

# Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses

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## INTRODUCTION

Religious institutions have long offered their congregants services that go beyond worship. From access to schools or community halls to services as basic as parking, religious institutions necessarily use their land and resources for more than just religious observance. But particularly in the last two decades, they have begun expanding far beyond their traditional offerings to a wider and more diverse array of “auxiliary uses”—non-worship uses that are affiliated with a religious institution. Religious institutions now run insurance agencies, hospitals, health maintenance organizations, and transportation companies.<sup>1</sup> They manage retail stores that sell religiously themed merchandise,<sup>2</sup> incorporate popular franchises like Starbucks<sup>3</sup> and McDonald's,<sup>4</sup> finance recording studios,<sup>5</sup> and operate credit unions and banks.<sup>6</sup> The nation's second-largest church (with 30,000 congregants) has even begun developing

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1. See Kamron Keele, *A Plea for the Repeal of Section 107: No More Tax-Free Mansions for Dubious “Ministers of the Gospel,”* 56 TAX LAW. 73, 97 (2002).

2. See Carrie Coolidge, *Christian Capitalism: David vs. Goliath*, FORBES.COM, Sept. 15, 2003, [http://www.forbes.com/2003/09/15/cz\\_cc\\_0915wmt.html](http://www.forbes.com/2003/09/15/cz_cc_0915wmt.html).

3. See, e.g., Christian Life Center, The Book and Bean Café, <http://www.clconline.org/HTML/CoffeeShop.asp> (last visited Oct. 18, 2005); Covenant Celebration Church, Driving Directions [and Starbucks hours], [http://www.covenantcelebration.org/aboutus\\_directions.asp](http://www.covenantcelebration.org/aboutus_directions.asp) (last visited Oct. 18, 2005).

4. See, e.g., Maria Jolly, *A Harvest of Generational Blessings*, CHURCH EXECUTIVE, May 2004, available at [http://www.churchexecutive.com/2004/05/A\\_harvest\\_of\\_generational\\_blessings.asp](http://www.churchexecutive.com/2004/05/A_harvest_of_generational_blessings.asp) (noting that along with its McDonald's franchise, Houston's 12,000-member Brentwood Baptist Church operates a transitional housing facility for people with HIV/AIDS, lifelong learning center, child development center, maintenance facility, and credit union on its 111-acre campus).

5. See, e.g., Welcome to Arrow Records, <http://www.arrow-records.com> (last visited Oct. 18, 2005); see also Biography of Dr. Creflo A. Dollar, [http://www.creflodollarministries.org/about/bio\\_t.html](http://www.creflodollarministries.org/about/bio_t.html) (last visited Oct. 18, 2005) (revealing that the leadership of Arrow Records includes the wife of the pastor of World Changers Church International).

6. See, e.g., Mary Claire Dale, *Church Credit Unions Grow*, FORT WAYNE J. GAZETTE (Ind.), July 24, 2004, at 2C; Brentwood Baptist Church Federal Credit Union, <http://bbccredit.gcg2.net> (last visited Oct. 7, 2005).

both a 1200-home neighborhood and a 280-unit gated retirement community.<sup>7</sup> The expanding breadth of the auxiliary uses offered by modern religious institutions raises the critical question considered by this Note: Which auxiliary uses should government protect, and how far should those protections be extended?

The worship uses of religious institutions have long been granted special protections by the government of the United States. According to the Supreme Court in *Walz v. Tax Commission of New York*, “[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least [a] kind of benevolent neutrality toward churches and religious exercise.”<sup>8</sup> But government has not extended its benevolent neutrality to include *all* auxiliary uses. In the tax context, for example, government has distinguished some auxiliary uses from others: Tax laws favorable to religious institutions may only be applied to their auxiliary uses if the institution can prove that the use is substantially related to its religious, educational or charitable mission.<sup>9</sup>

In the religious land use context, however, no such line has been drawn. Federal religious land use policy is now primarily governed by the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.<sup>10</sup> RLUIPA, *inter alia*, requires a strict scrutiny analysis of certain land use regulations that impose a substantial burden on “religious exercise.”<sup>11</sup> Such land use regulations may include any “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)” in which the claimant religious institution has a present or future property interest.<sup>12</sup> Under RLUIPA, Congress wanted religious exercise to be broadly construed—“to the maximum extent permitted by the terms of [the statute] and the Constitution.”<sup>13</sup> Accordingly, it defined religious exercise as “*any* exercise of religion, whether or not

7. See Muriel L. Whetstone Sims, *Potter’s House at Primrose*, 9 GET READY (2004), available at [http://www.thepottershouse.org/GRM\\_index.php](http://www.thepottershouse.org/GRM_index.php) (noting that housing prices range from \$90,000 to \$400,000).

8. 397 U.S. 664, 676-77 (1970) (holding that a New York statute granting tax exemption to religious institutions was not a violation of constitutional principles establishing the separation of church and state). See also *Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827, 836 (N.Y. 1956) (finding that the state, in granting tax exemptions to religious institutions, “had declared a policy that churches . . . are more important than local taxes”), *aff’d*, 174 N.E.2d 743 (N.Y. 1961); *State ex. rel. Anshe Chesed Congregation v. Bruggemeier*, 115 N.E.2d 65, 69 (Ohio Ct. App. 1953) (observing similarly that granting tax exemptions to religious institutions served as “a public recognition of the importance of these voluntary organizations to the well being of our community life”).

9. See 26 U.S.C. § 513(a) (2000).

10. See Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (Supp. 2003).

11. See § 2000cc(a).

12. § 2000cc-5(5).

13. § 2000cc-3(g).

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compelled by, or central to, a system of religious belief,”<sup>14</sup> specifically including “[t]he use, building, or conversion of real property for the purpose of religious exercise.”<sup>15</sup>

With this definition of “religious exercise,” Congress dramatically expanded the protections offered to religious institutions seeking to build or physically grow. Importantly, RLUIPA also extended these protections to religious institutions’ auxiliary uses. It did so partly by omission: Congress declined to differentiate between worship and non-worship uses. It also did so by writing certain provisions of the law so broadly and so ambiguously that all non-worship auxiliary uses could conceivably be granted RLUIPA’s protections. RLUIPA now permits any auxiliary enterprise to take advantage of the same protections afforded to religious institutions regardless of the relationship of that enterprise to the institution’s religious, educational, or charitable mission.

This change is all the more significant given the trend among religious institutions to expand the number, size, and scope of auxiliary uses. While statistics focusing on the auxiliary use phenomenon are not readily available, one indicator of their increase is the proliferation of large religious institutions. Such institutions tend to support a wide range of auxiliary uses and must often push for physical expansion to accommodate them. One type of large religious institution, the megachurch, defined as a Protestant church with 2000 or more members, is fast gaining members in part because megachurches typically offer many non-worship amenities: schools, community centers, dining facilities, and even movie theaters and gymnasiums.<sup>16</sup> Megachurches seeking to accommodate new congregants must push for physical expansion.<sup>17</sup> A survey of 153 megachurches revealed that few respondents felt that their current space was adequate: nearly half claimed they lacked space for worship, approximately sixty-five percent said they lacked space for parking and fellowship, and fully three-quarters claimed they needed more space for education.<sup>18</sup> More and more, megachurches desperate for larger spaces are achieving their expansionist goals with the help of RLUIPA. And there is every

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14. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A) (Supp. 2003) (emphasis added).

15. § 2000cc-5(7)(B).

16. Kris Axtman, *The Rise of the American Megachurch*, CHRISTIAN SCI. MONITOR, Dec. 30, 2003, at 1 (noting that in 2003 alone, megachurch attendance may have grown by four percent); Scott Thumma, *Megachurches Today* (2001), [http://www.hartfordinstitute.org/org/faith\\_megachurches\\_FACTsummary.html](http://www.hartfordinstitute.org/org/faith_megachurches_FACTsummary.html) (noting that megachurches have seen attendance increase by ninety percent over the last twenty years).

17. A dramatic example of this push for expansion is Lakewood Church in Houston, Texas. The 30,000-plus congregation moved in July 2005 to the 16,000-seat Compaq Center, formerly home to the Houston Rockets basketball team. See William Martin, *Prime Minister*, TEX. MONTHLY, Aug. 2005, at 110.

18. Thumma, *supra* note 16.

reason to think they will continue to do so.

Indeed, while it has yet to occur, RLUIPA could potentially be invoked by megachurches building not just schools, parking, and worship space but non-traditional facilities as well. If a megachurch decided to build a new hospital, for example, RLUIPA could help the megachurch avoid complying with zoning codes, city planning goals, historic preservation ordinances, traffic requirements, and aesthetic regulations—resulting in a greater impact on neighborhoods and towns than the law’s framers might have envisioned. To be sure, not every religious institution has the means to build hospitals: most of the nearly 300,000 religious institutions in the United States<sup>19</sup> remain small, and half have fewer than one hundred regularly participating adults.<sup>20</sup> Yet by recognizing RLUIPA’s potentially dramatic impact through the megachurch example, one might better understand why changing the law is so important.

This Note argues that RLUIPA does not adequately address the issue of auxiliary uses, and that Congress must rework RLUIPA to differentiate between those auxiliary uses that are substantially related to a religious institution’s mission and those that are not. Congress should explicitly deny religious protection to uses that are not substantially related to a religious, educational or charitable mission. By failing to so limit RLUIPA’s protections, Congress would not only be perpetuating bad policy: it could also be overstepping the benevolent neutrality formulation in cases like *Walz* and violating the Establishment Clause.

To set the stage for this discussion, Part I describes free exercise jurisprudence before RLUIPA and the development of the strict scrutiny test, a test RLUIPA would eventually adopt. This Part recounts the buildup to RLUIPA, as Congress and the courts both attempted to shape free exercise jurisprudence. Finally, the Part takes note of the dearth of case law regarding auxiliary uses, religious land use, and free exercise.

