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# RLUIPA: Re-Aligning Burdens of Proof, Clarifying Freedoms, and Re-Defining Responsibilities

George P. Smith II

*The Catholic University of America, Columbus School of Law*

Philip M. Donoho

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# RLUIPA: RE-ALIGNING BURDENS OF PROOF, CLARIFYING FREEDOMS, AND RE-DEFINING RESPONSIBILITIES

*George P. Smith, II\**

*Philip M. Donoho\*\**

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\*\* B.A., The Catholic University of America; J.D., Georgetown University, 2015.

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*This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.*<sup>1</sup>

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1. 146 CONG. REC. 16,700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000). President William J. Clinton signed into law the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc-2000cc-5 (2013)), on September 22, 2000.

## INTRODUCTION &amp; OVERVIEW

Classically, federalism is seen as a political process or as “a system of political organization” to assign levels of governmental authority between a national government and state and local political subdivisions.<sup>2</sup> Three permutations or forms of federalism are commonly acknowledged: dual federalism, cooperative federalism, and coercive federalism.<sup>3</sup> Dual federalism considers the national and the state governments as “fully autonomous rivals with competing ideas and strategies.”<sup>4</sup> Cooperative federalism began to take shape in the 1970s through incentivize schemes by the federal government for those states that complied with, or implemented, specific federal programs or policies.<sup>5</sup> This form of federalism invites “state agencies to superintend federal law.”<sup>6</sup> National programs may thus be tailored to the needs of local governments, which has the effect of allowing the localized entities to “implement national policy while contemporaneously designing and implementing the program to address the needs and identity of the individualized locality.”<sup>7</sup> It remains for the federal government, however, to exercise unilateral choice in deciding whether, and at what level, state and local governments are to participate co-operatively.<sup>8</sup>

Finally, coercive federalism is implemented by regulating schemes such as preemption, mandated federal programs, and the withholding of benefits for noncompliance with these federal mandates.<sup>9</sup> Under this theory, the supremacy of federal policy is guaranteed. It is within environmental programs—and especially land use

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2. Patricia E. Salkin, *The Quiet Revolution and Federalism: Into The Future*, 45 J. MARSHALL L. REV. 253, 257–58 (2012) [hereinafter Salkin, *Quiet Revolution*]. See generally 1 PATRICIA E. SALKIN, *AMERICAN LAW ZONING* § 2:2 (5th ed. 2008) (providing an overview of conceptual bases of land use law); Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459 (2007) (analyzing the socio-political foundations and tensions inherent within federalism).

3. See Salkin, *Quiet Revolution*, *supra* note 2, at 257–63.

4. *Id.* at 258. The decline of dual federalism began during the Great Depression—with its ultimate abandonment commencing as a consequence of President Franklin D. Roosevelt’s New Deal. *Id.* at 259; see also Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (analyzing the roots of contemporary American federalism by examining the reasons for the decline of dual federalism at the turn of the twenty-first century and the corresponding rise of partisan federalism).

5. Salkin, *Quiet Revolution*, *supra* note 2, at 259.

6. Salkin, *Quiet Revolution*, *supra* note 2, at 259. (quoting Phillip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695 (2001)).

7. Salkin, *Quiet Revolution*, *supra* note 2, at 259.

8. See Salkin, *Quiet Revolution*, *supra* note 2, at 260.

9. Salkin, *Quiet Revolution*, *supra* note 2, at 261–62.

policy—that the federal government has been particularly assertive in mandating uniform national standards through coercive federalism.<sup>10</sup> From 2001 to 2006, Congress enacted twenty-seven statutes that preempted state health, safety, and environmental regulations, or other social policies, with the ultimate effect of blocking state regulation of these areas.<sup>11</sup> Many of those statutes relate to land use in particular. The voracious appetite of the federal government to direct local land use planning and control is seen in particularly dramatic fashion in the passage and subsequent enforcement of the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000,<sup>12</sup> a problematic intrusion into previously untrammelled local decision-making.<sup>13</sup> By selectively defining certain religious land uses and users as worthy of statutory solicitude, RLUIPA categorically imposes strict scrutiny on those actions taken by local land use authorities that are directed at religious land uses and users, thus disturbing a relationship that had remained mostly stable over the last century or so.<sup>14</sup> In effect, Con-

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10. *See id.* at 262. In addition to RLUIPA, three particular environmental legislative schemes—the Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280, the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), and the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884—have a direct effect on local land use controls. *See Salkin, Quiet Revolution, supra* note 2, at 262. *See generally* Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”: Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97 (1996) (analyzing the appropriate roles that federal, state, and local governments should have in protecting the public health and the environment and concluding that cooperative and coercive federalism are the two advisable frameworks for action in those fields).

