponsor schools, day-care centers, adult education classes, a variety of programming serving different age groups, and various faith-based “support” groups.¹⁹ Some churches also provide shelter for the homeless and meals for the indigent.²⁰ Many houses of worship also have venues where wedding receptions or bar/bat mitzvah celebrations are held late into the night on weekends. As church activities expand to twelve or more hours per day, seven days a week, neighbors become increasingly concerned about the negative effects of the increased traffic, parking, noise, and late-night activity on property values.

Of course, any new or expanded “non-residential” development proposed for a residential neighborhood—the traditional locale for houses of worship—is likely to be opposed by neighbors. But the classic “NIMBY” phenomenon²¹ poses additional difficulties with re-

18. See, e.g., Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 436 (2006) (arguing that RLUIPA “gives religious land owners an almost irresistible incentive to assert claims of religious discrimination if they face opposition to their use or proposal, if only to gain strategic leverage in the land use approval process”).

19. See Heather M. Welch, *The Religious Land Use and Institutionalized Persons Act and Mega-Churches: Demonstrating the Limits of Religious Land Use Exemptions in Federal Legislation*, 39 U. BALT. L. REV. 255, 281–83 (2010). See generally Jennifer S. Evans-Cowley & Kenneth Pearlman, *Six Flags Over Jesus: RLUIPA, Megachurches, and Zoning*, 21 TUL. ENVTL. L.J. 203 (2008) (discussing the growth of mega-churches and their impact on local zoning regulations); David A. Zucco, *Super-Sized with Fries: Regulating Religious Land Use in the Era of Megachurches*, 88 MINN. L. REV. 416 (2003) (exploring the unique zoning challenges presented by mega-churches); Jim Schwab, *Zoning and Big Box Religion*, ZONING NEWS (Am. Planning Ass’n, Chicago, IL), Nov. 1996, at 1 (discussing the emergence of “megachurches” that can have a substantial impact on surrounding land uses).

20. See, e.g., *Fifth Ave. Presbyterian Church v. City of New York*, No. 01 Civ. 11493 (LMM), 2004 WL 2471406 (S.D.N.Y. Oct. 29, 2004), *aff’d*, 177 Fed. Appx. 198 (2d Cir. 2006); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 849 F. Supp. 77 (D.D.C. 1994).

21. NIMBY, an acronym for “not in my backyard,” refers to organized opposition to proposed land uses proximate to existing residential communities. See generally Kurt F. Pantzer Jr., *NIMBY: Opposing a Land Use Change*, 5 PROB. & PROP. 28 (1991).

spect to houses of worship because of recent changes in the manner in which Americans worship. Where previous generations attended houses of worship in their own neighborhoods, commentators have noted that today, “religious institutions serve populations that are less and less centered in the geographic communities in which they are located.”²² Thus, a proposed house of worship is likely to be seen by its neighbors as providing few benefits—since most of them will not be members—while imposing burdens such as increased traffic, parking difficulties, noise, and the potential for negative effects on property values.

The rapidly increasing scope of our religious diversity may also be a factor in some land use disputes involving religious institutions. Traditionally, the major religious institutions in most American communities were those affiliated with the Catholic Church or “mainstream” Protestant denominations such as Lutheran, Baptist, Methodist, and Presbyterian, with larger cities also home to a variety of Jewish, Eastern Orthodox, and smaller Christian denominations.²³ In contrast, today’s fastest-growing religious groups—Mormon, Evangelical Christian, Orthodox Muslim, Hindu, Sikh, Buddhist, and ultra-Orthodox Jewish²⁴—which were previously either geographically isolated (*e.g.*, Mormons in Utah and ultra-Orthodox Jews in New York City) or only a minor presence until their numbers were swelled by

22. Marc D. Stern, *Zoning for Churches: Guidelines, But No Magic Formula*, 7 RESPONSIVE COMMUNITY 69, 70 (1997).

23. The increasing geographical diversity of minority religions can be documented at the *Directory of Religious Centers*, PLURALISM PROJECT HARV. U., <http://pluralism.org/directory/index.php> (last visited June 12, 2012) (7636 centers listed). For a historical perspective on geographical changes for religious denominations, see EDWIN SCOTT GAUSTAD & PHILIP L. BARLOW, *NEW HISTORICAL ATLAS OF RELIGION IN AMERICA* 357–94 (2000).

24. Studies of religious self-identification in the United States conducted in 1990, 2001, and 2008 show that although the absolute number of adult Americans who self-identify as “Christian” increased 14.66% between 1990 (151,225,000) and 2008 (173,402,000), (a finding that is not unexpected given the overall population growth during that period), the percentage of adult Americans who self-identify as “Christian” fell from 86.2% in 1990 to 76% in 2008, a relative decrease of almost 12%. During that same period both the absolute number and the percentage of adult Americans who self-identify as “Other Religions” (*i.e.*, non-Christian) rose from 5,853,000 (3.3%) in 1990 to 8,796,000 (3.9%) in 2008. Those numbers represent a population increase among adult non-Christians of over 50% and a relative increase of over 18% in the representation of non-Christian Americans in the general adult population. See BARRY A. KOSMIN & ARIELA KEYSAR, *AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS 2008) SUMMARY REPORT 3 tbl.1* (2009).

recent immigrants (*e.g.*, Hindus, Buddhists, Sikhs, and Muslims)—may be found in almost any American community.²⁵

At times, the entry of such “nonmainstream” groups into a community—or the local community’s reaction to it—can lead to land use conflicts. A 1999 study of all then-reported cases in the zoning and land use context claims that its findings “strongly suggest that a high percentage of cases are being contested by religious groups comprising a very small percentage of the total population.”²⁶ This pattern appears to be continuing in the cases brought under RLUIPA.²⁷ Why is this so? On the one hand, the arrival of a new religious denomination—if it is small and impecunious—can lead to conflict if the members of the fledgling congregation seek to worship or study regularly in a private home,²⁸ rented storefront,²⁹ or an industrially-zoned

25. *See, e.g.*, *Guru Nanak Sikh Society of Yuba City v. Cnty. of Sutter*, 326 F. Supp. 2d 1140 (E.D. Cal. 2003), *aff’d*, 456 F.3d 978 (9th Cir. 2006) (Sikhs in Yuba City, California); *Islamic Ctr. of Miss., Inc. v. City of Starksville*, 876 F.2d 465 (5th Cir. 1989) (Muslims in Starksville, Mississippi); *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n of Newtown*, 941 A.2d 868 (Conn. 2008) (Buddhists in Newtown, Connecticut); *Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 747 N.E.2d 131 (Mass. 2001) (Mormons in Belmont, Massachusetts).

26. Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 739 tbl.2, 740 (1999).

27. *See, e.g.*, Roman P. Storzer, *The Perspective of the Religious Land Use Applicant*, in *RLUIPA READER: RELIGIOUS LAND USES, ZONING AND THE COURTS* 43, 48 (Michael S. Giaimo & Lora A. Lucero eds., 2009) (“After eight years of RLUIPA, there can be little doubt that lawsuits are disproportionately brought by minority or nontraditional faith groups”); UNITED STATES DEPARTMENT OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 13 (2010) [hereinafter REPORT], available at http://www.justice.gov/crt/rluipa_report_092210.pdf (“Animus-based discrimination remains a priority. Jewish synagogues and schools, African-American churches, and, increasingly, Muslim mosques and schools are particularly vulnerable to discriminatory zoning actions taken by local officials, often under community pressure. Increasing hostility and misunderstanding requires vigilant enforcement of the law to prevent such actions and ensure officials understand their responsibilities.”).