Part II argues that RLUIPA fails to adequately address the auxiliary use claims of religious institutions. To support this contention, Part II first demonstrates how RLUIPA modifies the free exercise case law regarding religious land use, and describes the stated intent of the law’s framers. This Part then critiques these modifications with respect to auxiliary uses. This Part finds that RLUIPA’s textual ambiguities have made it difficult for courts to agree upon a uniform standard by which to judge auxiliary use claims. Finally, this Part identifies a suspicion among courts of RLUIPA claims that attempt to

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19. AMERICAN RELIGION DATA ARCHIVE, RELIGIOUS GROUPINGS: FULL U.S. REPORT (2000), <http://www.thearda.com/rcms/2000/usreport2000.html> (estimating that there are 268,254 religious congregations in America, excluding historically black Christian churches).

20. FAITH COMMUNITIES TODAY, A REPORT ON RELIGION IN THE UNITED STATES TODAY (2000), [http://fact.hartsem.edu/research/fact2000/executive\\_summary.html](http://fact.hartsem.edu/research/fact2000/executive_summary.html) (asserting further that “a full quarter of congregations has fewer than 50 regularly participating adults, while less than 10 percent have more than 1,000”).

protect auxiliary uses.

Part III more fully discusses two reasons why Congress may want to begin reworking RLUIPA to better address auxiliary use claims. First, despite what some courts have done to limit RLUIPA's applicability in the auxiliary use context, RLUIPA is nonetheless being invoked by religious institutions outside the court system to free auxiliary uses from complying with land use regulations. This phenomenon suggests that RLUIPA's ambiguous language has had the practical effect of granting protection to auxiliary uses. Second, this Part argues that the Establishment Clause may be violated if RLUIPA is applied without restriction to all auxiliary uses. While this Note's treatment of this issue is not exhaustive, it does reveal how Establishment Clause case law could support fatal constitutional challenges to RLUIPA's land use provisions.

Finally, Part IV offers specific suggestions about how Congress could limit RLUIPA's applicability in ways that would balance both the right to religious freedom and the concerns of those who fear the consequences of RLUIPA's current generosity toward auxiliary uses. This Part recommends adding a provision in the law to explicitly limit RLUIPA's protections for non-worship auxiliary uses. This Part concludes by arguing that changes to RLUIPA, as suggested by this Note, are not inconsistent with the intent of the law's framers. Such an observation gives substantial weight to the practical feasibility of the reforms suggested.

### I. RELIGIOUS LAND USE LAW BEFORE RLUIPA

No pre-RLUIPA case squarely addresses the issue of auxiliary uses with regard to free exercise. Nonetheless, understanding the contours of pre-RLUIPA jurisprudence in the context of religious land use is essential to understanding the later treatment of auxiliary uses under RLUIPA. Pre-RLUIPA free exercise and protected liberty jurisprudence in the Supreme Court was characterized by heightened or strict scrutiny of governmental actions that burden a protected freedom. Though the Supreme Court thus granted considerable protections to religious institutions, the lower courts tended to be less sympathetic. Indeed, lower courts created new legal burdens for religious institutions and exhibited a permissive attitude toward regulation. With its *Smith* decision in 1990, which granted substantial deference to the government's interest, the Supreme Court began to move in the same direction as the lower courts. A critical Congress attempted to reverse this shift in the Court's free exercise jurisprudence through legislation—a move that would eventually result in RLUIPA. After describing this interplay between Congress and the courts, this Part concludes by pointing out the dearth of pre-RLUIPA free exercise case law addressing auxiliary uses.

A. *In the Supreme Court*

Free exercise case law is rooted in the First Amendment, which has been made applicable to the states and provides that “Congress shall make no law . . . prohibiting the free exercise” of religion.<sup>21</sup> The Supreme Court has never considered the question of free exercise in the context of land use law.<sup>22</sup> However, in elaborating its free exercise and protected liberty jurisprudence, the Court handed down two cases that pre-RLUIPA lower courts used to resolve religious land use disputes: *Sherbert v. Verner*<sup>23</sup> and *Schad v. Borough of Mount Ephraim*.<sup>24</sup>

*Sherbert* established the strict scrutiny test for free exercise cases, holding that the First Amendment is offended when government imposes a substantial burden on the free exercise of religion, unless a compelling interest justifies the burden.<sup>25</sup> The Court held that under this standard, the State of South Carolina had unconstitutionally denied unemployment benefits to the plaintiff-claimant who refused to work on Saturdays in violation of her religious beliefs.<sup>26</sup> The State’s denial imposed a substantial burden because it forced the claimant to choose “between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>27</sup> According to the Court, the State failed to demonstrate a compelling government interest justifying its imposition of this substantial burden.<sup>28</sup> The *Sherbert* Court indicated in dicta that government must also show that “no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”<sup>29</sup> The Court would later confirm this least restrictive means test to be a component of strict scrutiny.<sup>30</sup>

*Schad*, which analyzed a land use regulation in the context of free expression, gave lower courts an alternate ground on which to decide religious land use cases. The Court in *Schad* considered the conviction of an operator of an adult bookstore for violating a zoning ordinance that prohibited all live

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21. U.S. CONST. amend. I. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that “[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact” laws prohibiting free exercise of religion).

22. Though it involved a zoning dispute between a church and a municipality, *City of Boerne v. Flores*, 521 U.S. 507 (1997), did not thoroughly discuss the convergence of free exercise doctrine and land use laws.

23. 374 U.S. 398 (1963).

24. 452 U.S. 61 (1981).

25. *Sherbert*, 374 U.S. at 406-07.

26. *Id.* at 407.

27. *Id.* at 404.

28. *Id.* at 406-07.

29. *Id.* at 407.

30. See, e.g., *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”).

entertainment. Using heightened scrutiny, the Court stated that “when a zoning law infringes upon a protected liberty [like free speech], it must be narrowly drawn and must further a sufficiently substantial government interest.”<sup>31</sup> The Court found that the ordinance violated First Amendment free expression rights because it was not narrowly drawn and because the Borough had indicated no substantial government interest in prohibiting live entertainment.<sup>32</sup> As with *Sherbert*, the *Schad* Court articulated, but did not reach, an additional requirement that courts must “determine whether [demonstrated substantial government] interests could be served by means that would be less intrusive on activity protected by the First Amendment.”<sup>33</sup>

*Sherbert* and *Schad* offer a similar two-tiered approach to determine whether a governmental infringement is unconstitutional. Yet they differ in a number of ways. On the most basic level, *Sherbert* addresses free exercise—the heart of RLUIPA—while *Schad* addresses free expression. And *Schad*, but not *Sherbert*, involves land use regulations. But more importantly, *Sherbert*’s level of scrutiny is higher than *Schad*’s for both the claimant and the government: *Sherbert* requires that the claimant show a “substantial burden,” and that government show a “compelling” interest, while *Schad* requires that the claimant show an “infringement” and requires only a “sufficiently substantial” interest from government. Despite these differences, lower courts frequently invoked both *Schad* and *Sherbert* to resolve free exercise cases, often ending up with a hybrid heightened-strict standard.<sup>34</sup> Eventually, however, it was *Sherbert*’s strict scrutiny test that would be codified by RLUIPA.

### B. *In the Lower Courts*

Following these developments in the Supreme Court’s free exercise and protected liberty jurisprudence, religious institutions began to bring suits against land use authorities claiming constitutional infringements on their free exercise. Lower courts used heightened scrutiny, somewhere between *Sherbert* and *Schad*, to resolve these cases. Two observations characterize the lower court decisions, regardless of the precise level of scrutiny being applied. First, in determining whether a case involved a free exercise claim, pre-RLUIPA courts consistently considered the centrality of the religious belief that the regulation implicated: the closer the belief to the center of the claimant’s faith, the easier he could prove that a free exercise claim, and further a substantial

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

32. *Id.* at 72.

33. *Id.* at 70.

34. See, e.g., *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 823 (10th Cir. 1988) (calling *Schad* and *Sherbert* “fluid precedent” and some of “the many evolving standards applicable to the case”); *Islamic Ctr. of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (incorporating both *Schad* and *Sherbert*, but misconstruing the extent of *Schad*’s scrutiny).

burden, existed. Second, courts also examined the governmental interest at stake, heavily weighting government's arguments and often finding its interest persuasive. As Part II will clarify, RLUIPA would change each of these characteristics of pre-RLUIPA case law in the context of religious land use, with significant effects on auxiliary uses.

### 1. *The Centrality-of-Belief Test*

In the line of cases following *Sherbert*, the Supreme Court required religious institutions claiming a substantial burden to show that the government had placed a substantial burden on a "central religious belief or practice."<sup>35</sup> Accordingly, when resolving claims that a land use regulation imposed a free exercise burden, pre-RLUIPA lower courts usually considered whether the alleged burden implicated a belief central to the claimant's faith. Land use regulations were deemed to have passed heightened scrutiny analysis when the burden that they placed on a religious claimant was merely incidental, aesthetic, or economic—especially when alternative opportunities were available for the same religious conduct.<sup>36</sup>

Exemplifying the application of this criterion was *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*.<sup>37</sup> In *Lakewood*, a Jehovah's Witnesses congregation challenged a municipal zoning ordinance prohibiting the construction of a worship facility on a lot the congregation had purchased. Observing that "the centrality of the burdened religious observance to the believer's faith influences the determination of an infringement,"<sup>38</sup> the Sixth Circuit found that there was no substantial burden on the congregation and upheld the ordinance as constitutional.<sup>39</sup> The panel reasoned:

There is no evidence that the construction of Kingdom Hall is a ritual, a "fundamental tenet," or a "cardinal principle" of its faith. At most the Congregation can claim that its freedom to worship is *tangentially related* to worshipping in its own structure. However, building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs.<sup>40</sup>

Because no central belief was implicated, no substantial burden could exist. The court found that the congregation brought the case primarily to avoid economic and aesthetic burdens—burdens which did not rise to the level of

35. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

36. For its part, the Supreme Court has supported this type of analysis. *See, e.g.*, *Braunfield v. Brown*, 366 U.S. 599 (1961) (upholding as constitutional a Sunday closing law despite the law's imposition of an economic burden on Orthodox Jewish merchants who could not open their businesses on Saturdays for religious reasons).