11. PUBLIC HEALTH LAW AND ETHICS 102 (Lawrence O. Gostin ed., 2010). *See generally* Symposium, *Federalism as the New Nationalism*, 123 YALE L.J. 1889 (2014) (exploring what is denominated the “nationalist school of federalism,” which departs from traditional notions of state-centered federalism and advances, instead, a nation view of devolution).

12. Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to 2000cc-5 (2013)).

13. Salkin, *Quiet Revolution, supra* note 2, at 263; *see also* Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1433-34 (2012) (noting that local governments “must comply with the federal requirements [of RLUIPA] or leave religious land use unregulated,” a “largely illusory” choice).

14. *See* Marci A. Hamilton, *The Constitutional Limitations on Congress’s Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional*, 2 ALB. GOV’T L. REV. 366, 415-25 (2009); *cf.* Ashira Perlman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 724 (2008) (contending that RLUIPA’s strict scrutiny review is “inappropriate for as-applied land use decisions that impact neither fundamental rights nor suspect classes”); Stanton K. Oishi, Comment, *RFRA II: The Failure of the Religious Land Use and Institutionalized Persons Act of 2000 Under Section 5 of the Fourteenth Amendment*, 25 U. HAW. L. REV. 131, 154 (2002) (asserting that RLUIPA, by changing the standard required to show a constitutional violation, expands constitutional rights and thus violates separation of powers principles).

gress created a new “civil right” for churches “burdened” by land-use and zoning laws.<sup>15</sup> Federal governmental overreach of RLUIPA’s sort might fairly be termed “pragmatic federalism,”<sup>16</sup> recognizing, simply, that “all power derives from the central government,”<sup>17</sup> and might—despite its aspiration that “the federal government should consider local initiative and responsibility to be a central constitutional value”<sup>18</sup>—have the practical effect of subordinating local institutions and responsibilities.<sup>19</sup>

Prior to RLUIPA, local land use authorities could reject or condition use permits for religious entities based on several factors, including how that religious entity fit into the community, how it served the community, how it affected property values of surrounding properties, how the use affected the aesthetics of the community, how it would affect safety and traffic, and how it affected any of the other peculiarly local concerns that are immune to generalization at some national common denominator.<sup>20</sup> Yet far from condemning idiosyncratic uses and users to majoritarian exclusion, the now *ancien régime* allowed for a largely informal process whereby land use authorities were able to interact and negotiate with these religious entities just as they would with any other non-religious entity.<sup>21</sup> Landowners, religious and oth-

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15. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 97 (2005).

16. Salkin, *Quiet Revolution*, *supra* note 2, at 263 & n.54.

17. Robert J. Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 162 (2004).

18. *Id.*

19. See Salkin, *Quiet Revolution*, *supra* note 2, at 263 (noting “more recent examples of federal intrusion into local land use actions that have the effect, regardless of intent, of severely restricting local land use actions”); see also Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014) (investigating the dynamic, ongoing contours of federalism and concluding that when negotiations of inter-governmental issues are undertaken by “overlapping political communities,” it is desirable to have the communities promote “national integration” yet maintain local “governing spaces for meaningful disagreement”).

20. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (finding that, as a general constitutional and structural matter, local concerns—grounded in issues of public health, safety, morals or general welfare—are proper issues in zoning regulation and enforcement).

21. HAMILTON, *supra* note 15, at 95–96, 106–08; see also Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 320–23, 335–41 (2003) [hereinafter Hamilton, *Federalism and the Public Good*] (discussing the benefits of local control over land use); Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859 (2007) (examining the pre-RLUIPA zoning appeals process in New Haven, Connecticut, and concluding that religious expression is not unduly restricted by the local land use decision-making process).

erwise, were thus equally subject to all zoning and land use restrictions.<sup>22</sup>

With RLUIPA—and its *ex ante* requirement of a compelling governmental interest, as concomitantly enforced *ex post* through the lens of strict judicial scrutiny—a great deal of power was severed from land use authorities, and with it went their ability to balance, minimize, or meaningfully respond to the externalities created by the manner in which religious entities use their land. More than simply upsetting the prior federal-state equilibrium in some theoretical sense, litigation of RLUIPA's new civil right has mired its putative enforcer—the federal judiciary—in an analytical and ideological conflict over the appropriate construction and application of RLUIPA's provisions. The resulting uncertainty, if protracted, threatens to stymie the local zoning process.