28. *See, e.g.*, *Murphy v. Zoning Comm’n of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003), *judgment vacated on other grounds sub nom. Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342 (2d Cir. 2005) (challenging attendance restriction on prayer meetings in a private home); *Konikov v. Orange Cnty., Fla.*, 302 F. Supp. 2d 1328 (M.D. Fla. 2004), *aff’d in part, rev’d in part and remanded*, 410 F.3d 1317 (11th Cir. 2005) (challenging restriction on conducting religious services in a private home).

29. *See, e.g.*, *Dixon v. Town of Coats*, No. 5:08-CV-489-BR, 2010 WL 2347506, at *1 (E.D.N.C. June 9, 2010); *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280, 1284 (S.D. Fla. 2008); *Madain v. City of Stanton*, 111 Cal. Rptr. 3d 447, 451 (Ct. App. 2010).

building³⁰ and the neighbors or local officials claim the property is not zoned for use as a house of worship.

On the other hand, when a well-funded religious denomination arrives and seeks approval for a new, large house of worship—a Mormon temple³¹ or a “big box church”³² being paradigmatic cases—neighbors or local officials may again object, citing such traditional zoning concerns as effect on property values, traffic, parking, landscaping, et cetera, as the basis for their opposition. Local officials may also be concerned about erosion of the city’s tax base if too much property is acquired by tax-exempt religious institutions.³³ Regrettably, conflict may sometimes arise as a result of citizens’ and local officials’ antipathy for, and resulting discriminatory actions toward, the newly arrived or rapidly expanding denomination.³⁴

C. The Land Use Regulation Context for RLUIPA

Although a lengthy description or discussion of local regulation of land use is well beyond the scope of this Article,³⁵ it will be helpful to

30. *See, e.g.*, *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 634 F.3d 1037, 1039 (9th Cir. 2011).

31. *See, e.g.*, *Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141 (2001) (rejecting a neighbor’s challenge to the city’s exemption from normal height restrictions for a proposed eighty-three-foot high spire atop a Mormon temple).

32. *See, e.g.*, *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs of Boulder Cnty.*, 612 F. Supp. 2d 1163 (D. Colo. 2009), *aff’d*, 613 F.3d 1229 (10th Cir. 2010); *see also supra* text accompanying note 19.

33. *See, e.g.*, *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) (asserting that city denied church’s application to build on lot where city preferred to see commercial retail development center because of concerns about tax revenues).

34. Professor Douglas Laycock notes that there is suspicion of, or hostility to, religious intensity.

People who are religious themselves are often hostile to unfamiliar faiths, to high intensity faiths, and to the conservative and evangelical churches associated with the “Religious Right.” Thus in 1993, 45% of Americans admitted to “mostly unfavorable” or “very unfavorable” opinions of “religious fundamentalists,” and 86% admitted to mostly or very unfavorable opinions of “members of religious cults or sects.” In 1989, 30% of Americans said they would not like to have ‘religious fundamentalists’ as neighbors, and 62 percent said they would not like to have “members of minority religious sects or cults” as neighbors. A desire not to have members of a minority sect as neighbors is closely related to a desire not to have the minority sect’s church as a neighbor.

Laycock, *State RFRAs*, *supra* note 11, at 760 (citations omitted).

35. Readers interested in such descriptions/discussions should consider reading one or more of the following sources: RICHARD F. BABCOCK, *THE ZONING GAME*:

make some observations about the topic to provide a context for the discussion that follows in subsequent sections. First, a major goal of almost all zoning ordinances has been, and remains, to segregate “incompatible” land uses, with a focus on ensuring that single-family residential uses are shielded from more intensive multi-family residential, institutional, commercial and industrial uses.³⁶ Second, many, if not most, zoning decisions that actually apply an ordinance to a specific request for a zoning approval have some degree of subjectivity.³⁷ Third, disputes over land use approvals can be seen as fitting into two broad categories that I will call “plan disputes” and “neighbor disputes”; the categories are not mutually exclusive. By “plan dispute,” I mean a dispute that arises when the zoning for a particular property allows “x” and the property owner or developer seeks approval for “y,” with “x” and “y” referring to one or more land use regulatory criteria such as use, density, bulk, parking requirements, et cetera. A “plan dispute” can arise out of motivations associated with the public interest at one end of the spectrum (for example, an honest disagreement about the appropriateness of the regulations applied to the property) or an interest in pure rent-seeking³⁸ at the other. By “neighbor dispute” I mean “NIMBY”³⁹ opposition from neighboring

MUNICIPAL PRACTICES AND POLICIES (1966); RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985); DWIGHT H. MERRIAM, *THE COMPLETE GUIDE TO ZONING: HOW TO NAVIGATE THE COMPLEX AND EXPENSIVE MAZE OF ZONING, PLANNING, ENVIRONMENTAL, AND LAND-USE LAW* (2004); RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* (rev. ed. 2004); HERBERT H. SMITH, *THE CITIZEN’S GUIDE TO ZONING* (1983).

36. *See* *Vill. of Euclid, Ohio v. Ambler Realty*, 272 U.S. 365, 379–82 (1926) (establishing the constitutionality of zoning featuring a segregation of uses, which then became the norm for zoning); *see also* EDWARD H. ZIEGLER, JR., RATHKOPF’S *THE LAW OF ZONING AND PLANNING* § 1:5 (4th ed. 2011); Hamilton, *Constitutional Limitations*, *supra* note 13, at 337–38. While zoning’s segregation of uses is frequently modified by provisions, such as Planned Developments, allowing for a mix of uses, *see, e.g.*, DANIEL R. MANDELKER, *PLANNED UNIT DEVELOPMENTS* (2007), and there is a movement away from zoning based on uses and towards zoning based on “urban form,” particularly in larger cities, *see, e.g.*, DANIEL G. PAROLEK ET AL., *FORM BASED CODES: A GUIDE FOR PLANNERS, URBAN DESIGNERS, MUNICIPALITIES, AND DEVELOPERS* 4–5 (2008); *Final Code – May 2011*, MIAMI 21: YOUR CITY, YOUR PLAN (May 26, 2011), http://www.miami21.org/final_code_May2011.asp (featuring a form-based code adopted by Miami), segregation of uses remains the norm.

37. *See* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons From RLUIPA*, 31 HARV. J. L. & PUB. POL’Y 717, 733–37 (2008).

38. *See, e.g.*, Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1744–45 (1988) (discussing rent-seeking in the zoning context).

39. *See supra* note 21 and accompanying text.

landowners, a common occurrence in zoning approval decisions,⁴⁰ which may be based on valid land use concerns,⁴¹ individual prejudices that have little to do with land use,⁴² or some combination of the two.⁴³ Fourth, local elected officials or their appointees, such as citizen members of planning and zoning boards or commissions, view themselves as accountable to a constituency of citizens, and are thus likely to reflect their constituency's opposition to a particular land use approval regardless of their personal views on the issue.⁴⁴

I. RLUIPA BASICS

A. Coverage and Claims

RLUIPA's "general rule" restores strict scrutiny to land use regulations that impose a substantial burden on religious exercise,⁴⁵ but does not attempt to define the term "substantial burden."⁴⁶ The

40. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 442–43 (1990) (discussing NIMBYism associated with a variety of land uses, with emphasis on the suburban context).