37. 699 F.2d 303 (6th Cir. 1983).

38. *Id.* at 306.

39. *Id.* at 307-09.

40. *Id.* at 307 (emphasis added).



substantiality.<sup>41</sup> *Lakewood* has been criticized as “seriously misconstru[ing] the *Sherbert* compelling interest test” because it redefined the congregation’s stated religious interest as the “construction of a church in a particular district” and consequently failed to reach the issue of the government’s asserted interest.<sup>42</sup> Nonetheless, its centrality-of-belief standard was a powerful tool used by pre-RLUIPA courts to limit the free exercise claims of religious institutions.<sup>43</sup>

## 2. Deference to Government Interest

As *Lakewood* makes clear, pre-RLUIPA courts were not sympathetic to claims that governmental regulation burdened the construction and relocation activities of a religious institution. One common method of dismissing these claims of religious institutions was finding, as *Lakewood* did, that such activities did not implicate a centrally held religious belief. Another common method, not considered in *Lakewood*, was finding the governmental interest sufficient to overcome any alleged burden. Using this method, pre-RLUIPA decisions like *Grosz v. City of Miami Beach*<sup>44</sup> demonstrated great deference to the asserted interest of government.

In *Grosz*, the Eleventh Circuit considered a believer’s claim that his faith was substantially burdened by a municipal zoning provision that prohibited him from conducting large religious services in his home. Finding the use of a *Sherbert* analysis insufficient (in part because of divergent facts), the court used an “ad hoc balancing test” to weigh the believer’s alleged burden against the government’s interest.<sup>45</sup> Under that nebulous test, the court was convinced by the government’s assertion that enforcing its zoning ordinance “protects the zones’ inhabitants from problems of traffic, noise and litter, avoids spot zoning, and preserves a coherent land use zoning plan.”<sup>46</sup> The court stated that “the important objectives underlying zoning and the degree of infringement of those objectives [that would be] caused by allowing the religious conduct to continue place a heavy weight on the government’s side of the balancing scale.”<sup>47</sup> Ultimately, the court dismissed the believer’s claims, calling them “towards the

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41. *Id.* at 307-08 (stating that “the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches”). The court went on to analyze the city ordinance using a due process rational basis test and upheld the ordinance. *Id.* at 308.

42. Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Use After Boerne*, 68 GEO. WASH. L. REV. 861, 873 (2000).

43. See also *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824-25 (10th Cir. 1988) (finding no substantial burden on a church where “the record contains no evidence that building a church or building a church on the particular site is *intimately related* to the religious tenets of the church” (emphasis added)).

44. 721 F.2d 729, 739 (11th Cir. 1983), *reh’g denied*, 727 F.2d 1116 (11th Cir. 1984).

45. *Id.* at 738-740.

46. *Id.* at 738.

47. *Id.* at 739.

lower end of the spectrum” and merely inconvenient, in part because other nearby locations were available for worship sites.<sup>48</sup> Other pre-RLUIPA courts adopted *Grosz*’s deference to the governmental interest at stake in religious land use claims.<sup>49</sup>

There were exceptions to this deference, but only in cases where the government’s asserted interest was plainly insignificant, or worse, where government’s conduct was plainly unjust. In *Islamic Center of Mississippi, Inc. v. City of Starkville*, for example, the Fifth Circuit held that a “more than incidental”<sup>50</sup> burden was established when a series of zoning decisions made “a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation.”<sup>51</sup> That panel found that the city could not show a compelling government interest because it had failed to enforce the ordinance against nine Christian churches.<sup>52</sup> The discrimination of the Starkville municipal officials provided the panel with no reasonable alternative but to rule in favor of the mosque. Such an outcome, given pre-RLUIPA courts’ hostility to religious institutions’ land use claims, remained exceptional.

### C. *Smith and the Congressional Response*

In the decades preceding RLUIPA, and particularly after *Sherbert* was decided in 1963, free exercise doctrine was relatively stable. But in 1990, the Supreme Court decided a case that would spark a chaotic exchange between the Court and Congress as both institutions attempted to reshape free exercise doctrine.

The case, *Employment Division, Department of Human Resources v. Smith*, radically altered the landscape of free exercise jurisprudence by applying rational basis review to a law affecting religious rights.<sup>53</sup> The Court justified its departure from *Sherbert*’s strict scrutiny by stating: “To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense.”<sup>54</sup> The Court acknowledged

48. *Id.*

49. *See, e.g., Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (citing *Grosz* in upholding a city’s denial of a use permit to a church to locate in a residential neighborhood because the city had a strong interest in maintaining the integrity of its zoning scheme, protecting its residential neighborhoods, and responding to complaints of residents about traffic and noise).

50. 840 F.2d 293, 302 (5th Cir. 1988).

51. *Id.* at 299.

52. *Id.* at 302.

53. 494 U.S. 872 (1990).

54. *Id.* at 885 (citations and quotation marks omitted).

exceptions,<sup>55</sup> but otherwise established the rule that government action which constitutes a neutral law of general applicability and which does not specifically single out a religious belief or practice should be evaluated using rational basis review.<sup>56</sup>

The change that *Smith* brought to free exercise analysis was a surprise to most observers: it “sent shock waves across the country, especially among faith communities and those who practiced constitutional law.”<sup>57</sup> Many commentators stressed how *Smith* subverted well-settled First Amendment jurisprudence.<sup>58</sup> In the decade between *Smith* and the passage of RLUIPA, Congress tried to appease those dissatisfied with *Smith* by reshaping free exercise doctrine through legislation. Legislators likely took notice of *Smith*’s statement that state legislatures and the political process should weigh the protection of religious practices against the interests of the state. As the Court put it, the “unavoidable consequence[s] of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”<sup>59</sup>

The Religious Freedom Restoration Act (RFRA) of 1993<sup>60</sup> was Congress’s first “unsubtle attempt” to undo the *Smith* decision and to impose *Sherbert*’s strict scrutiny on all laws that substantially burden religious exercise.<sup>61</sup> RFRA

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55. See *id.* at 881 (granting an exception if the law implicated a hybrid right—both the Free Exercise Clause and another constitutional right); *id.* at 884 (stating that “where the State has in place a system of individual exemptions” and not generally applicable laws, it must have a “compelling reason” for doing so); *id.* at 886 n.3 (noting that strict scrutiny would still apply if a law were facially non-neutral).

56. *Id.* at 878-81.

57. Timothy J. Houseal, *RLUIPA: Protecting Houses of Worship and Religious Liberty*, 20 DEL. LAW. 28, 29 (2002).

58. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Mediating Institutions: Beyond the Public/Private Distinction*, 61 U. CHI. L. REV. 1245, 1249 (1994) (defending *Smith* but noting that “the *Smith* Court did more to underscore the disarray . . . than it did to resolve [it]”); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 (1993) (claiming that *Smith* was “substantively wrong and institutionally irresponsible”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (charging that “*Smith* is contrary to the deep logic of the First Amendment”). But see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (defending *Smith* against McConnell’s critique).

59. *Smith*, 494 U.S. at 890; cf. McConnell, *supra* note 58, at 1129:

The rhetoric of this sentence is certainly impolitic, leaving the Court open to the charge of abandoning its traditional role as protector of minority rights against majoritarian oppression. The “disadvantaging” of minority religions is not ‘unavoidable’ if the courts are doing their job. Avoiding certain ‘consequences’ of democratic government is ordinarily thought to be the very purpose of a Bill of Rights. But the argument reflected in this sentence nonetheless contains ideas that cannot be dismissed so lightly.

*Id.*

60. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)), partially invalidated by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

61. Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious*

mandated that strict scrutiny be applied to any government action involving a substantial burden on religious exercise: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>62</sup> With this language, which closely tracks *Sherbert's*, it is not surprising that the land use cases decided under RFRA largely followed pre-RLUIPA decisions.<sup>63</sup> But these cases were few in number, as RFRA only remained intact for three-and-a-half-years. In *City of Boerne v. Flores*, and despite its encouragement in *Smith* for Congressional action, the Court invalidated RFRA as applied to the states, finding it an unconstitutional exercise of Congress's Enforcement Clause powers because Congress had not shown a pattern of religious discrimination meriting such a far-reaching remedy and because RFRA violated separation-of-powers principles.<sup>64</sup>

After the *Boerne* decision, Congress considered the Religious Liberty Protection Act (RLPA) bills of 1998<sup>65</sup> and 1999,<sup>66</sup> which attempted to impose a strict scrutiny test on government action burdening religious land use. These proposed laws, which were criticized as too broad and having the same defects as RFRA, were never passed. However, two groups—dedicated to restoring the land use and prison rights components of RFRA, respectively—emerged undeterred from the RLPA process and combined forces to produce RLUIPA.<sup>67</sup>

#### D. *A Dearth of Free Exercise Claims Regarding Auxiliary Uses*

A final observation, relevant for this Note's discussion of RLUIPA in Part II, is that pre-RLUIPA free exercise cases like *Lakewood*, *Grosz*, and *Islamic Center* dealt with facilities used primarily for worship purposes. Few pre-RLUIPA free exercise cases involved facilities with both worship and auxiliary

*Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 323 (2003).

62. RFRA, 42 U.S.C. § 2000bb-1(b) (2000).

63. *Compare, e.g.,* *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1558 (M.D. Fla. 1995) (using a *Grosz* analysis to hold that where there are other alternatives for a homeless shelter to locate, the burden is "at the lower end of the spectrum" and not entitled to free exercise protection), *and* *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 544-45 (D.D.C. 1994) (holding that the enforcement of zoning regulations prohibiting a church from feeding homeless persons on its premises substantially burdened free exercise of religion because ministering to the needy could be considered a religious activity), *with* *St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935, (N.J. Super. Ct. Law Div. 1983) (finding a city ordinance unconstitutional for denying a permit to a homeless shelter where the shelter constituted free exercise of religion protected by the First Amendment). *See also* *Int'l Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 880 (N.D. Ill. 1996) (recognizing that RFRA "takes us back pre-*Smith*" and concluding that additional expense, "so long as it is not an [unusual] inflated expense . . . is not a substantial burden").