Part I of this Article will examine the context from which RLUIPA emerged and its history and judicial antecedents, as well as the relevant provisions of RLUIPA itself. Part II will proceed to examine the attitudes and thinking of the Framers of the Constitution as they studied the role and idea of religion within the socio-political structure of a new American nation. Part II will further evaluate the Supreme Court's treatment of free exercise claims, and the vacuum—a result of the fitful evolution of the Court's First Amendment jurisprudence—into which RLUIPA was thrust. Part III will examine the litigation of RLUIPA—specifically, the Act's Equal Terms provision<sup>23</sup>—in the circuits, illustrating the complicated litigation that has marred the statute's maturation over time and recommending Judge Richard Posner's Equal Terms analysis in *River of Life*<sup>24</sup> as a reasonable solution from within the judiciary itself.

Finally, with the three cross currents of federalism, existing free exercise jurisprudence, and the institutional momentum thus far gathered by RLUIPA enforcement in mind, this Article will offer, in Part IV, two additional remedial constructs that might help resolve RLUIPA's present interpretative quagmire and allow for a graceful convalescence. One of those constructs involves engrafting onto RLUIPA claims a burden-shifting evidentiary template comparable to that set out by the Supreme Court in *McDonnell Douglas Corporation*

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22. HAMILTON, *supra* note 15, at 95–96.

23. Religious Land Use and Institutionalized Persons Act of 2000 § 2(b)(1), 42 U.S.C. § 2000cc(b)(1) (2013).

24. See *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 371–74 (7th Cir. 2010) (en banc).

*v. Green*<sup>25</sup> for employment discrimination actions brought under Title VII of the Civil Rights Act of 1964.<sup>26</sup> In conjunction with the doctrine of anticipatory nuisance, application of the Title VII formula to RLUIPA claims would tighten the dispute resolution process and permit a more finely tuned balancing of often-diffuse assertions of religious freedom against genuine local economic interests codified in zoning plans. The second proposed remedial strategy for honing the litigation of RLUIPA actions would directly apply the federal common law of nuisance to assess whether the conduct of a religious entity seeking RLUIPA protection is reasonable, thus avoiding the thorny issues that arise as a result of judicial definitions of religion and determinations of sincerity.

So long as special property rights continue to be conferred upon religious entities—countering both an American property system grounded in equal opportunity and the traditional local allocation of zoning authority in a federal system—a “fair” application of RLUIPA will become more contentious.<sup>27</sup> Short of some climactic, unforeseen change—for example, Congress amending RLUIPA to clarify its standards, or the Supreme Court offering clear and unequivocal guidance on the subject—the issue will remain murky and the continued threat of outcome-uncertain RLUIPA litigation likely will have significant effects, both *ex ante* and *ex post*, on local zoning. The three approaches proposed in this Article seek to avoid that outcome by clarifying the current opaque judicial decision-making process under which it has been possible.

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25. See 411 U.S. 792, 802–05 (1972).

26. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2013)).

27. See HAMILTON, *supra* note 15, at 110; see also *id.* at 109 (cautioning that even if RLUIPA were to be held unconstitutional, RFRA-like state statutes could fill the void created by such action); Daniel P. Dalton, *The Religious Land Use and Institutionalized Persons Act—Recent Decisions and Developments*, 44 URB. LAW. 647 (2013) (presenting a synopsis of RLUIPA cases in the federal courts over an 18-month period, which highlights the uncertainty and ambiguity in litigating these claims).



## I.

AN ORIGIN STORY: THE LIFE, DEATH, AND REBIRTH OF  
CONSTITUTIONAL RELIGIONA. *Call to Adventure: The Supreme Court Throws Down a  
Gauntlet*

Pre-RLUIPA history is both protracted and multi-faceted,<sup>28</sup> with the Supreme Court's free exercise jurisprudence marked by running battles between efforts to balance, in some semblance, "republicanism and libertarianism, community and individualism, and isolation and obligation."<sup>29</sup> Preferential treatment was, for the most part, given freely to organized religions, with one important exception: namely, religious conduct was within the scope of regulation when shown to be harmful or potentially harmful.<sup>30</sup> A detailed analysis of the history of religious zoning far exceeds the purpose of this Article. However, given its centrality to the passage of RLUIPA, some constitutional history is necessary to show the interdependence and the call-and-response reactivity between the Supreme Court's treatment of religion on the one hand and congressional tolerance for such indeterminacy on the other. Ultimately, in the waning of the twentieth century, such skirmishing entered a frenetic, final (for now) stage: in just ten years, two separate landmark decisions of the Supreme Court—*Employment Division, Department of Human Resources v. Smith*<sup>31</sup> and *City of Boerne v. Flores*<sup>32</sup>—were each met with rapid congressional responses, the latter of which endures as RLUIPA.

In 1990 began the *Smith-Lukumi* line of cases, in which the Supreme Court departed from its past benevolence<sup>33</sup> toward free exercise claims. The Court first adopted a less hospitable approach in *Smith*, stating that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."<sup>34</sup> Though the majority de-

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28. See generally HAMILTON, *supra* note 15, at 78–110.