41. See Marci A. Hamilton, *The Unintended Consequences RLUIPA Has Visited on Residential Neighborhoods*, in RLUIPA READER: RELIGIOUS LAND USES, ZONING AND THE COURTS 63–65 (Michael S. Giaimo & Lora A. Lucero eds., 2009) (arguing that residential neighbors have valid concerns about the introduction or expansion of more intense uses associated with religious institutions). Often, opposition by neighbors stems from the fact that a proposed use or expansion of an existing use will provide diffused benefits but concentrated costs, and no mechanism exists whereby winners can compensate losers. Thus, for example, a new religious — or healthcare — institution may benefit many people over a large geographical area but also inflict concentrated costs in the form of increased density, traffic, parking problems, and noise on the relatively few people who live in close proximity to the new development. See, e.g., Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787 (1994) (discussing the problem of diffused benefits, concentrated costs, and compensation mechanisms in the context of so-called LU-LU's: locally undesirable land uses).

42. See Storzer, *supra* note 27, at 43–45 (describing prejudicial views of neighbors).

43. See *id.* (noting both valid and prejudicial concerns of neighbors).

44. See *id.* at 47.

45. See 42 U.S.C. §§ 2000cc(a)(1)(A)–(B) (2006). These sections require that governmental action that "impose[s] or implement[s] a land use regulation in a manner that imposes a substantial burden on . . . religious exercise" be justified as "the least restrictive means of furthering that compelling governmental interest."

46. See 146 CONG. REC. S7774-01, Ex. 1, S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch & Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("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.

“general rule” applies where the substantial burden: (1) is imposed in connection with a federally-funded activity; (2) affects interstate commerce; or (3) is imposed for the implementation or imposition of a land use regulation in the context of a scheme whereby government makes “individualized assessments” regarding the property involved.⁴⁷ RLUIPA also prohibits government from: (1) treating religious land uses on “less than equal terms” with a nonreligious land use;⁴⁸ (2) “discriminat[ing] against” an assembly or institution on the basis of religion or religious denomination;⁴⁹ (3) totally excluding religious assemblies;⁵⁰ and (4) unreasonably limiting religious assemblies, institutions or structures.⁵¹

The “general rule” applies to “the religious exercise of a person, including a religious assembly or institution,”⁵² while the other provisions of the Act apply only to religious assemblies or institutions or, in the case of the “unreasonable limitation” provision,⁵³ religious assemblies, institutions, or structures. The Act does not define the terms “religious assembly” or “religious institution,” but their differing treatment—the ban on total exclusion applies only to “religious assemblies”—demonstrates that “religious assembly” is the broader term, reaching such religious exercises as group worship or study in private homes⁵⁴ and congregations that occupy rented facilities.⁵⁵

RLUIPA’s potential reach is extremely broad due to its expansive definition of what constitutes a protected exercise of religion and

Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. 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.”).

47. See §§ 2000cc(a)(2)(A)–(C); *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 497–99 (S.D.N.Y. 2010) (discussing both Commerce Clause and individualized assessment jurisdictional elements).

48. § 2000cc(b)(1).

49. § 2000cc(b)(2).

50. See § 2000cc(b)(3)(A).

51. See § 2000cc(b)(3)(B).

52. § 2000cc(a)(1).

53. See § 2000cc(b)(3)(B).

54. See, e.g., *Murphy v. Zoning Comm’n of New Milford*, 223 F. Supp. 2d 377 (D. Conn. 2002) (denying town’s motion to dismiss for lack of subject matter jurisdiction); *Murphy v. Zoning Comm’n of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001) (issuing preliminary injunction invalidating limit on number of persons allowed to attend healing prayer services in private home).

55. See, e.g., *Freedom Baptist Church of Del. Cnty. v. Twp. of Middletown*, 204 F. Supp. 2d 857, 862 (E.D. Pa. 2002).

which parties can claim protection. The Act first defines “religious exercise” generally as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁵⁶ It then defines a “Rule” that “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”⁵⁷ Reading these definitions together with the Act’s definition of “land use regulation” as a “zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest,” shows that a wide range of interests in property that will be put to some use for “religious exercise” can support a RLUIPA claim.⁵⁸

Other major provisions in RLUIPA: (1) prescribe rules for legal claims brought under the statute,⁵⁹ including shifting the burden of persuasion to local governments once a plaintiff produces prima facie evidence of a violation;⁶⁰ (2) specifically authorize accommodations by local government to avoid RLUIPA liability;⁶¹ (3) state that any such accommodations are not themselves a violation of RLUIPA so long as the accommodations are permissible under the Establishment

56. § 2000cc-5(7)(A).

57. § 2000cc-5(7)(B).

58. § 2000cc-5(5). This definition has led courts to reject claims that RLUIPA applies to such governmental actions as: (1) annexation, see *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 998 (7th Cir. 2007); (2) a sewer tap-in ordinance, see *Second Baptist Church of Leechburg v. Gilpin Twp.*, 118 F. App’x 615, 617 (3d Cir. 2004); and (3) eminent domain, see *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 641–42 (7th Cir. 2007); *Faith Temple Church v. Town of Brighton*, 402 F. Supp. 2d 250, 256–58 (W.D.N.Y. 2005). *But see* *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (finding jurisdiction under RLUIPA for use of eminent domain that was premised on an underlying zoning scheme). One scholar has argued that courts should allow RLUIPA claims for restrictions imposed by building codes and aesthetic regulations when these involve individual assessments. *See generally* Shelly Ross Saxer, *Assessing RLUIPA’s Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALB. GOV’T L. REV. 623 (2009).

59. *See* § 2000cc-2.

60. *See* § 2000cc-2(b).

61. *See* § 2000cc-3(e).

2012]

EFFECT OF RLUIPA

1233

Clause;⁶² and (4) provide for the recovery of attorneys' fees under 42 U.S.C. § 1988.⁶³

B. Constitutionality

RLUIPA has been held constitutional in the land use context in numerous federal district court cases,⁶⁴ and several federal court of appeals cases.⁶⁵ In 2003, a federal district court in California declared RLUIPA to be unconstitutional, but in 2006 that ruling was reversed and the case remanded by the Ninth Circuit⁶⁶ in light of the Court of Appeals' previously holding that RLUIPA was constitutional.⁶⁷

C. RLUIPA Litigation

Most RLUIPA litigation has involved claims that a land use regulation has imposed a substantial burden on religious exercise and/or constitutes unequal treatment of a religious use as compared to a similarly situated secular use. Only a handful of RLUIPA cases have been decided on claims involving discriminatory treatment, total exclusion, or unreasonable limitation.⁶⁸

62. See § 2000cc-4.

63. See § 1988(b) ("In any action or proceeding to enforce a provision of . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."). See *generally* Alden, *supra* note 13, at 1810–11.