64. 521 U.S. 507, 529-36 (1997).

65. *See* Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998).

66. *See* Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

67. *See* Hamilton, *supra* note 61, at 334.

## RLUIPA and Auxiliary Uses

uses, and no case considers or squarely addresses a facility with solely auxiliary uses.<sup>68</sup> One Tenth Circuit case considered the free exercise concerns of a church seeking to build a multi-use facility that included worship space, administrative offices, classrooms, a gym, parking, and a drive-in amphitheater.<sup>69</sup> The church proposing to build this facility had been denied a special use permit to begin construction in an agricultural zone that excluded religious uses. The court held that the ordinance was valid because the burden on the church was “indirect” and “financial” in nature, and therefore did not amount to the infringement of religious freedom.<sup>70</sup> Unfortunately for our purposes, neither the existence nor the nature of these auxiliary uses was considered in the court’s ruling.

When land use disputes involving auxiliary uses did arise, religious institutions rarely sought to resolve them by claiming free exercise infringements. Instead, pre-RLUIPA courts considered the nature of the relationship of the enterprise to a religious institution in the context of the local land use ordinances. Specifically, courts asked whether an enterprise could be considered an “accessory use” as defined by a relevant zoning code. Often the code would define an accessory use as customary, “anticipated incidental or secondary uses that are either necessary or convenient for the property owner.”<sup>71</sup> As the Indiana Supreme Court put it, describing that State’s law: “facilities that *go with* the church of the particular denomination may not be excluded if the church is admissible.”<sup>72</sup> If an enterprise was determined to be an accessory use to a religious institution, it would be given rights and restrictions derived from the rights and restrictions on the institution itself—that is, it would be subject to, or free from, the same land use regulations as its parent institution. Accessory uses were not prohibited solely because they resulted in an adverse effect on property values, loss of tax revenue, or decreased enjoyment of neighborhood property.<sup>73</sup>

While a full treatment of this body of case law is outside the scope of this Note, suffice it to say that courts varied widely in their approach because the issues and the underlying land use regulations were highly localized. Some jurisdictions were permissive in determining accessory uses; others were not.<sup>74</sup>

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68. The author found no such cases in several searches.

69. *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 822 (10th Cir. 1988).

70. *Id.* at 825.

71. Helen M. Maher, *Religious Freedom and Zoning*, 5 BUFF. ENVTL. L.J. 309, 326 (1998) (quoting DANIEL MANDELKER, *LAND USE LAW* § 5.14 (3d ed. 1993)).

72. *Bd. of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 42 (Ind. 1961) (finding that a Catholic church was wrongly denied permission to build a church facility, school, priests’ dwelling, and sisters’ home because such uses were *accessory* uses) (emphasis added).

73. *See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. City of Idaho Falls*, 448 P.2d 185, 188 (Idaho 1968).

74. *Compare, e.g., City of Concord v. New Testament Baptist Church*, 382 A.2d 377, 379-80 (N.H. 1978) (defining a “facilit[y] usually connected with a church” under a Concord ordinance as one in

No nationwide case law emerged—or indeed, could emerge—regarding the disposition of religious land use cases involving auxiliary uses. This fractured body of case law was not troubling when few religious institutions offered auxiliary uses.<sup>75</sup> But the rise of auxiliary uses begs a unified approach.<sup>76</sup>

As the preceding discussion reveals, a nationwide approach—at least for primary worship facilities—was emerging with the development of protected liberty case law. Pre-RLUIPA courts used two commingling standards—*Schad* and *Sherbert*—to address land-use claims involving a religious institution’s primary worship facility. Greater federalization of religious land use claims would come to extend to auxiliary uses with the passage of RLUIPA.

## II. RLUIPA AND AUXILIARY USES

With the exception of the approximately six years when *Smith* was the controlling precedent, courts used heightened scrutiny as defined by the Supreme Court’s free exercise and protected liberty cases to determine whether a challenged land use regulation was constitutional.<sup>77</sup> RLUIPA’s drafters insisted that they were not changing this jurisprudence with their passage of the new law.<sup>78</sup> However, RLUIPA has significantly departed from prior law by expanding the class of protected religious uses to all auxiliary uses, including those that are not substantially related to a religious institution’s religious, educational or charitable mission. The law has done so both by offering a broader, statutory definition of “religious exercise” and by failing to exclude tangential auxiliary uses from receiving its protections. RLUIPA has also created confusion in the courts by first eliminating the centrality-of-belief standard of pre-RLUIPA jurisprudence and declining to specify another one in its place, and second, by failing to define a substantial burden. Courts have recognized the difficulties of these ambiguities for cases involving auxiliary uses. Wary of over-inclusion, and perhaps heeding indications from the law’s framers that RLUIPA be limited in scope,<sup>79</sup> some courts have indicated a growing reluctance to favor religious institutions.

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“close association” with the church and holding that a religious school is a connected use of a church when congregants’ religious beliefs require that their children receive a religious education), *with Damascus Cmty. Church v. Clackamas County*, 610 P.2d 273, 275-76 (Or. Ct. App. 1980) (ruling that full-time parochial school was not an ancillary use “usually” connected with a church as was required by statute to evade special permit requirement).

75. Before RLUIPA, auxiliary uses certainly existed—like the “school; meeting room; kindergarten, small games, open field and hard-top play areas, and parking lot” considered in a 1956 land use claim brought by a church. *See, e.g., Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827, 830, 837 (N.Y. 1956) (finding “arbitrary and unreasonable” a zoning board’s denial of a church’s application to build these structures).

76. *See supra* text accompanying notes 16-20.

77. This “six years” figure includes 1990-1993 (after *Smith* but before RFRA), and 1997-2000 (after *Boerne* but before RLUIPA).

78. *See infra* text accompanying note 94.

79. *See supra* Subsection II.A.2.

## RLUIPA and Auxiliary Uses

This Part aims to clarify the ways in which RLUIPA affects free exercise claims involving auxiliary uses. The first Section describes the passage and codification of RLUIPA and notes the framers' intent with regard to auxiliary uses. The second Section analyzes RLUIPA's departure from the pre-RLUIPA jurisprudence described in Part I, emphasizing the impact of these departures on auxiliary use claims. The third Section chronicles the courts' response to these ambiguities in RLUIPA and their growing concern over the inclusion of auxiliary uses.

### A. *The Passage and Codification of RLUIPA*

#### 1. *RLUIPA's Central Provisions*

With RLUIPA, Congress attempted to avoid the constitutional defects of RFRA, both by narrowing the scope of the law to the land use<sup>80</sup> and institutional<sup>81</sup> (primarily prison) contexts and by developing a legislative record that found a history of discrimination in land use practice.<sup>82</sup> It concluded that this discrimination justified RLUIPA's prophylactic rules to "simplify the enforcement of constitutional standards in land use regulation of churches."<sup>83</sup>

In many ways, RLUIPA simply codified existing case law. It enshrined the *Sherbert* strict scrutiny / least restrictive means test in its first section:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

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

(B) is the least restrictive means of furthering that compelling governmental interest.<sup>84</sup>

This test applies in three contexts: (1) when the burden is imposed in a federally funded program or activity, even if the burden results from a generally applicable law; (2) where the burden affects, or the removal of that burden would affect, interstate commerce, even if the burden results from a generally applicable law; and (3) where the burden is imposed in the process of

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80. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (Supp. 2003).

81. § 2000cc-1.

82. See Houseal, *supra* note 57, at 30 (chronicling Congress's efforts, including holding six House Subcommittee hearings and three Senate Committee hearings, taking expert testimony, and analyzing several studies).

83. 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Senator Orrin Hatch and Senator Edward Kennedy). Legislators were particularly worried about black churches, Jewish synagogues, and "new, small, or unfamiliar churches." *Id.* at S7774. See also *id.* at S7778 (July 27, 2000) (statement of Senator Harry Reid) (emphasizing the Mormon Church's "serious reservations" about land use regulations that are applied in a discriminatory fashion).

84. § 2000cc(a)(1).

implementing an individualized land use regulation.<sup>85</sup> In articulating the first two contexts, the drafters simply restated existing restrictions on Congress's Spending and Commerce Powers, while the third adopted one of the exceptions carved out by *Smith*.<sup>86</sup> RLUIPA also codified prior case law in its discrimination and exclusion clause, prohibiting a government from imposing a land use regulation that treats a religious institution on "less than equal terms,"<sup>87</sup> discriminates against an institution on the basis of religion,<sup>88</sup> or "totally excludes . . . or unreasonably limits" religious institutions from locating in a jurisdiction.<sup>89</sup> RLUIPA thus protects religious exercise from land use regulations in three independent ways—protecting against substantial burdens, discrimination, and exclusion.

RLUIPA did not adopt prior case law wholesale: it created a new term, "*religious exercise*,"<sup>90</sup> which had never been used in free exercise jurisprudence.<sup>91</sup> This term specifically encompassed exercises of religion compelled by non-central religious beliefs<sup>92</sup> as well as "[t]he use, building, or conversion of real property for the purpose of religious exercise."<sup>93</sup> Oddly, senators commenting on the Congressional Record proclaimed that RLUIPA's strict scrutiny formulation was "not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden [on] religious exercise."<sup>94</sup> Such a proclamation was belied

85. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a)(2) (Supp. 2003).

86. This was *Smith's* so-called individualized assessments exception. See *supra* note 55.

87. § 2000cc(b)(1). Prior cases codified by this provision include *Roman Catholic Welfare Corp. of San Francisco v. City of Piedmont*, 289 P.2d 438 (Cal. 1955) (invalidating a zoning ordinance that limited private and religious schools, but not public schools, in residential areas); *City of Miami Beach v. State ex rel. Lear*, 175 So. 537, 539 (Fla. 1937) (invalidating as "arbitrary and unreasonable" an ordinance that limited private and religious schools, but not public schools, in a residential area); and *Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827, 834 (N.Y. 1956) (stating that "[a]n ordinance will also be stricken if it attempts to exclude private or parochial schools from any residential area where public schools are permitted"), *aff'd*, 174 N.E.2d 743 (N.Y. 1961).