29. HAMILTON, *supra* note 15, at 205.

30. See HAMILTON, *supra* note 15, at 205.

31. 494 U.S. 872 (1990)

32. 521 U.S. 507 (1997).

33. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (considering the state's denial of unemployment benefits to an individual refusing on religious grounds to work on Saturday, and holding that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties").

34. See *Smith*, 494 U.S. at 879 (1990) (citation and internal quotation marks omitted); see also *id.* at 886 (rejecting strict scrutiny in the context of Free Exercise claims

scribed its opinion as consistent with long-standing law,<sup>35</sup> Congress disagreed. Just three years later, it enacted the Religious Freedom Restoration Act (RFRA) of 1993.<sup>36</sup> RFRA was designed, essentially, to codify one—and only one—approach to resolving free exercise issues. The goal of RFRA was to treat “every law in the country, including land-use laws, as presumptively unconstitutional,” insofar as such laws relate to religion.<sup>37</sup> RFRA’s practical effect, at least for the purposes of land use, was to impose strict scrutiny on zoning restrictions, that is, no restriction could be imposed unless it was justified by a compelling reason and “tailored as narrowly as possible” to such reason.<sup>38</sup>

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and declining to reason analogically from other constitutional guarantees, since what the “compelling government interest” requirement produces in the Equal Protection and Free Speech “fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms,” but “what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly”).

35. See 494 U.S. at 885

36. Pub. L. No. 103-41, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-5 (2013)).

37. HAMILTON, *supra* note 15, at 94.

38. *Id.* at 94–95. The compelling interest test presented in the legislation is rooted in two Supreme Court cases: *Sherbert v. Verner*, 347 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). RFRA was understood as reversing the Court’s subsequent decision in *Smith*, 494 U.S. at 872, which had held that the right of free exercise did not require religious entities to be immune from generally applicable laws and regulation. See DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 435–36 (5th ed. 2008).

RFRA was invalid as an enforcement measure since it went beyond Congress’s “remedial” authority under section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 519–20, 532–36 (1997). In short, “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.” *Id.* at 519. The Court recognized the responsive nature of RFRA to *Smith*, noting that “[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise.” *Id.* at 534. However, RFRA remains valid as applied to the federal government, since Congress can voluntarily circumscribe its own authority without being limited to mere enforcement of the Supreme Court’s determination of constitutional meaning. As such, RFRA is a valid, albeit non-constitutional, rule that remains binding against the federal government, but not against the states. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (upholding the application of RFRA in a challenge to federal law); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–82 (2014) (applying RFRA to invalidate federal rulemaking).

Until very recently, the only contemporary case regarding RFRA to come before the Supreme Court was *Gonzales*. The religious claimants in *Gonzales* (a small sect) sought an exemption for use of hoasca, a sacred tea made from a hallucinogen regulated under the Controlled Substances Act. *Gonzales*, 546 U.S. at 423; see also *Controlled Substances Act*, Pub. L. No. 91-513, 84 Stat. 1236, 1242–84 (1970). Applying the strict scrutiny standard of review, the Court held that the claimants should be allowed an exemption because the use of hoasca was limited to circumstances of

At the same time, the Supreme Court further muddied the constitutional waters in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, by deciding that while strict scrutiny remained inapplicable to Free Exercise claims brought against neutral laws of general applicability, a heightened standard was called for where the challenged law was neither neutral nor generally applicable.<sup>39</sup> With free exercise jurisprudence crystallized in the *Smith-Lukumi* line of cases, the Supreme Court went on to invalidate Congress's attempted response to *Smith*, holding in *City of Boerne v. Flores* that RFRA was overly broad in its application and thrust, and that under the facts of the case, it was a usurpation of state and local authority.<sup>40</sup>

Undaunted by this holding, however, religious groups endeavored to introduce and enact another "substantial" piece of legislation—one which had almost the same scope as RFRA.<sup>41</sup> An initial proposal in 1999, termed the Religious Liberty Protection Act (RLPA), failed to reach the Senate.<sup>42</sup> Recognizing that RLPA, as drafted, would raise serious issues regarding its constitutionality, religious groups sought to pare the proposed legislation to two categories deserving of protection: land use and prisons.<sup>43</sup> The new compromise, styled the Religious Land Use and Institutionalized Persons Act,<sup>44</sup> was enacted in 2000.<sup>45</sup>

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religious worship services and the facts were consistent with a similar exemption from federal drug laws granted to North American Indian Ceremonies. *Gonzales*, 546 U.S. at 432–37; see also MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 193 (3d ed. 2011) (discussing *Gonzales*).