64. See, e.g., *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 3, 2007); *Church of Hills of Bedminster v. Twp. of Bedminster*, No. Civ. 05-3332(SRC), 2006 WL 462674 (D.N.J. Feb. 24, 2006); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *U.S. v. Maui Cnty.*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 326 F. Supp. 2d 1140 (E.D. Cal. 2003), *aff'd*, 456 F.3d 978 (9th Cir. 2006); *Murphy v. Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003), *judgment vacated on other grounds*, 402 F.3d 342 (2d Cir. 2005); *Westchester Day Sch. v. Vill. of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003), *judgment vacated on other grounds*, 386 F.3d 183 (2d Cir. 2004); *Freedom Baptist Church of Del. Cnty. v. Twp. of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

65. See, e.g., *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *Guru Nanak Sikh Soc'y of Yuba City*, 456 F.3d 978; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

66. See *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1097–1104 (C.D. Cal. 2003) (holding that RLUIPA was unconstitutional because both the "individualized assessments" and Commerce Clause jurisdictional prongs were suspect), *rev'd*, 197 F. App'x 718 (9th Cir. 2006).

67. See *Guru Nanak Sikh Soc'y of Yuba City*, 456 F.3d at 994–95.

68. See BLAESSER & WEINSTEIN, *supra* note 3, §§ 7.29–7:34 (discussing numerous cases involving substantial burden and equal treatment claims, but only a small number of cases involving discrimination, exclusion, and unreasonable limitation claims).

The courts of appeals have adopted varying approaches to both substantial burden⁶⁹ and unequal treatment⁷⁰ claims. As regards substantial burden, the circuits have sought to fit existing substantial burden tests into terms that can be more readily applied to the land use context.⁷¹ I argue below that, regardless of the test applied, substantial burden claims have not fared particularly well absent some indication that the government applied its land use regulations in a less than fair and carefully-reasoned manner. Absent those factors, courts have had little trouble rejecting claims that even significant restrictions imposed by land use decisions constituted a substantial burden on religious exercise. Examples of this include: upholding a ban on churches in a village's industrial zone⁷² and a town's business district,⁷³ not allowing a church to build a house of worship of the size it

69. *See id.* §§ 7.29–7.31.

70. *See id.* § 7.32; Anthony Lazzaro Minervini, *Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 584–90 (2010) (noting confusion in application of RLUIPA's equal terms provision). *See generally* Terry M. Crist, III, *Equally Confused: Construing RLUIPA's Equal Terms Provision*, 41 ARIZ. ST. L.J. 1139 (2009); Matthias Kleinsasser, *RLUIPA's Equal Terms Provision and the Split Between the Eleventh and Third Circuits*, 29 REV. LITIG. 163 (2009).

71. *See generally* Salkin & Lavine, *supra* note 14, app. (listing substantial burden tests by jurisdiction). *Compare* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (“[F]or a land use regulation to impose a ‘substantial burden,’ it must be ‘oppressive’ to a ‘significantly great’ extent. That is, a ‘substantial burden’ on ‘religious exercise’ must impose a significantly great restriction or onus upon such exercise.”) and *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (“[A] ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.”), *with* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003) (“We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable. . . . [S]carcity of affordable land . . . along with the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes . . . are incidental to any high-density urban land use [and thus] do not amount to a substantial burden on religious exercise.”).

72. *See* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (noting that where a church is denied the right to build in a particular zoning district, but there are ample sites available elsewhere for churches to build a new church or convert an existing structure to use as a church, there is no substantial burden).

73. *See Midrash Sephardi*, 366 F.3d at 1228 (11th Cir. 2004) (holding that excluding a synagogue from a business district was not a substantial burden even though the

desired,⁷⁴ requiring a church to face significant difficulty in locating an appropriate site for a new house of worship in an urban area,⁷⁵ and upholding a restriction on signage a church claimed was needed for its ministry.⁷⁶

“Less than equal terms” claims⁷⁷ have also seen courts formulate different approaches to the question of how to determine what is a “similarly-situated” comparator to the religious use claimed to have been treated unequally. In 2004, the Eleventh Circuit, in *Midrash Sephardi, Inc. v. Town of Surfside*, became the first court to adopt an explicit test for an equal-terms challenge,⁷⁸ interpreting the language of RLUIPA’s equal terms provision literally: “Under RLUIPA, we must first evaluate whether an entity qualifies as an ‘assembly or institution,’ as that term is used in RLUIPA, before considering whether the governmental authority treats a religious assembly or institution differently than a nonreligious assembly or institution.”⁷⁹ Because RLUIPA does not define “assembly” or “institution,” the *Midrash Sephardi* court used dictionary definitions for those terms and ruled

exclusion required that some congregants walk farther to attend services). Note, however, that this restriction was found to violate the equal terms provision of RLUIPA. *See id.* at 1231; *see also* *New Life Ministries v. Charter Twp. of Mt. Morris*, No. 05-74339, 2006 WL 2583254, at *5 (E.D. Mich. 2006) (finding equal terms violation where numerous nonreligious assemblies and institutions were permitted in C-2 district, but religious institutions were prohibited).

74. *See* *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006) (holding that restrictions on size, activities and hours of operation, while inconvenient, did not constitute a substantial burden where the church was allowed to construct a facility on the property it currently owned that would be of sufficient size to accommodate the immediate and future needs of the congregation, even though it was not the size preferred by the church).

75. *See Civil Liberties for Urban Believers*, 342 F.3d at 761.

76. *See* *Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt.*, 962 A.2d 404, 430 (Md. 2008) (holding that denial of a variance that would allow a large changeable message sign was not a substantial burden).

77. Courts have ruled that a less than equal terms claimant need not prove that the unequal treatment imposes a substantial burden. *See, e.g.,* *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 283 (3d Cir. 2007); *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007); *Konikov v. Orange Cnty., Fla.*, 410 F.3d 1317, 1324 (11th Cir. 2005) (*per curiam*); *Midrash Sephardi*, 366 F.3d at 1229–35; *Civil Liberties for Urban Believers*, 342 F.3d at 762.

78. *See* 366 F.3d at 1230. The Eleventh Circuit is unique, however, in reading the “strict scrutiny” provisions from the substantial burden subsection into the separate equal terms subsection. *See id.* at 1232; *see also* *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171 n.37 (9th Cir. 2011) (“We recognize that the Eleventh Circuit does read the ‘strict scrutiny’ provisions from the substantial burden subsection into the separate equal terms subsection, but we do not agree.”).

79. *Midrash Sephardi*, 366 F.3d at 1230.

that because the challenged ordinance allowed a non-religious assembly (a private club) in the zoning district in question, it must permit a religious assembly to locate there as well.⁸⁰ In contrast, three years later, the Third Circuit ruled that, “a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*.”⁸¹

More recently, the Seventh Circuit, in 2010, in an *en banc* majority opinion authored by Judge Richard Posner, provided both an overview of the question and a new test for equal-terms challenges, plus critiques of that new test in concurring and dissenting opinions.⁸² In Judge Posner’s view, the Eleventh Circuit approach, if “[p]ressed too hard, . . . would give religious land uses favored treatment[.]”⁸³ The Third Circuit test, in his view, also fails to understand the equal-terms provision properly because the court’s

use of ‘regulatory purpose’ as a guide to interpretation invites speculation concerning the reason behind exclusion of churches; invites self-serving testimony by zoning officials and hired expert witnesses; facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches (as by favoring public reading rooms over other forms of nonprofit assembly); and makes

80. *See id.* at 1230–31; *see also Konikov*, 410 F.3d at 1324–29; *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308–10 (11th Cir. 2006). The *Midrash Sephardi* ruling was summarized in *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 369 (7th Cir. 2010), as:

The Eleventh Circuit reads the language of the equal-terms provision literally: a zoning ordinance that permits any ‘assembly,’ as defined by dictionaries, to locate in a district must permit a church to locate there as well even if the only secular assemblies permitted are hospital operating theaters, bus terminals, air raid shelters, restaurants that have private dining rooms in which a book club or professional association might meet, and sports stadiums.