88. § 2000cc(b)(2). Prior cases codified by this provision include *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (reversing the conviction of a minister who had given a sermon in a park where other religious groups had freely operated because "[t]o call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another").

89. § 2000cc(b)(3). Prior cases codified by this provision include *Ellsworth v. Gercke*, 156 P.2d 242 (Ariz. 1945) (striking down as arbitrary and unreasonable a city ordinance excluding churches from residential districts, but allowing other nonresidential uses); *O'Brien v. City of Chicago*, 105 N.E.2d 917 (Ill. App. Ct. 1952) (upholding a city council's decision to allow a church to build in a residential area); and *Diocese of Rochester*, 136 N.E.2d at 834 (espousing the majority view that "[i]t is well established in this country that a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district").

90. See § 2000cc-5(7)(A).

91. See *supra* text accompanying notes 11 and 14.

92. See Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A) (Supp. 2003).

93. § 2000cc-5(7)(B).

94. See *supra* note 83, at S7776.



by the unique religious exercise definition codified in the statute. As this puzzle and the following discussion reveal, the final form of RLUIPA did not always reflect its framers' stated intent.

### 2. *The Framers' Intent Regarding Auxiliary Uses*

The central provisions of RLUIPA demonstrate that Congress had many goals in passing the law: to remedy perceived discrimination, to eliminate substantial burdens on religious exercise, and to reinforce certain aspects of free exercise case law. But the statute does not fully reveal how Congress thought that the central issue considered by this Note—auxiliary uses—should be addressed. To discern the intent of the law's framers with regard to auxiliary uses, one must look beyond the text of RLUIPA.

The starting point for this analysis is the substantial evidence that Congress intended for the law to apply broadly. The text of the statute specifies a construction that is “to the maximum extent permitted by the terms of [the statute] and the Constitution.”<sup>95</sup> The bill's co-sponsors, Senators Hatch and Kennedy, issued a joint statement that explained the rationale for such a broad construction:

The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.<sup>96</sup>

With this statement, and despite their call that the law should be broadly applied, the law's framers could be seen to suggest two possible limitations: (1) to spaces in which the “right to assemble for worship” could be exercised, and (2) to spaces “consistent with [religious institutions'] theological requirements.” Neither of these seemingly sensible limitations was codified in RLUIPA. RLUIPA does not mandate that its protections be limited to worship spaces. Nor does RLUIPA incorporate a “consistent with their theological requirements” standard—a standard that sounds similar to the centrality-of-belief standard used in pre-RLUIPA cases.

Nonetheless, RLUIPA never indicates by its terms that the law is limitless or that religious entities should be entirely exempt from land use regulations.<sup>97</sup> The drafters themselves declared that the law “does not provide religious institutions with immunity from land use regulation.”<sup>98</sup> Such rhetoric was not inconsistent with the drafters' intent that the law apply broadly; it does

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95. § 2000cc-3(g).

96. *See supra* note 83, at S7774.

97. *Cf. Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003), (stating that “no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise”).

98. *See supra* note 83, at S7776.

demonstrate, however, that this breadth should have limits. Indeed, Senators Hatch and Kennedy directly addressed the question of excluding certain auxiliary uses from RLUIPA's protections, emphasizing that:

[N]ot every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition [on] "religious exercise." For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on "religious exercise."<sup>99</sup>

Thus the bill's most ardent supporters asserted that some auxiliary uses—those with a less direct relationship to religious exercise—should not trigger strict scrutiny under RLUIPA. However, they recognized the absurdity of offering RLUIPA's protections to enterprises that are essentially commercial, and not religious, in nature.

In the end, Congress failed to codify any limitations on auxiliary uses in the language of the statute itself. Without being passed into law, the words of Senators Hatch and Kennedy have no legal force. They do, however, indicate that Congress knew about, but declined to address, the issue of auxiliary uses. As the next Section will explain, Congress's choice opened the door for religious institutions to make claims that were, practically speaking, impossible before RLUIPA: free exercise claims involving auxiliary uses.<sup>100</sup>

### B. *RLUIPA's Failure To Address Auxiliary Use Claims*

Contrary to its drafters' stated intent, RLUIPA does not prevent the law's protections from extending to a religious institution's auxiliary uses. Firstly, Congress gave no indication in the statute of how auxiliary uses should be treated, never differentiating between worship and non-worship uses and never mentioning auxiliary uses in the text. Moreover, Congress both failed to provide standards by which to judge auxiliary use claims and failed to define "substantial burden" in a way that would bring clarity to legal disputes invoking RLUIPA. As to Congress's first failure, one possibility for judging such claims could have been the pre-RLUIPA centrality-of-belief standard that considered, as a threshold matter, whether the free exercise allegedly implicated was central to a claimant's faith. Congress could have provided that auxiliary uses in particular should be subject to such analysis. Instead, Congress eliminated the centrality-of-belief standard altogether and offered no

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99. *Id.*

100. *See supra* Subsection I.B.3.

replacement. Most courts have since formulated a much lower sincerely-held belief standard to take its place. That shift has also signaled the decline of deference to government interest. Having eliminated the centrality-of-belief standard, Congress alternatively might have defined a standard for establishing a demanding definition for a substantial burden. However, Congress again failed to clarify RLUIPA's scope by declining to define substantial burden at all. The absence of a uniform standard resulted in a circuit split over how to determine whether a substantial burden has been imposed.

### 1. *Centrality-of-Belief Standard v. Sincerely-Held Belief Standard*

RLUIPA eliminated the centrality-of-belief standard that helped pre-RLUIPA courts to determine, as a threshold matter, when free exercise was implicated. Instead, the law defines "religious exercise" to include "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief."<sup>101</sup> RLUIPA thus renders obsolete the reasoning in pre-RLUIPA cases—among them the *Lakewood* decision—that considered whether the construction of a religious structure is centrally related (as opposed to "tangentially related") to the religious institution's religious beliefs.<sup>102</sup> Instead of focusing on the relationship between religious beliefs and religious exercise, courts must now determine whether an act constitutes religious exercise. Some commentators have pointed out that "RLUIPA's definition avoids the Sixth Circuit's conundrums [in *Lakewood*] over whether construction of a church building is only 'tangentially related' to religious worship."<sup>103</sup>

The departure from the centrality-of-belief standard, however, has left more conundrums in its place. Most courts have said that although the religious practice need not be central, the substantial burden "must be based on a sincerely held religious belief."<sup>104</sup> The notion of sincerity has some history in Supreme Court free exercise jurisprudence. In *Wisconsin v. Yoder*, the Court ruled that a compulsory education regulation was not enforceable on a religious group in part because the group's claimants had demonstrated "the sincerity of their religious beliefs."<sup>105</sup> The Court, however, did not rest solely on the fact

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101. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A) (Supp. 2003) (emphasis added).

102. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983). See also *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988).

103. Roman P. Storz & 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, 959 (2001).

104. *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 675 N.W.2d 271, 281 (Mich. App. 2003) (quotation marks omitted). See also *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004)).

105. 406 U.S. 205, 235 (1972).

that the claimants had proved their sincerity. It also relied upon “the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of . . . their religious organization, and the hazards presented by the State’s enforcement of a statute generally valid as to others.”<sup>106</sup> In other words, the Court’s holding in *Yoder* relied in its holding on its determination that the particular belief being implicated was central to the claimants’ faith.

Without the additional requirement of centrality, then, the sincerely-held belief standard now being applied by courts under RLUIPA is low. A Connecticut federal district court, for instance, granted a preliminary injunction where a town had issued a cease-and-desist order and had denied a special use permit for weekly prayer group meetings.<sup>107</sup> These meetings often involved fifty to sixty people, lasted several hours each week, and resulted in traffic and safety problems.<sup>108</sup> Asserting that the conditions his prayer meetings imposed on neighbors were minimal, the owner of the house where the group met claimed that the meetings were “an important part of his faith” and “brought him closer to God” such that enforcement of the cease and desist order would impede his ability to practice his beliefs.<sup>109</sup> The court held that because the homeowner was sincere, he had a free exercise claim, and further found that his free exercise was unconstitutionally burdened by the town’s actions. Under the sincerely-held belief standard, the homeowner’s ability to demonstrate that free exercise was implicated rested on the relatively low burden of proving the sincerity of his beliefs.

Eventually, the logic of the Connecticut court will be tested by courts considering auxiliary use claims. When this occurs, religious institutions may succeed in a claim that an accessory use constitutes religious exercise under RLUIPA so long as they can demonstrate sincerity. Establishing that an accessory use meets this relatively low threshold is the critical step in showing that an institution’s free exercise is implicated. Unlike the centrality-of-belief standard, the sincerely-held belief standard does not consider whether the use is actually related to a central tenet of the institution’s faith. Such a low standard may lead to the over-inclusion of accessory uses in that it may protect accessory uses that only minimally relate to the religious institution’s religious, educational or charitable mission. Under the sincerely-held belief standard, the era of deference to the government interest is over.

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106. *Id.*

107. *Murphy v. Zoning Comm’n of New Milford*, 148 F. Supp. 2d 173, 187-88 (D. Conn. 2001), *vacated and remanded for dismissal*, 402 F.3d 342 (2d Cir. 2005).

108. *Id.* at 176.

109. *Id.* at 176-77. *See also* *Dilaura v. Ann Arbor Charter Twp.*, 30 F. App’x 501, 509 (6th Cir. 2002) (per curiam) (adopting *Murphy* and holding that “gatherings of individuals for the purposes of prayer . . . is a use of land constituting a religious exercise that is substantially burdened, under the RLUIPA, by a zoning ordinance that prevents such gatherings”).

2. *Variations on the Substantial Burden Theme*

In addition to its failure to provide a standard with regard to establishing a religious exercise claim, RLUIPA never defines substantial burden. The framers of the law had hoped that the courts would interpret this absence to mean that substantial burden analysis would be similar to that of pre-RLUIPA courts.<sup>110</sup> However, courts have split over the articulation of the substantial burden standard. Competing views have been articulated by the Seventh and Eleventh Circuits.