Interestingly, on the last day of the Supreme Court's 2013–2014 term, a uniquely "related" RFRA case—viewed through RLUIPA's "exercise of religion" guarantee and the Federal Affordable Care Act regulations regarding the mandatory health insurance coverage for contraceptive and/or abortion services—was decided in *Hobby Lobby*. For a discussion of the *Hobby Lobby* decision, see Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2013–2014 *CATO SUP. CT. REV.* 35.

39. See 508 U.S. 520, 546 (1993).

40. See *Flores*, 521 U.S. at 532–36 (1997); see also HAMILTON, *supra* note 15, at 95; Epstein, *supra* note 38, at 69 ("There is nothing in RFRA's framework of basic rights, compelling state interest, and least restrictive means that cannot be generalized to cover all human activity. The broader the principles are, the fewer the ad hoc judgments, and the more consistent the social commitment will be to individual liberty in all its manifestations.").

41. HAMILTON, *supra* note 15, at 95.

42. HAMILTON, *supra* note 15, at 95.

43. HAMILTON, *supra* note 15, at 95.

44. HAMILTON, *supra* note 15, at 95.

45. See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. § 2000cc to 2000cc-5 (2013)).

*B. Threshold: The Legal Framework*

In relevant part, RLUIPA is aimed at two distinct harms: “substantial burdens” and “discrimination and exclusion.”<sup>46</sup> The first is covered by Section 2(a)(1) of the Act, which provides the general rule that:

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>47</sup>

The second harm is covered by Section 2(b) of RLUIPA, which seeks to prevent discrimination and exclusion by: (1) requiring “equal terms,” under Section 2(b)(1), such that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less-than-equal terms with a nonreligious assembly or institution,”<sup>48</sup> (2) requiring “nondiscrimination,” under Section 2(b)(2), such that “[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination,”<sup>49</sup> and (3) restricting a locality’s ability to enforce “exclusions

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46. *See id.* § 2, 42 U.S.C. § 2000cc(a)–(b).

47. *Id.* § 2(a), 42 U.S.C. § 2000cc(a)(1). States have also enacted similar protections. *See* HAMILTON, *supra* note 15, at 95. As Marci Hamilton notes, “[t]welve states have some form of privilege for religious entities to transform generally applicable, neutral laws into presumptively illegal laws” if the laws present a substantial burden. *Id.* at 109; *see also* ALA. CONST. amend. DCXXII; ARIZ. REV. STAT. ANN. § 41-1493.01 (2011); CONN. GEN. STAT. ANN. § 52-571b (West 2013); FLA. STAT. ANN. § 761.03 (West 2010); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. 35/15 (West 2011); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2004); OKLA. STAT. ANN. tit. 51, § 253 (2008); 71 PA. CONS. STAT. ANN. § 2404 (West 2012); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2011). Two of those state laws—Oklahoma’s and Texas’s—resemble the federal RFRA in that they grant “specific exceptions to allow local governments to carry out generally applicable land-use laws.” HAMILTON, *supra* note 15, at 109; *see also* OKLA. STAT. ANN. tit. 51, § 258 (2008); TEX. CIV. PRAC. & REM. CODE ANN. § 110.010 (West 2011). These state law provisions are said to be “ticking time bombs,” which “will be ready for action when RLUIPA is held unconstitutional or severely restricted in scope to make it constitutional.” HAMILTON, *supra* note 15, at 109.

48. Religious Land Use and Institutionalized Persons Act § 2(b)(1), 42 U.S.C. § 2000cc(b)(1).

49. *Id.* § 2(b)(2), 42 U.S.C. § 2000cc(b)(2).

and limits” by providing in Section 2(b)(3) that “[n]o government shall impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”<sup>50</sup>

No doubt, the central strength or weakness of RLUIPA—depending on one’s perspective—is its direction to the judiciary to consider all land use laws applicable to religious groups as presumptively unconstitutional.<sup>51</sup> For example, when a municipal zoning or land use law is found both to impose a substantial burden on the practices of a religious landowner’s conduct and to have been applied through an “individualized assessment,” the government will be precluded from enforcing the ordinance “unless it can prove the law was necessary and narrowly tailored.”<sup>52</sup> In essence, this statutorily imposed strict scrutiny—central to both the “substantial burdens” and “equal terms” provisions—means that the federal judiciary has assumed a new responsibility under RLUIPA: namely, that of zoning board review.<sup>53</sup>

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50. *Id.* § 2(b)(3), 42 U.S.C. § 2000cc(b)(3).

51. *See* HAMILTON, *supra* note 15, at 96; *see also* Religious Land Use and Institutionalized Persons Act § 2(a), 42 U.S.C. § 2000cc(a).