81. *Lighthouse Institute for Evangelism, Inc.*, 510 F.3d at 266 (emphasis in original). This approach was described by Judge Posner in *River of Life Kingdom Ministries*, 611 F.3d at 368: “The Court must identify first the goals of the challenged zoning ordinance and second the secular assemblies (meeting places) that are comparable to the plaintiff’s religious assembly in the sense of having roughly the same relation to those goals.”

82. *See River of Life Kingdom Ministries*, 611 F.3d 367 (7th Cir. 2010); *see also* BLAESSER & WEINSTEIN, *supra* note 3, at 763–67.

83. *River of Life Kingdom Ministries*, 611 F.3d at 369. Judge Posner argues that under the Eleventh Circuit’s test, that court sees a “seemingly unequal treatment of religious uses that nevertheless is consistent with the ‘strict scrutiny’ standard for determining the propriety of a regulation affecting religion” as not violating the equal-terms provision. *Id.* (citing *Midrash Sephardi*, 366 F.3d at 1232).

the meaning of ‘equal terms’ in a federal statute depend on the intentions of local government officials.⁸⁴

In Posner’s view, these problems “can be solved by a shift of focus from regulatory purpose to accepted zoning criteria,” arguing that “[p]urpose’ is subjective and manipulable, so asking about ‘regulatory purpose’ might result in giving local officials a free hand in answering the question ‘equal with respect to what?’,” while “[r]egulatory criteria’ are objective — and it is federal judges who will apply the criteria to resolve the issue.”⁸⁵

A subsequent Second Circuit case, while acknowledging the split among the Circuits, shifted its focus from the “formal” differences between the religious and secular uses that were being compared — here, catering services at a church versus catering services at two hotels — to the question of “whether, in practical terms, secular and religious institutions are treated equally.”⁸⁶ Applying that practical standard, the Court of Appeals upheld the trial court’s finding that the city had violated RLUIPA’s equal terms provision when it sought to prohibit the catering services at the church.⁸⁷

84. *Id.* at 371.

85. *Id.* Applying that test to the case at hand, where the action challenged was the exclusion of a church — along with other new noncommercial uses — from an area close to the town’s train station designated for revitalization as a commercial center, Judge Posner found that the designation of exclusively commercial districts was an accepted zoning criterion, noting that the village “really was applying conventional criteria for commercial zoning in banning noncommercial land uses from a part of the village suitable for a commercial district because of proximity to the train station.” *Id.* at 373–74. Other judges on the *en banc* panel took issue, however, with Judge Posner’s view. Five judges, who concurred with the majority’s ruling that there was no violation of the equal-terms provision, viewed the Third Circuit’s “regulatory purpose” test as “equally valid,” *id.* at 374, or “the most appropriate,” *id.* at 376, and argued, variously, that “the ‘accepted regulatory criteria test’ . . . presents a risk of self-serving testimony just as the majority believes the ‘regulatory purpose’ approach would,” *id.* at 376–77, or that “the search by the different circuits for an entirely objective test is probably in vain.” *Id.* at 374–75. The one dissenting judge argued at length that the Eleventh Circuit’s test was most appropriate and would have found a violation under that test. *Id.* at 389–92.

86. *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667, 671 (2d Cir. 2010).

87. *See id.* at 672–73; *see also* *Elijah Group, Inc. v. City of Leon Valley, Tex.*, 643 F.3d 419, 424 (5th Cir. 2011) (concluding that the “less than equal terms” provision requires a religious use to show more than simply that its religious use is forbidden and some other nonreligious use is permitted, but rather, “must be measured by the ordinance itself and the criteria by which it treats institutions differently”). In this case, the Fifth Circuit specifically noted, “[t]his analysis should not be interpreted as necessarily adopting any of the [less than equal terms] tests heretofore adopted by the other circuits.” *Id.* at 424 n.19.

D. Role of the Beckett Fund and the U.S. Justice Department in RLUIPA Litigation

The Beckett Fund for Religious Liberty, which describes itself as a “non-profit, public-interest legal and educational institute that protects the free expression of all faiths,”⁸⁸ has provided significant litigation support for RLUIPA claimants.⁸⁹ Additionally, the U.S. Justice Department (DOJ) has played a significant role in the enforcement of RLUIPA. A DOJ Report issued in September 2010 states: “The Department of Justice has used the full array of available enforcement tools to ensure the protection of religious freedom.”⁹⁰ The Report notes that since the enactment of RLUIPA, the DOJ has opened fifty-one RLUIPA investigations; filed seven RLUIPA lawsuits involving land use; filed ten *amicus* briefs in private cases to inform the court about its interpretation of the law’s provisions; and intervened in private lawsuits to defend the constitutionality of RLUIPA in thirty land use cases.⁹¹ The DOJ continues to remain active in RLUIPA enforcement.⁹²

The active role of both the Fund and the DOJ in RLUIPA litigation, when combined with the availability of attorneys’ fees for a successful claim, certainly poses concerns for a local government when

88. See *Our Mission*, BECKETT FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/our-mission/> (last visited Mar. 30, 2012).

89. See *Our Cases*, BECKETT FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/u-s-litigation/our-cases/> (last visited Mar. 30, 2012). The Fund’s website lists the following RLUIPA cases in which it is, or has been, involved: *Elijah Group, Inc.*, 643 F.3d 419; *Rocky Mountain Christian Church v. Bd. of Cnty. Com’rs of Boulder Cnty.*, 612 F. Supp. 2d 1163 (D. Colo. 2009), *aff’d*, 613 F.3d 1229 (10th Cir. 2010); *Yoder v. Town of Morristown*, 7:09-cv-00007-TJM-GHL (N.D.N.Y. filed Jan. 6, 2009); *Hale O Kaula Church v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cambodian Buddhist Soc. of Conn., Inc. v. Planning and Zoning Com’n of Town of Newtown*, 941 A.2d 868 (Conn. 2008).

90. REPORT, *supra* note 27, at 5.

91. See *id.* at 5–6.

92. The DOJ filed *amicus curiae* briefs in two additional cases in 2011: *Elijah Group, Inc.*, 643 F.3d 419, and *Bronx Household of Faith v. Bd. of Educ. of New York*, 650 F.3d 30 (2d Cir. 2011), *cert. denied sub nom. Bronx Household of Faith v. New York City Bd. Of Educ.*, 132 S. Ct. 816 (2011). The DOJ also announced settlements of a number of RLUIPA claims in 2011, including those against Henrico County, VA and Lilburn, Georgia. See *Justice Department Resolves Lawsuit Alleging Religious Discrimination by Henrico County, Va., Against Muslim Group*, DEP’T JUST. (Sept. 6, 2011), <http://www.justice.gov/opa/pr/2011/September/11-crt-1139.html>; Press Release, US Dep’t of Justice, Settlement Reached with Lilburn, Georgia, Over Religious Discrimination Case Involving Muslim Group (Aug. 26, 2011), available at <http://www.justice.gov/usao/gan/press/2011/08-26-11.html>. See generally *Religious Freedom in Focus Newsletters*, US DEP’T OF JUSTICE, http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletters.php (last visited Mar. 30, 2012).