In a case commonly known as the *C.L.U.B.* case, the Seventh Circuit held that:

[I]n 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*.<sup>111</sup>

The *C.L.U.B.* court went on to emphasize that the burdens of meeting procedural requirements in a zoning application process, accommodating for land scarcity, dealing with political aspects of the approval process, and/or bearing financial costs as a result of less-than-favorable zoning provisions were not substantial under RLUIPA because they did not render impracticable the use of real property for the purpose of religious exercise.<sup>112</sup> The Third and Ninth Circuits have adopted this definition of substantial burden, as have several other courts.<sup>113</sup>

Like the pre-RLUIPA centrality-of-belief standard for determining a free exercise claim, *C.L.U.B.*'s effectively impracticable standard for determining a substantial burden establishes a high bar for claimants to show the substantiality of their burden. Though *C.L.U.B.* dealt with a worship facility, its

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110. See *supra* text accompanying note 94.

111. *Civil Liberties for Urban Believers v. City of Chicago (C.L.U.B.)*, 342 F.3d 752, 761 (7th Cir. 2003) (emphasis added) (finding no RLUIPA substantial burden in a city's ordinance requiring special use approval to operate in commercial or business areas and limiting operation in manufacturing areas), *cert. denied*, 541 U.S. 1096 (2004).

112. *Id.*

113. See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 F. App'x 70, 77 (3d Cir. 2004) (citing *C.L.U.B.*'s definition of substantial burden and finding that the religious institution did not establish a likelihood of success in establishing a substantial burden); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (affirming the grant of summary judgment for the city on the college's RLUIPA claim); *Petra Presbyterian Church v. Vill. of Northbrook*, No. 03-C-1936, 2003 WL 22048089, at \*10 (N.D. Ill. Aug. 29, 2003) (holding under *C.L.U.B.* that no substantial burden was imposed by zoning ordinances, even though the church "has undoubtedly suffered serious hardships, first in its attempt to find a suitable property, and, once it found one . . . in attempting to win approval for the intended uses" (quoting *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 979 (N.D. Ill. 2003))). See also, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of W. Linn*, 86 P.3d 1140, 1157 (Or. Ct. App. 2004) (finding that "neither the building of a new church (and the concomitant expansion of the church community) nor, in the meantime, the ability of current members to reasonably conveniently engage in worship has been rendered 'effectively impracticable'"), *aff'd*, 111 P.3d 1123 (Or. 2005).

implications for non-worship auxiliary use claims are relatively clear. An alleged burden on auxiliary uses must be shown to bear a direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable. Under *C.L.U.B.*, an auxiliary use that only tangentially relates to a religious institution's mission would not likely receive the protections of RLUIPA.

The Eleventh Circuit, by contrast, has said that the Seventh Circuit's definition would render parts of RLUIPA "meaningless" and accordingly has offered a new analysis: "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."<sup>114</sup> This formulation implies that an obstacle incident to the regulation of land use—so long as it coerced a change in conduct—could be found to be substantial. Compared with the Seventh Circuit, the Eleventh Circuit formulation sets a lower burden for the religious institution claiming that it has suffered a burden on its religious exercise because of restrictions on its auxiliary enterprise. Under the Eleventh Circuit rule, such an institution is not required to demonstrate that the challenged restrictions rendered religious exercise impracticable. It must merely show that these restrictions directly affected the behavior of adherents. Other courts have found this lower burden to be an attractive alternative to the Seventh Circuit rule.<sup>115</sup>

The debate between the Seventh and Eleventh Circuits highlights the effects of RLUIPA's ambiguities and omissions. Without the clarity of a uniform rule, courts have had a difficult time establishing standards by which to judge whether a religious belief has been implicated or whether a substantial burden has been established.

### C. *A Suspicion of Extending RLUIPA to Auxiliary Uses*

Even without consistent statutory standards, courts have generally construed RLUIPA in favor of religious institutions. Courts have not, however, dealt with auxiliary uses with the same permissiveness as they have dealt with facilities used primarily for worship. Several of the courts that have considered whether RLUIPA protects auxiliary uses have rightly demonstrated a reluctance to grant these uses RLUIPA's full protections.

The court in *Castle Hills First Baptist Church v. City of Castle Hills* limited RLUIPA's applicability to exclude a common auxiliary use: parking.<sup>116</sup> There, the court acknowledged that the large religious institution had overcome the

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

115. *See, e.g., Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (restating the Eleventh Circuit formulation and emphasizing that "a government action or regulation creates a 'substantial burden' on a religious exercise if it *truly* pressures the adherent to *significantly* modify his religious behavior and *significantly* violate his religious beliefs") (emphases added).

116. No. SA-01-CA-1149-RF, 2004 WL 546792, at \*11 (W.D. Tex. Mar. 17, 2004).

sincerely-held belief threshold and thus that its desire to build a parking lot involved “genuine and compelling religious convictions require it to increase its own membership and encourage new members to join the congregation.”<sup>117</sup> Nonetheless, the court found that the city’s ruling with respect to Castle Hills’ parking lot did not constitute a substantial burden on free exercise warranting strict scrutiny review under RLUIPA,<sup>118</sup> in part because applying RLUIPA in that situation would allow the church to demand “whatever amount [of parking] the church desires.”<sup>119</sup> The court also recognized the city’s interest in regulating land to assure a uniform architectural character.<sup>120</sup> The court thus recognized that interpreting RLUIPA too broadly—to include such uses as parking—could have negative consequences.

Similarly, the Second Circuit in *Westchester Day School v. Village of Mamaroneck* considered a case in which a district court granted summary judgment to a religious day school that had been denied a permit to build additional facilities on its campus.<sup>121</sup> The court remanded the case, finding that there was a genuine issue of material fact as to whether the school could show a substantial burden resulting from the denial.<sup>122</sup> In dicta, the circuit panel criticized the district court’s interpretation of RLUIPA,<sup>123</sup> explaining that it would render “any improvement or enlargement proposed by a religious school to its secular educational and accessory facilities . . . immune from regulation or rejection by a zoning board so long as the proposed improvement would enhance the overall experience of the students.”<sup>124</sup> Under such logic, the panel went on, “a serious question arises whether it goes beyond the proper function of protecting the free exercise of religion into the constitutionally impermissible zone of entwining government with religion in a manner that prefers religion over irreligion and confers special benefits on it.”<sup>125</sup> With this dicta, the Second Circuit has gone farther than any other court in assessing the problems of applying RLUIPA too generously.

Using the *Westchester Day School* dicta, a New York federal district court recently declined to extend RLUIPA’s protection to include a church’s expansion that mainly involved the building out of administrative offices.<sup>126</sup>

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117. *Id.* at \*11.

118. *See id.* at \*12-\*13.

119. *Id.* at \*12.

120. *See id.* at \*13.

121. 386 F.3d 183 (2d Cir. 2004), *vacating on other grounds* 280 F. Supp. 2d 230 (S.D.N.Y. 2003).

122. *See id.* at 185 (stating that “[t]he Application provided for the addition of eighty-one parking spaces. In summary, a portion of the facilities to be built or modified . . . were intended specifically for religious exercises, while the major part of the plan involved secular facilities, such as classrooms, rooms for computer[s] and art, smaller rooms for tutoring, a cafeteria, and administrative offices”).

123. *Id.*

124. *Id.* at 189.

125. *Id.* at 190.

126. *See Cathedral Church of the Intercessor v. Inc. Vill. of Malverne*, 353 F. Supp. 2d 375, 380

The church had submitted one application for a building permit for its expansion, but was denied. The village later accepted a revised version of the church's application.<sup>127</sup> The church subsequently sued the village under RLUIPA, "contend[ing] it was 'compelled' to submit revised plans" and that after the permit was granted it was subject to harassment from city officials.<sup>128</sup> However, the court dismissed the suit, finding that there was no substantial burden and reasoning that "[s]imply because the Church is a religious institution does not mean it receives an unencumbered right to zoning approval for non-religious uses."<sup>129</sup> This language indicates a suspicion—a suspicion shared by other courts—of extending RLUIPA to cover non-worship uses.

Of course, these cases involved rather ordinary auxiliary uses—parking, school facilities, and administrative offices. Though no cases involving extraordinary auxiliary uses have come to the courts, courts' restraints on ordinary auxiliary uses indicate early apprehension about overextending RLUIPA's protections.

### III. WHY RLUIPA SHOULD BE MODIFIED TO BETTER ADDRESS AUXILIARY USE CLAIMS

The analysis in Part II revealed several reasons why Congress must clarify RLUIPA: the divergence between the written law and the framer's stated intent, Congress's failure to address auxiliary uses, and courts' difficulties applying the law. This Part focuses on two additional reasons. The first reason is that religious institutions have begun trying to enforce RLUIPA outside of the court system in a way that favors their auxiliary uses. The likelihood that religious institutions will win on RLUIPA claims in court has unexpectedly empowered religious institutions outside the courtroom. They have found that, by threatening to file a costly and time-consuming RLUIPA suit, they can pressure land use authorities into complying with their demands. As a result, religious institutions bargaining in the shadow of RLUIPA are beginning to become a "law unto themselves"—the very problem the *Smith* Court tried to prevent.<sup>130</sup> The second reason is that failing to limit the law's applicability may render the law as applied to be an unconstitutional violation of the Establishment Clause in that it may favor religion over irreligion. Combined, these two reasons provide a compelling rationale for the reforms called for in Part IV.

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(E.D.N.Y. 2005).

127. *See id.*

128. *Id.* at 380-81.

129. *Id.* at 390-91.

130. *See* text accompanying note 54.