52. HAMILTON, *supra* note 15, at 96–97. In order to come within RLUIPA’s protection, the substantial burden at issue must: be “imposed in a program or activity that receives Federal [funding],” 42 U.S.C. § 2000cc(a)(2)(A); “affect[ ] commerce with foreign nations, among the several States, or with Indian tribes,” § 2000cc(a)(2)(B); or be “imposed in the implementation of a land use regulation . . . under which the government makes, or has in place formal or informal procedures that permit the government to make, individualized assessments of the proposed uses for the property involved,” § 2000cc(a)(2)(C). Under the Act, an aggrieved party may assert a claim and obtain appropriate relief against a government. *See* § 2000cc-2(a); *see also* § 2000cc-5(4) (defining “government”). The congressional hearings on the scope of RLUIPA concluded that the remedies under the Act “track[ ] RFRA creating a private cause of action for damages, injunction, and declaratory judgment, and a defense to liability,” and that the Act provides “that a successful plaintiff may recover attorneys’ fees.” 146 CONG. REC. 1563 (2000). As enacted, however, RLUIPA “does not expressly state that monetary damages are available.” Daniel P. Dalton, *Defining “Appropriate Relief” Under the Religious Land Use and Institutionalized Persons Act: The Availability of Damages and Injunctive Relief with RLUIPA*, 2 ALB. GOV’T L. REV. 604, 619 (2009).

53. HAMILTON, *supra* note 15, at 97. *Cf.* Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 5, 53–54 (2009) (asserting that RLUIPA is best seen as a prophylactic rule, preventing discrimination that would otherwise be difficult to detect, and arguing that RLUIPA should not apply to eminent domain condemnation issues since, among other things, such an interpretation would have a salutary effect as “an escape hatch to avoid the most severe applications of RLUIPA’s zoning provisions” and “the background threat of condemnation may restore some power to local governments in negotiating sensible land use policies with religious groups”).

C. *Challenges and Temptations: Judicial Misdirection and Uncertainty*

Bred as it was in the tumult of the *Smith-Lukumi* line of cases, RLUIPA—notionally limited in scope and effect—has become inextricably intertwined with ideas of free exercise more generally. As a result of the split *Smith-Lukumi* decisions, “In land use litigation today relating to religious activities, religious organizations generally raise First Amendment free exercise and RLUIPA claims and their neighbors raise establishment clause claims.”<sup>54</sup> Since future application of the constitutional standard remains largely unclear<sup>55</sup> and conclusory,<sup>56</sup> RLUIPA likely represents the best of bad options for an aggrieved religious party, and actions sounding in the statute increasingly predominate.<sup>57</sup> The coupling of RLUIPA with constitutional free exercise, however, introduces into the statutory analysis an ideological divide that has long marred the constitutional one.

The inability of the Supreme Court to state with clarity a coherent Establishment Clause doctrine “has become an attractive nuisance for

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54. CALLIES ET AL., *supra* note 38, at 436.

55. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706, 709 (2012) (finding there to be a “ministerial exception” to the *Smith* rule and requiring dismissal of an employment discrimination suit by a disabled employee against her religious employer).

56. *Lukumi*’s mandated “neutrality” and “general applicability” inquiries, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993), are necessarily fact-sensitive and, thus, arguably prone to judicial engineering and immune to predictability. *See id.* at 533–42 (considering the text of the ordinances, the exceptions therein allowed, and the events preceding their enactment, and asserting that “the neutrality inquiry [led] to one conclusion: The ordinances had as their object the suppression of religion”); *see also id.* at 542–46 (concluding that the ordinances likewise failed to meet the “general applicability” requirement since “[d]espite the city’s proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice” and the ordinances are “underinclusive” with regard to health risks).

57. CALLIES ET AL., *supra* note 38, at 454 (“Free exercise claims are almost always coupled with RLUIPA claims, with the latter gaining prominence due to the lower level of protection afforded by the former.”); *see also Dalton*, *supra* note 27 (providing a synopsis of 2012 and 2013 cases involving RLUIPA). The compelling state interest with least restrictive means formula that “controls the land use provisions of RLUIPA” is “yet to be reviewed by the United States Supreme Court.” RICHARD A. EPSTEIN, *THE CLASSIC LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 472 (2014). The constitutionality of the statute has been presumed, however, in lower court decisions, thus “leaving open the issue of statutory construction of whether the religious land use provisions of the statute apply to eminent domain proceedings, to which the correct answer seems to be no, given that land use regulation does not cover the taking of property.” *Id.*

political judging.”<sup>58</sup> Since the 1970s, there is convincing evidence of a “religious-secular divide increasingly characteriz[ing] our national political discourse” regarding “the proper role of religion and religious values in public life.”<sup>59</sup> This has given rise to secular egalitarians positioned on the left, and an “overt religious coalition” situated on the right.<sup>60</sup> The federal courts seem to reflect a similar societal divide and, in fact, may be seen as “sliding down into the same ‘God Gap.’”<sup>61</sup> Indeed, a recent empirical study of how politically appointed federal judges consider challenges to the Establishment Clause revealed that Democrat-appointed judges predictably upheld Establishment Clause challenges at a rate of 57.3%, while Republican judges upheld the Clause just 25.4% of the time.<sup>62</sup> The same study, using a different proxy for ideology, found that “the most liberal judges were predicted to approve such claims at a 62.5% rate, compared with acceptance by the most conservative judges only 23.2% of the time.”<sup>63</sup>