2012]

EFFECT OF RLUIPA

1239

threatened with a RLUIPA claim. Local officials have good reason to believe that they may come under investigation by the DOJ and face the likelihood that a RLUIPA plaintiff will be able to find representation from local counsel, possibly with expert assistance from the Becket Fund.

II. THE EFFECT OF RLUIPA ON LOCAL GOVERNMENTS

A. What We Do Know — and What We Don't — About RLUIPA Litigation

1. *Amount of Litigation*

As previously noted, significantly more claims were brought under RLUIPA during its first four years than had been brought during the four years RFRA claims were available against state and local governments.⁹³ Despite that, I would argue that we can now see that there has been a relatively modest amount of RLUIPA litigation — fewer than 250 cases⁹⁴ — when one considers that: (1) RLUIPA has been in effect for over eleven years; (2) there are approximately 39,000 general purpose governments in the United States that are potential defendants,⁹⁵ the vast majority of which engage in some form of land use regulation;⁹⁶ and (3) as described previously, RLUIPA covers a broad range of potential claims and possible plaintiffs.⁹⁷

The amount of RLUIPA litigation also appears quite modest when compared to other types of litigation involving land uses with some degree of protection under the First Amendment, such as adult entertainment or billboards. Thus, for example, my search of Westlaw produced approximately twice as many cases involving challenges to land use regulation of adult entertainment businesses⁹⁸ and more than three times as many cases involving challenges to land use regulation

93. *See supra* note 17 and accompanying text.

94. *See supra* note 17 and accompanying text.

95. *See* U.S. CENSUS BUREAU ET AL., GOVERNMENT ORGANIZATION: 2002 CENSUS OF GOVERNMENTS 5 tbl.4 (Dec. 2002), available at <http://www.census.gov/prod/2003pubs/gc021x1.pdf> (showing 3034 county governments and 35,933 sub-county general purpose governments).

96. *See, e.g.*, ERIC D. KELLY & PATRICK J. ROHAN, 5 ZONING AND LAND USE CONTROLS § 33.01 n.3 (2011) (“The local zoning ordinance . . . is the mainstay of land use control in the United States . . .”).

97. *See supra* Part I.A.

98. Author's Westlaw search of ALLCASES database conducted February 9, 2012 using search term: “ADULT BUSINESS” “ADULT ENTERTAINMENT” /P ZON! & da(aft 9/2000 & bef 2/9/2012).

of billboards and other forms of outdoor advertising⁹⁹ during the same eleven plus year period that RLUIPA has been in effect.

What we do not know is the extent to which the threat of potential RLUIPA litigation has caused local governments to take action they might not otherwise have taken. Arguably, such actions would range from those that are wholly “appropriate,” in the sense that a land use regulation which clearly violated RLUIPA was brought into conformance with the statute,¹⁰⁰ to actions that are wholly “inappropriate,” in the sense that a local government acceded to a demand from a potential RLUIPA claimant that is clearly unjustified.¹⁰¹ Although some have claimed that RLUIPA has seriously compromised the ability of local governments to administer local land use regulations in a manner that fairly balances the needs of both religious and secular interests,¹⁰² those claims are not supported by any empirical data.

2. Outcomes of RLUIPA Litigation

We also know that the results of RLUIPA litigation have been decidedly mixed since RLUIPA’s early years¹⁰³ and remain so.¹⁰⁴ This is not surprising. Numerous scholars and commentators have bemoaned the indeterminate nature of RLUIPA litigation, particularly cases claiming that a land use regulation has imposed a substantial burden on religious exercise or violated the statute’s equal terms pro-

99. Author’s Westlaw search of ALLCASES database conducted February 9, 2012 using search term: BILLBOARD “OUTDOOR ADVERTISING” “OFF-PREMISE SIGN” “OFF-SITE-SIGN” /P ZON! & da(aft 9/2000 & bef 2/9/2012).

100. For example, “appropriate” actions would be similar to the settlements reached with the DOJ. *See supra* note 17.

101. One example is a claim that a religious institution does not have to comply with the normal permit approval process—a claim that has been uniformly rejected by the courts. *See, e.g., Konikov v. Orange Cnty., Fla.*, 410 F.3d 1317, 1323 (11th Cir. 2005) (stating that “requiring applications for variances, special permits, or other relief provisions would not offend RLUIPA’s goals”).

102. *See, e.g., Daniel Lenington, Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806 (2006) (arguing that the trend in RLUIPA decisions is towards making religious institutions immune from zoning laws); Salkin & Lavine, *supra* note 14, at 255 (“RLUIPA has had a chilling effect on local government’s ability to exercise the police power through zoning to ensure that community character is preserved and that the public health, safety, and welfare is protected.”).

103. *See Alden, supra* note 13, at 1787 n.34.

104. *See, e.g., Michael S. Giaimo, RLUIPA in the Courts, in RLUIPA READER: RELIGIOUS LAND USES, ZONING AND THE COURTS* 87–111 (Michael S. Giaimo & Lora A. Lucero eds., 2009) (discussing numerous RLUIPA decisions and showing that claimants have had both successes and failures).

vision.¹⁰⁵ Obviously, this lack of certainty as to the likely outcome of potential litigation is a concern as a factor that can lead to litigation.

One aspect of the outcomes of RLUIPA litigation is of particular note: the award of, or a settlement providing for, very substantial damages and attorney fees in egregious cases. Three cases stand out: (1) *Westchester Day School v. Village of Mamaroneck*,¹⁰⁶ in which the court awarded \$4.75 million in damages; (2) *Reaching Hearts International, Inc. v. Prince George's County*,¹⁰⁷ in which the court made a conditional award of damages in excess of \$3.7 million, and (3) *Hollywood Community Synagogue, Inc. v. City of Hollywood, Florida*,¹⁰⁸ in which, after losing a RLUIPA challenge, city officials agreed to a settlement that included paying \$2 million to the RLUIPA plaintiff and having city officials attend religious sensitivity training.¹⁰⁹ As I will discuss below, cases such as these, involving denials of land use approvals shown to be based on religious prejudice, while relatively rare, argue that RLUIPA is a necessary safeguard of religious freedom.

105. See, e.g., Lenington, *supra* note 102, at 814 (arguing that “the question of what constitutes a ‘substantial burden’ is far from clear, and has led to confusion and a split among the courts”); Adam J. McLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA*, 40 REAL EST. L.J. 115, 118–49, 166–75 (2011) (noting confusion in application of the substantial burden test and suggesting a solution by focusing on land use decisions involving subjective individual assessments); Salkin & Lavine, *supra* note 14, at 219 (arguing that inconsistent application of RLUIPA “has created confusion among municipalities, planners and the bar; and has failed to date to create one national standard or rule with respect to the siting of religious land uses”); see also Minervini, *supra* note 70, at 584–95 (noting confusion in application of RLUIPA’s equal terms provision).

106. 504 F.3d 338, 352 (2d Cir. 2007) (noting the “arbitrary blindness to the facts” exhibited by village officials).