A. *A Law Unto Themselves: Invoking RLUIPA Outside the Court System*

Despite some courts' efforts to limit RLUIPA's applicability in auxiliary use cases, RLUIPA is nonetheless working to protect auxiliary uses—outside the court system. After more than five years of RLUIPA litigation,<sup>131</sup> religious institutions have realized that land use authorities are extremely vulnerable to the threat of litigation: local governments worry about the time, expense, and social cost of litigating against a well-funded or well-respected religious institution. Accordingly, religious institutions, particularly larger ones with multiple auxiliary uses, have found a way to take advantage of the broad protections of RLUIPA before resorting to court action. Instead of waiting for a land use dispute to become litigious, they immediately invoke RLUIPA at the first stage of the dispute. This practice, which has been chronicled only rarely but is sure to increase in frequency, demonstrates that courts alone cannot control the applicability of RLUIPA.

In those cases that have become public, local governments have shown a tendency to acquiesce to the threat of a RLUIPA-based challenge rather than take on the religious institution that issued it. Denver's 2000-member Greenwood Community Church, for example, threatened to file suit under RLUIPA after its application to amend an existing special use permit was denied.<sup>132</sup> The congregation, already big enough to operate a day care center, wanted to double the size of its main building by expanding the sanctuary and adding a chapel, music room, and community area, as well as 250 parking spaces.<sup>133</sup> After the church's threat, the city officials reversed their decision. This reversal effectively allowed the church to move ahead in building auxiliary uses—including parking—where a court following *Castle Hills* might have found such building restricted.<sup>134</sup>

Similarly, the planning board of Rockaway Township, New Jersey, considered whether the 5000-member Christ Church was so large that it fell outside Rockaway's traditional definition of a church, and would therefore require additional permits from the zoning board before relocating.<sup>135</sup> The church was proposing to build several new buildings on a former office site encompassing 107 acres, including a sanctuary seating 2152 people, a private school, parking lot, and various recreational facilities.<sup>136</sup> When the church

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131. RLUIPA was signed into law on September 22, 2000.

132. See Becket Fund for Religious Liberty, *Greenwood Community Church v. City of Greenwood Village*, <http://www.becketfund.org/index.php/case/55.html> (last visited Dec. 15, 2005).

133. See Joan Lowy, *Megachurches*, CINCINNATI POST, Sept. 8, 2003, at 1F.

134. See *supra* text accompanying notes 116-119.

135. John Chadwick, *Law Creates Pulpit Bullies, Critics Say*, BERGEN RECORD (N.J.), Sept. 5, 2004, at A1.

136. See Rob Jennings, *Rockaway Pastor: OK Christ Church*, DAILY RECORD (Morris County, N.J.), Jan. 26, 2005, available at <http://www.dailyrecord.com/news/articles/news2-churchletter.htm>. A group opposing Christ Church's efforts has stated that a review of the site plans indicates an intent to

threatened a RLUIPA suit, the planning board temporarily dropped its plans to limit the church.<sup>137</sup> However, when the board went so far as to pass new zoning ordinances affecting Christ Church's submitted site plans, Christ Church responded by amending its RLUIPA lawsuit to claim further religious exercise infringements.<sup>138</sup>

The recent public disputes involving Greenwood Community Church and Christ Church illustrate the power of RLUIPA outside the courts to shelter auxiliary uses from land use regulations—a power sure to be harnessed by more and more religious institutions. Rather than evaluate the application of a land use regulation using post-RLUIPA free exercise framework, land use authorities are beginning to use only one criterion: whether an entity is a religious institution. Religious institutions, they reason, will have the powerful protection of RLUIPA in court—a protection that may ultimately cause the land use authorities to lose. Instead of wasting money and time litigating, land use authorities give in to religious institutions' threats. Land use authorities may benefit in the short term by avoiding the costs of litigation. But in the long term, RLUIPA's reach will expand to the point where some religious institutions, including their auxiliary uses, are effectively dictating their own land use regulations. Even the law's framers, who may have wanted RLUIPA to fortify religious institutions' bargaining power, would not have predicted such an outcome. Congress should remedy this negative effect of RLUIPA by modifying the law.

### B. *Potential Violations of the Establishment Clause*

In addition to the unwanted phenomenon of extrajudicial enforcement of RLUIPA, the law's questionable constitutionality should compel Congress to act. While the law as written would not likely be declared unconstitutional, the law's applicability to auxiliary uses—without regard to their relationship to a religious, educational, or charitable mission of a religious institution—may well be incompatible with the Establishment Clause.

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.”<sup>139</sup> As *Walz* recognizes, government may exercise “benevolent neutrality” to accommodate impositions of government on religious institutions.<sup>140</sup> In explaining this term, the Supreme

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build two chapels, a book store, TV and radio broadcasting facilities, Christian museum, a fellowship hall for 1000 people, and a food court. *Voices of Rockaway Township, Inc., Facts and Fiction Regarding the Voices of Rockaway Township*, <http://www.voicesofrockawaytwp.org/pages/4/index.htm> (last visited Dec. 15, 2005).

137. See Chadwick, *supra* note 135.

138. See Alicia Zadrozny, *Christ Church Submits New Plans for Rockaway*, MONTCLAIR TIMES (N.J.), Aug. 4, 2005, <http://www.montclairtimes.com/page.php?page=10220>.

139. U.S. CONST. amend. I.

140. *Walz v. Tax Comm'n*, 397 U.S. 664, 676-77 (1970).

Court noted that “there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”<sup>141</sup> As part of the “play in the joints,” the neutrality principle does not preclude government from taking religion into account.<sup>142</sup> However, it does preclude government from favoring one religion over another. Moreover, and most importantly for our purposes, it prevents the government from favoring religion over irreligion.

In *Board of Education of Kiryas Joel Village School District v. Grumet*, the Supreme Court held that “a principle at the heart of the Establishment Clause [is] that government should not prefer . . . religion to irreligion.”<sup>143</sup> *Kiryas Joel* involved a New York statute that created a special school district in which members of a particular religious sect could educate their children.<sup>144</sup> The Court found that this kind of “legislative favoritism”<sup>145</sup> violated the neutrality principle of the Establishment Clause, crossing the line “from permissible accommodation to impermissible establishment.”<sup>146</sup> Justice Stevens elaborated on this notion in his concurrence in *Boerne*, the decision that invalidated RFRA. Alone among his peers, he argued that RFRA violated the Establishment Clause because “the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.”<sup>147</sup> While Stevens’ statements were dicta, they are helpful in understanding the irreligion-religion conceptual framework.

Following the logic of *Kiryas Joel* and Justice Stevens, one could argue that the accommodation of auxiliary uses under RLUIPA—particularly those not substantially related to a religious institution’s religious, educational, or charitable goals—goes beyond benevolent neutrality. To the extent that RLUIPA as applied could protect auxiliary enterprises that are merely tangential to a religious institution’s mission—enterprises like fast food restaurants and banks—the law could be thought to demonstrate “legislative favoritism” of religious over irreligious uses. This is because the law confers special and economically valuable benefits on these enterprises solely on the basis of their relationship to a religious institution—despite the fact that such relationships might be merely peripheral. By permitting religious institutions to

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141. *Id.* at 669.

142. *See, e.g., Locke v. Davey*, 540 U.S. 712, 718 (2004) (allowing, as “play in the joints,” a state’s denial of scholarships to students majoring in theology because the state was attempting to avoid Establishment Clause concerns).

143. 512 U.S. 687, 703 (1994) (holding that the drawing of a special school district that served only members a religious sect violated the Establishment Clause).

144. *Id.* at 690.

145. *Id.* at 704.

146. *Id.* at 710.

147. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring).

locate auxiliary enterprises in advantageous but otherwise restricted locations, RLUIPA may put competing enterprises at an economic disadvantage. While the question has not yet arisen in litigation, a court faced with such facts could rightly find RLUIPA, as applied, to violate the “no preference” jurisprudence of the Establishment Clause.

It is necessary to emphasize here that this Note does not argue that RLUIPA as written violates the religion-irreligion framework. The law includes a provision, entitled “Establishment Clause Unaffected,” which provides, “Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion [the Establishment Clause].”<sup>148</sup> Indeed, most courts considering facial challenges have declined to find RLUIPA unconstitutional on Establishment Clause grounds.<sup>149</sup> Moreover, the Supreme Court, in *Cutter v. Wilkinson*, recently upheld RLUIPA’s institutionalized persons provisions against an Establishment Clause challenge.<sup>150</sup> The Court emphasized that its holding applied only to facial challenges and not to future claims that applying RLUIPA would produce unconstitutional results.<sup>151</sup> The Court also said that as-applied challenges would be in order if “inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution.”<sup>152</sup>

The Supreme Court has never ruled on RLUIPA’s land use provisions, but *Cutter* suggests that the Court would be sympathetic to Establishment Clause challenges alleging that RLUIPA as applied produces effects that favor religion over irreligion. This Note has chronicled how RLUIPA already produces such effects and predicts more of the same. RLUIPA’s application to auxiliary uses must therefore be clarified in order to satisfy the demands of the Establishment Clause.<sup>153</sup>

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148. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-4 (Supp. 2003).

149. See, e.g., *Madison v. Riter*, 355 F.3d 310, 318 (4th Cir. 2003) (finding that with RLUIPA, “Congress has simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths”); *Westchester Day Sch. v. Vill. of Mamaroneck*, 280 F. Supp. 2d 230, 238 (S.D.N.Y. 2003) (holding that RLUIPA meets the standard set forth in *Lemon v. Kurzman*, 403 U.S. 602 (1971), for determining violations of the Establishment Clause), *vacated on other grounds*, 386 F.3d 183 (2nd Cir. 2004); *Life Teen, Inc. v. Yavapai County*, 2003 U.S. Dist. LEXIS 24363 at \*49-50 (D. Ariz. Mar. 26, 2003).

150. See *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005).

151. See *id.* at 2124.

152. *Id.* at 2125.

153. See Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 201-207 (2001) (arguing that RLUIPA violates the Establishment Clause because it “favors all religious groups over those groups without religious affiliation” and thus benefits only religious groups).