Without a valid and consistent neutral theory of judicial interpretation that seeks to find and to balance majority and minority freedoms based upon the Constitution, the Court cannot set forth decisive criteria for the settlement of conflicts.<sup>64</sup> With the failure of any specific articulation, recourse has been taken to structural methods of reconciling religion and the law. Thus, if such a thing as a general tenet can be derived from the run of recent Supreme Court jurisprudence, it is “that neutral, general laws apply to everyone, religious or not.”<sup>65</sup> This tenet simultaneously reflects a recognition of the limits of judicial competence and legitimacy—if religious exemptions are to be granted judicially, they are to be reserved for the litigious, the wealthy, or both, and are necessarily to be granted only after entangling the courts with religion—and recognizes the benefits of the legislative process, which demands open public debate, scrutiny, and participation.<sup>66</sup>

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58. Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1263 (2012).

59. *Id.* at 1205.

60. *Id.* at 1206–07.

61. *Id.* at 1207.

62. *Id.* at 1201.

63. *Id.*

64. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–4 (1971) (arguing that “the Court’s power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority of minority freedom”).

65. HAMILTON, *supra* note 15, at 274, 203–37.

66. HAMILTON, *supra* note 15, at 275.

Where the burden on religious conduct can be lifted by the legislature with only de minimis harm to the public, there is good reason to accommodate the religious conduct. But where the religious conduct harms others, accommodation is not consistent with the public good, and the exemption is likely a legislative sellout that shortchanges important interests in society and that violates the Establishment Clause. This is the permissive accommodation rule that fits with the larger constitutional scheme and honors both religious liberty and the obligation of the government to protect citizens from harm.<sup>67</sup>

## II.

### REVELATION OR ABYSS?: RELIGION'S ROLE IN CONSTITUTIONAL SOCIETY

With free exercise jurisprudence offering “no principled way to prefer any claimed human value to any other,”<sup>68</sup> RLUIPA seems to offer an alternative path—its quarrelsome litigation thus seemingly “a continuation of political intercourse, carried on with other means.”<sup>69</sup> But to understand this continuity—to appreciate the analytical and intellectual debt that RLUIPA owes to free exercise jurisprudence—one must grapple with the *idea* of religion's role within a legal order premised on secular, general law.<sup>70</sup> This Part, therefore, directly addresses the constitutional history of religion, phrased initially in “exceptional” terms, which provided the foil to both a contemporary judicial conception less hospitable to exception and, ultimately, to a congressional willingness to continue religious exceptionalism by other, statutory, means.

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67. HAMILTON, *supra* note 15, at 275.

68. Bork, *supra* note 64, at 8.

69. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., trans., Princeton Univ. Press 1984) (describing war).

70. See generally Michael W. McConnell, “*God is Dead and We Have Killed Him!*”: Freedom of Religion in the so Post-modern Age, 1993 B.Y.U. L. REV. 163, 186, 188 (1993) (discussing the growth in the divide between religiosity and the contemporary state and explaining that one reason “modern liberalism ceased to be consistent with a robust notion of religious liberty was that liberalism turned out not to be merely a neutral arbiter among competing understandings of the good life, but to embody certain substantive principles, among them individualism, independence, and rationality” and noting that “secular ideologies . . . use political muscle to advance their causes” while seeking “to preserve liberal formalism in court to ensure that religion is not included in the public dialogue”).



A. *The Constitutional Framers: Toleration or Exception*

In 1789, the Framers accepted the uniqueness of religion,<sup>71</sup> as evidenced by George Washington's farewell address, in which he stated that "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion."<sup>72</sup> The founding generation endeavored to codify a rapprochement between the nascent republic and a burgeoning religiosity. First they rejected *toleration*, as "not the opposite of intolerance, but [a] counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it."<sup>73</sup> Instead, the Framers, perceiving no necessary conflict between religious and civic duty, chose to adopt a policy of *exceptionalism*:

This, then, is the key difference between the Lockean view [the traditionally *liberal* view] and the popular American view [at the time of the framing of the Constitution]: the former takes the perspective of government and the latter the perspective of the believer. . . . If the scope of religious liberty is defined by religious duty . . . and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, *even if they are secular and generally applicable*.<sup>74</sup>

The language of the First Amendment itself suggests a protection of religion more extensive than mere toleration, as "exercise" suggests action, and if the clause is to protect action, it must do more than

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71. See Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1496 (1990) ("The textual insistence on the special status of 'religion' is . . . rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of human judgment."). *But see* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 967, 975, 984–85 (2013) (asserting that no special set of rights, autonomy, or sovereignty derive from religious institutions themselves but that institutional or church autonomy derives, ultimately, from individual rights of conscience).