107. 584 F. Supp. 2d 766, 781–82 (D. Md. 2008), *aff’d*, 368 Fed. App’x 370 (4th Cir. 2010) (upholding jury’s finding that county defendants’ actions were motivated, at least in part, on the basis of religious discrimination).

108. 436 F. Supp. 2d 1325, 1337 (S.D. Fla. 2006) (finding that “[n]othing in the ordinance or its application prevents City officials from encouraging some places of worship while discouraging others through the arbitrary grant or denial of a Special Exception”).

109. See Todd Wright, *Hollywood to Pay \$2 Million to Synagogue*, MIAMI HERALD, June 26, 2006, available at 2006 WLNR 11054024. The author was retained as an expert witness by the DOJ in its lawsuit against the City of Hollywood, which was settled at the same time the city settled with the synagogue plaintiff. See Press Release, U.S. Dep’t of Justice, Justice Department Resolves Lawsuit Alleging Religious Discrimination by City of Hollywood, Florida (July 5, 2006), available at http://www.justice.gov/opa/pr/2006/July/05_crt_416.html.

B. How RLUIPA Has Changed Local Land Use Regulation

RLUIPA has made land use regulation more difficult for local governments in what I would term both “negative” and “positive” ways. On the “negative” side, RLUIPA has led to litigation, or threats of litigation, that lack substantial merit¹¹⁰ and likely would not have been brought were RLUIPA not available.¹¹¹ Responding to actual or threatened litigation not only imposes legal and other costs (e.g., diversion of staff time) on local governments, but may well have led some local governments to grant land use approvals to religious uses in cases where the approval should properly have been denied.¹¹²

On the “positive” side, RLUIPA effectively allows for heightened scrutiny—including strict scrutiny—of local land use decisions that would not necessarily have triggered heightened scrutiny absent RLUIPA. This has led, in a number of cases, to courts uncovering discrimination against religious groups.¹¹³ I used the term “effectively allows,” rather than “effectively imposes,” because courts have used several “gate-keeping” mechanisms to limit an overly expansive application of RLUIPA,¹¹⁴ including: demanding tests for what constitutes a substantial burden on religion,¹¹⁵ avoiding expansive readings

110. See, e.g., *supra* note 101 (discussing the claim that a religious institution need not make application for a land use approval).

111. For example, without RLUIPA, a claim that a land use regulation imposed a “substantial burden” on religious exercise would be subjected only to rational basis review under *Employment Div. v. Smith*, 494 U.S. 872 (1990), unless the claimant could demonstrate that the claim involved a facially neutral law that targeted religious uses so as to bring the case under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). See discussion at note 8, *supra*. It is logical to assume that fewer claims will be made when the standard of review is rational basis rather than strict scrutiny.

112. This argument has been made by numerous critics of RLUIPA. See *supra* text accompanying note 102.

113. See *supra* text accompanying notes 106–09. But see Marci A. Hamilton, Letter to the United States Senate (July 24, 2000) (on file with author) (claiming that after reviewing the record presented to Congress, she was unable to identify a single case or anecdote where a government acted in a discriminatory manner that could not be justified by “a neutral reading of the local government’s purpose”).

114. See, e.g., Alden, *supra* note 13, at 1779 (arguing that “courts have avoided the application of strict scrutiny and have made it very challenging for religious entities to show that secular land users have been treated more favorably”). Note, however, that the statute states that it must be construed broadly to protect religious exercise “to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g) (2006); see also *Reaching Hearts Int’l., Inc. v. Prince George’s Cnty.*, 584 F. Supp. 2d 766, 785 n.13 (D. Md. 2008), *judgment aff’d*, 368 Fed. Appx. 370 (4th Cir. 2010) (noting the “broad application” of RLUIPA).

115. See *supra* notes 71–76.

of what constitutes religious exercise¹¹⁶ or land use regulation,¹¹⁷ and requiring closely-matched comparators for equal terms challenges.¹¹⁸

Thus, in my view, the courts have, overall, been effective in applying RLUIPA. An example that shows why I hold this view is the way the Seventh Circuit has dealt with RLUIPA claims. In *Civil Liberties for Urban Believers v. City of Chicago*, the plaintiffs had originally sued under RFRA, claiming that the city's zoning facially discriminated against churches because it required them to obtain special use approvals to locate in zoning districts where nonreligious assembly uses were permitted as of right.¹¹⁹ The RFRA claims were dropped after *Boerne*.¹²⁰ The city recognized the validity of the plaintiffs' constitutional claims, however, and in February 2001 amended its zoning ordinance to require that all assembly uses in the zoning districts in question obtain special use approvals and exempted churches from having to show that their proposed use was "necessary for the public convenience."¹²¹ Despite this accommodation, the plaintiffs subsequently amended their complaint to include claims pursuant to RLUIPA, but the district court granted the city's motion for summary judgment, ruling that the February 2000 zoning ordinance amendments had removed any potential RLUIPA violation.¹²²

On appeal, the churches claimed that RLUIPA's broad definition of "religious exercise" meant that there was a "substantial burden" on religion whenever a land use regulation "inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise." The Seventh Circuit rejected the claim, arguing that this construction of RLUIPA's "substantial burden on religious exercise" language "would render meaningless the word 'substantial,' be-

116. See, e.g., *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186 (D. Wyo. 2002) (ruling against church's claim that day care center constitutes religious exercise under RLUIPA), *aff'd*, 427 F.3d 775 (10th Cir. 2005), *opinion vacated on reh'g*, 451 F.3d 643 (10th Cir. 2006); *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734 (Mich. 2007) (ruling against church's claim that building an apartment complex constitutes religious exercise under RLUIPA); *Glen-side Ctr., Inc. v. Abington Twp. Zoning Hearing Bd.*, 973 A.2d 10 (Pa. Commw. Ct. 2009) (finding that Alcoholics Anonymous meetings are not a religious use under RLUIPA).

117. See *supra* note 58.

118. See *supra* notes 77–87 (indicating that other Circuits have rejected the Eleventh Circuit's literal approach).

119. 342 F.3d 752, 758 (7th Cir. 2003).

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

121. *Civil Liberties for Urban Believers*, 342 F.3d at 758.

122. *Civil Liberties for Urban Believers v. City of Chi.*, 157 F. Supp. 2d 903, 917 (N.D. Ill. 2001), *motion to amend denied*, 2002 WL 485380 (N.D. Ill. March 29, 2002).

cause the slightest obstacle to religious exercise incidental to the regulation of land use, however minor the burden it were to impose, could then constitute a burden sufficient to trigger RLUIPA's [strict scrutiny] requirement"¹²³

These plaintiffs had claimed that "the scarcity of affordable land available for development" in certain zones, "along with the costs, procedural requirements, and inherent political aspects" of the special use and other zoning procedures, imposed a substantial burden.¹²⁴ The court rejected this facial challenge. Noting that such conditions "are incidental to any high-density urban land use," and thus "may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city," the court found that "they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago," observing that each of the plaintiffs had been successful in finding a location.¹²⁵ The court argued that were it to find a RLUIPA violation based on the time and expense required to meet land use permit requirements, then "RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land use regulations."¹²⁶ The court sternly rejected any claim that RLUIPA mandates such favoritism: "Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise."¹²⁷

123. *Id.* at 761 (holding that, under RLUIPA, a land use regulation should be viewed as imposing a substantial burden on religious exercise only if it "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property for the purpose thereof within the regulated jurisdiction generally-effectively impracticable.").