### IV. MODIFYING RLUIPA TO BETTER ADDRESS AUXILIARY USE CLAIMS

Congress should modify the land use provisions of RLUIPA to ensure that it properly differentiates between those auxiliary uses that are substantially related to the religious, educational, or charitable mission of a religious institution and those that are only tangentially related. Congress could achieve this goal in two ways. One way is to reinstate the centrality-of-belief standard to determine whether religious exercise is implicated and to establish a uniform, high standard for proving the substantiality of a burden. Such a change, while supported by pre-RLUIPA case law, may be difficult to achieve given Congress's express elimination of the centrality-of-belief standard and given the possibility that these changes would affect worship uses in a way that Congress did not intend. However, another way is to create a new provision in the law that applies only to non-worship auxiliary uses. Such a provision would rightly restrict RLUIPA's applicability to those auxiliary uses that are substantially related to the religious, educational, or charitable mission of a religious institution. A new provision could also be narrowly tailored to address auxiliary uses to avoid adverse effects on other parts of the law.

#### A. *Reinstating Centrality-of-Belief and Standardizing the Substantial Burden Analysis*

As one option, Congress could amend the text of RLUIPA to establish a higher bar for a religious institution that hopes to prevail on a claim that a given land use regulation imposes a substantial burden on it via an auxiliary use. Congress could amend the law in precisely the places where this Note has observed ambiguities: first, in reinstating the pre-RLUIPA centrality-of-belief standard, and second, in establishing a uniform, high standard for showing a substantial burden.

To reinstate the centrality-of-belief standard, Congress would have to change § 2000cc-5(7)(A), which offers a definition of religious exercise that includes “any exercise of religion, *whether or not* compelled by, or central to, a system of religious belief.”<sup>154</sup> Congress could modify this language to define religious exercise as “any exercise of religion *that is either* compelled by, or central to, a system of religious belief.” Congress would also have to modify § 2000cc-5(7)(B), which mandates 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.”<sup>155</sup> Instead of wording this section as an unequivocal mandate,

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154. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A) (Supp. 2003) (emphasis added).

155. § 2000cc-5(7)(B).

Congress should either change the word “shall” to “may” or should add language consistent with the modification suggested for subsection (A). Such additional language, added to the end of the section, could be: “so long as such use, building, or conversion is compelled by, or central to, a system of religious belief.” Either of these alternatives could limit the ability of certain auxiliary uses to take advantage of RLUIPA, while still providing protections to others.

To enact a uniform standard for demonstrating a substantial burden, Congress could add a definition for “substantial burden” to § 2000cc-5. If its goal is to create a high bar, Congress could model its definition for substantial burden on the *C.L.U.B.* formulation.<sup>156</sup> Such a definition could be: “(8) Substantial Burden. The term ‘substantial burden’ means a burden that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise as defined herein effectively impracticable.” This definition would help in making the substantial burden analysis more uniform in RLUIPA cases.

However, there are several reasons to think that these changes are not feasible. Congress, in drafting RLUIPA, did not simply ignore the centrality-of-belief standard: it explicitly stated that this standard did not apply. To expect Congress to significantly change one of the statute’s most critical definitions, that of religious exercise, may be asking too much. Similarly, RLUIPA’s framers explicitly declined to define “substantial burden.” They stated: “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.”<sup>157</sup> Even the argument that a definition for substantial burden would simplify case law under RLUIPA may not convince today’s Congress to contravene its predecessor’s explicitly stated intentions. Moreover, these changes might also affect non-auxiliary uses—that is, they may affect strictly worship facilities—in ways that Congress did not intend and this Note has not considered. Accordingly, this first option may have limited success and be an unwise choice.

#### B. *Creating a New Provision To Specifically Address Auxiliary Uses*

A more feasible and better solution might be for Congress to write an entirely new provision for RLUIPA—one that specifically and narrowly addresses the concerns of this Note. Such a provision could state: “An auxiliary use affiliated with a religious institution [constitutes religious exercise and may receive protection under this statute] only if it is shown to substantially relate to the religious, educational, or charitable mission of that religious institution.”

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156. See *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004).

157. See *supra* note 83, at S7776.

## RLUIPA and Auxiliary Uses

Such a provision would require a definition of “auxiliary use” as any non-worship use, to be added in § 2000cc-5. It would also require a statement that other provisions of RLUIPA apply pursuant to the limitation in the new provision and that the new provision is the sole criteria for determining whether an auxiliary use should obtain RLUIPA’s protections.

The “substantial relationship” standard offered in this suggested language has been used by the government in other circumstances where the relationship between an auxiliary use and its affiliated religious institution is important. One could hardly expect government not to impose such a standard given the extent to which government supports religious institutions. Federal, state, and local governments financially support religious institutions with tax breaks, public health funding, and education aid.<sup>158</sup> Governmental assistance also reaches religious institutions through “Medicare, Medicaid, and educational programs, such as the Pell Grant program for low income post-secondary students and the G.I. Bill of Rights for veterans.”<sup>159</sup> To ensure that this assistance reaches the most relevant parts of a religious institution, government has reserved the right to differentiate between its activities.

With regard to taxes, for example, the government allows religious institutions to obtain tax-exempt status except on unrelated business income that is not “substantially related” to the religious institution’s religious, educational or charitable purposes.<sup>160</sup> A body of regulatory and judicial case law now provides standards for evaluating whether a relationship is substantial using individualized facts.<sup>161</sup> According to regulations from the Department of the Treasury, trade or business activities are related to a religious institution’s charitable exempt purpose if they are causally connected to achieving an important exempt purpose of the organization (other than through the generation of income), and if that causal connection is substantial.<sup>162</sup> The Supreme Court has noted that the purpose of such restrictions is “to restrain the unfair competition fostered by the tax laws” and to combat “perceived abuses of the tax laws by tax-exempt organizations that engaged in profit-making activities.”<sup>163</sup> Equitable principles suggest that RLUIPA is unfairly giving

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158. For a legal analysis of this proposition, see *Zelman v. Simmons-Harris*, 536 U.S. 639, 665-667 (2002) (O’Connor, J., concurring).

159. Laura Athens, *Is the Wall Between Church and State Crumbling?*, 81 MICH. BAR J., Sept. 2002, at 18, 21.

160. I.R.C. § 513(a) (2000).

161. See, e.g., *United States v. Am. Coll. of Physicians*, 475 U.S. 834, 849-50 (1986) (finding that the advertisements in the journal of a nonprofit organization do not substantially relate to the organization’s exempt educational purposes, and thus income from such advertisements is taxable).

162. See I.R.C. § 513(d)(2) (2000). This provision of the regulations goes on to state: “Thus, for the conduct of trade or business from which a particular amount of gross income is derived to be substantially related to purposes for which exemption is granted, the production or distribution of the goods or the performance of the services from which the gross income is derived must *contribute importantly* to the accomplishment of those purposes.” *Id.* (emphasis added).

163. *Am. Coll. of Physicians*, 475 U.S. at 838.

entities affiliated with religious institutions competitive advantages over non-affiliated entities. Accordingly, Congress may find the substantial relationship standard an appropriate and persuasive analogy with regard to auxiliary uses under the land use provisions of RLUIPA.

Creating an entirely new provision would also help RLUIPA to better address the issue of auxiliary uses without affecting other provisions of the statute. It would provide a uniform standard of assessing their relationship to a religious institution's mission where none currently exists. A substantial relationship standard would comport with and could draw from other areas of the law, like federal tax exemption criteria. And it would codify the correct findings (though not necessarily the same standards of review) of cases like *Castle Hills* and *Westchester Day School* that restrict RLUIPA's protections with regard to auxiliary uses.<sup>164</sup>

Whether motivated by a constitutional defect or motivated by concern for uniformity, changes to RLUIPA would not be inconsistent with the views of the law's framers—who, after all, recognized that “not every activity carried out by a religious entity or individual constitutes “religious exercise.”<sup>165</sup> Indeed, they specifically advanced the notion that tangentially related auxiliary uses should be excluded from RLUIPA's scope. It is unclear why they failed to reflect this notion in the language of the statute—perhaps, as some suggest, they were unable to thoroughly consider the issue.<sup>166</sup> Had the law's framers realized the potential impact of their omission, they might have themselves amended the bill in this way that this Note suggests.

#### CONCLUSION

Auxiliary uses have become an increasingly important component of religious life in America. Religious institutions now serve not only as spiritual destinations, but they also provide congregants with a host of personal, medical, educational, and even financial services. They are building larger facilities, sometimes in dense urban areas but more often in the sprawling suburbs, where land use battles will become more heated as development pushes outward.<sup>167</sup> While trends in auxiliary usage are not easy to assess, it seems certain that the legal and land use conflicts they occasion will only grow as time passes. What will changes in modern religious institutions—more of which are establishing auxiliary uses—mean for religious rights laws?

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164. See *supra* Section II.C.

165. See *supra* note 83, at S7776; see generally *supra* Subsection II.A.2.

166. See Hamilton, *supra* note 61, at 342-44 (arguing that the framers took little time to investigate such matters and describing the process by which representatives stretched a few anecdotal examples to justify the law's enactment).

167. As one indicator, nearly three-quarters of megachurches are located in the suburbs. See Thumma, *supra* note 16.



## RLUIPA and Auxiliary Uses

RLUIPA, one of the most important religious rights law, fails to address adequately the increasingly important question of auxiliary uses, both by omitting mention of auxiliary uses in the statutory text and by providing ambiguous standards by which to adjudicate claims brought under the law. This Note has chronicled the inability of courts to limit RLUIPA's applicability without Congress's help. And it has shown that RLUIPA's generous strict scrutiny protection of religious institutions should not be extended to include *all* auxiliary uses, in part because doing so could violate the Establishment Clause.

To save RLUIPA from constitutional challenges and to more fairly apply its protections, Congress must modify the law. It is realistically feasible for Congress to add a provision that differentiates among religious institutions' auxiliary use claims by imposing a requirement that uses receiving RLUIPA's protections be substantially related to a religious institution. This Note has argued that such a modification is not inconsistent with the framers' intent. Moreover, such a modification can prevent religious institutions from effectively becoming—at least with regard to land use—a law unto themselves.