124. *Id.*

125. *Id.*

126. *Id.* at 761-62.

127. *Id.* at 762. The court also rejected plaintiffs' claims that the special use requirement violated RLUIPA's nondiscrimination provisions, the Free Exercise Clause of the First Amendment, or the Equal Protection Clause of the Fourteenth Amendment; however, Judge Posner dissented on the Equal Protection claim. Two of the panel's three judges rejected the claim that equal protection challenges to land use regulation of churches should be subject to heightened scrutiny because such regulation "necessarily implicates the fundamental right of religious exercise," citing the Supreme Court's well-known decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), as authority. *Civil Liberties for Urban Believers*, 342 F.3d at 766. Applying rational basis review, the majority held that Chicago had not violated the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 766-67. Judge Posner's dissent argued that in *Cleburne*, the Supreme Court expanded the

Two years later, the Seventh Circuit revisited its interpretation of the substantial burden test in *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*.¹²⁸ Here, the church acquired property in a residential zone and applied to rezone part of the property from residential to institutional in order to build a new house of worship. To address the city's concern that some other use might be developed on the rezoned parcel if the church decided not to build on the site, the church modified its application by agreeing that the city would promulgate a planned unit development ordinance limiting the parcel to church-related uses as a condition of the rezoning.¹²⁹ The city council, however, still denied the rezoning, citing various legal concerns and proposing alternatives.¹³⁰

After that denial, the court noted,

the Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense.¹³¹

Since the court found the church willing to bind itself by any means necessary not to sell the land for a nonreligious institutional use, a factor that would eliminate the city's only legitimate concern, the court concluded that the church was substantially burdened by the city's denial and the "delay, uncertainty, and expense" it imposed.¹³²

boundaries of rational basis review by using, and thus authorizing future use of, a "sliding scale" approach to rational basis review so that "discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities." *Id.* at 769. Viewing the churches in this case as "no less sensitive a land use than homes for the mentally retarded" in *Cleburne*, Judge Posner argued, "[w]hen government singles out churches for special regulation, as it does in the Chicago ordinance, the risk of discrimination, not against religion as such—Chicago is not dominated by atheists—but against particular sects, is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning." *Id.* at 770. Applying this standard, Posner argued that the challenged zoning provisions discriminated against "new, small, or impecunious churches" by making it more difficult and expensive to find locations they can afford, and he found no justification for such discrimination in the land use goals articulated by the city. *Id.* at 770–73.

128. 396 F.3d 895 (7th Cir. 2005).

129. *See id.* at 898.

130. *See id.* at 898–99.

131. *Id.* at 901.

132. *See id.* For further discussion of the various Courts of Appeals' treatment of the substantial burden issue, see BLAESSER & WEINSTEIN, *supra* note 3, § 7:29; see also Salkin & Lavine, *supra* note 14, app. (listing substantial burden tests by jurisdiction).

These two Seventh Circuit opinions illustrate what I believe is the courts' pragmatic approach to finding a way to maneuver in the difficult terrain that RLUIPA occupies; aptly described by the Second Circuit as

a treacherous narrow zone between the [f]ree [e]xercise [c]lause, which seeks to assure that government does not interfere with the exercise of religion, and the [e]stablishment [c]lause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion.¹³³

In particular, they illustrate a court's looking far more carefully at an "as applied" RLUIPA challenge than a facial challenge, a difference in approach that I consider well-taken and which other scholars have advocated.¹³⁴ It is an approach that combines appropriate judicial deference to a legislature that enacts a neutral law of general applicability with the heightened judicial scrutiny that becomes appropriate when that same law is applied to a specific zoning approval,¹³⁵ a circumstance that frequently allows for subjectivity, and thus the potential for discrimination or arbitrariness in the approval process.¹³⁶ Although this approach is a reasonable compromise between courts' being either too deferential or not deferential enough, it has been and will continue to be applied differently by different courts, as previously noted in discussions of the substantial burden¹³⁷ and "less than equal terms"¹³⁸ provisions of the statute. Obviously, this is not a situation unique to RLUIPA litigation.¹³⁹

133. *Westchester Day School v. Vill. of Mamaroneck*, 386 F.3d 183, 189 (2d Cir. 2004).

134. *See, e.g.*, Ostrow *supra* note 37, at 734.

135. As has been noted by others, this approach to judicial review of local land use regulation has been in place since the Supreme Court first reviewed the constitutionality of zoning. *Id.* at 753. *Compare* *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding constitutionality of zoning against a facial challenge) *with* *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (finding that a zoning ordinance as applied violated substantive due process).

136. *See supra* text accompanying notes 106–09; *see also* Ostrow, *supra* note 37, at 723–24.

137. *See* discussion at notes 71–76, *supra*.

138. *See* discussion at notes 77–87, *supra*.

139. For example, the author's search of WESTLAW's jlr (Journals and Law Reviews) database on February 20, 2012 using the search term "ti("circuit split") & da(aft 2006)" shows that eighty-six articles with the term "Circuit Split" in the title have been published in the past five years.

CONCLUSION

RLUIPA reflects today's dynamic social, political, and legal environment regarding the role of religion in our society in the context of potential conflicts between religious uses (either institutions or individuals exercising their rights to religious freedom) and local land use regulations. With RLUIPA, Congress has attempted to empower religious uses when they choose where and how they build a sanctuary or assemble for worship, and to restrain local governments when they seek to apply zoning or landmark regulations to those uses in ways that violate religious freedom.

There are some things we know about how RLUIPA has affected local governments. RLUIPA has produced a relatively modest amount of litigation, in my view, with the results decidedly mixed. Many local governments have successfully defended their land use regulations against a RLUIPA claim. At the same time, others have lost spectacularly, with several cases producing multi-million dollar awards or settlements.

But there is also much we do not know. In general terms, to what extent have local governments "caved-in" to unreasonable demands and sacrificed legitimate land use goals when threatened with a RLUIPA claim? How often has a potential RLUIPA claim led a local government to accommodate a reasonable request for relief from a regulation that imposed a substantial burden on a religious use or treated it in a less than equal manner? Many more specific questions can be posed.¹⁴⁰

In the absence of perfect information about how RLUIPA has affected local governments, this Article argues that the courts have adopted a pragmatic approach to maneuvering in the difficult terrain that RLUIPA occupies: combining appropriate judicial deference to a legislature that enacts a neutral law of general applicability with the heightened judicial scrutiny that becomes appropriate when that same law is applied to a specific zoning approval, a circumstance that frequently allows for subjectivity in the approval process, and thus, the potential for discrimination or arbitrary action against religious uses. I conclude that: (1) until proven otherwise, the cost RLUIPA undoubtedly imposes on local governments is the price to be paid for insuring against the discriminatory or arbitrary application of land use regulations, and (2) RLUIPA does not seek to establish an unconsti-

140. See, e.g., Salkin & Lavine, *supra* note 14, at 257–58 (listing numerous additional relevant questions).

1248

FORDHAM URB. L.J.

[Vol. XXXIX

tutional preference for religious uses, but rather a proper accommodation of religious exercise in the land use context.