72. McConnell, *supra* note 70, at 1441 (alterations in original) (internal quotation marks omitted) (quoting George Washington, *Farewell Address* (Sept. 17, 1796), reprinted in I DOCUMENTS OF AMERICAN HISTORY 169, 173 (H. Commager 9th ed. 1973)); see also *id.* at 1437 ("To determine the meaning of the religion clauses [of the First Amendment], it is necessary to see them through the eyes of their proponents, most of whom were members of the most fervent and evangelical denominations in the nation.").

73. McConnell, *supra* note 70, at 1444 (quoting Thomas Paine, *The Rights of Man*, pt. I, in I THE COMPLETE WRITINGS OF THOMAS PAINE 243, 291 (P. Foner ed. 1945)).

74. McConnell, *supra* note 70, at 1449, 1453 (emphasis added).

merely *tolerate* religion, it must freely *allow* it.<sup>75</sup> Dictionaries, both then and now, define “exercise” as connoting action, and of signifying more than mere internal conviction.<sup>76</sup> Moreover, when considering the significance of the duty religion imposes on its adherents, any attempt to categorically divorce religious *belief* from religious *action* fails under its own weight, for “there could be no such thing as freedom of conscience without freedom to act [on it].”<sup>77</sup> In other words, if the Free Exercise Clause protects an individual’s conscience, and an individual’s conscience demands that he or she act or refrain from acting, it must *ipso facto* protect those actions flowing directly from the conscience.<sup>78</sup> The belief-action distinction, then, is a false dichotomy. Preventing an individual who *knows* he must act in a certain way from acting in that way is the height of illogic and is manifestly unjust. This, however, is the result of a judicial philosophy that protects beliefs but prosecutes the bona fide result of those beliefs.

### B. *The Supreme Court’s Treatment of Free Exercise Claims*

The judiciary’s treatment of religion since 1789 presents a historical record of indecision and inconclusiveness. Until 1845, the Supreme Court’s position vis-à-vis the Free Exercise Clause might fairly be described as one of benign neglect, with the litigation of free exercise issues left primarily to the states.<sup>79</sup> Then, faced with the tensions borne of manifest destiny and the fervor of a Second Great Awaken-

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75. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). See generally ROBERT F. DRINAN, *CAN GOD AND CAESAR COEXIST?* 48–85 (2004) (discussing religious freedom in the United States).

76. See McConnell, *supra* note 71, at 1489 (providing dictionary definitions for the word “exercise” at the time of Framing); see also Concise Oxford English Dictionary (2011) (defining “exercise” as—*inter alia*— “[t]he use or application of a faculty, right, or process”).

77. McConnell, *supra* note 71, at 1452 (internal quotation marks omitted) (quoting THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 15 (1986)).

78. See McConnell, *supra* note 71, at 1443 & n.178, 1451. See generally RICHARD J. REGAN, *THE AMERICAN CONSTITUTION AND RELIGION* (2013) (discussing the interrelationship of religion with the Constitution generally); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1315 (1994) (recognizing the inadequacy of a constitutional regime that fails adequately to protect conscience-motivated acts and concluding that “the idea of religious liberty is self-contradictory” and suggesting “we replace [constitutional] privilege with protection” and “unimpaired flourishing with equal regard” in order to “rebuild the jurisprudence of religious accommodation”); Schragger & Schwartzman, *supra* note 71.

79. See McConnell, *supra* note 71, at 1503–11.

ing,<sup>80</sup> the Supreme Court heard *Reynolds v. United States*.<sup>81</sup> In *Reynolds*, the Court was asked to consider the prosecution of a man convicted of bigamy,<sup>82</sup> and though the case could have been settled on evidentiary grounds,<sup>83</sup> the Court set out to define religion. Non-controversially, the Court stated:

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.<sup>84</sup>

This prosaic restatement of the First Amendment's Free Exercise Clause, however, followed an explanation betraying a profound misrepresentation of the purpose of that clause. The Court declared that "[t]he inquiry is *not* as to the power of Congress to prescribe criminal laws for the Territories," such as that proscribing bigamy, "but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong."<sup>85</sup> Yet the Free Exercise Clause, as with the remainder of the protections enumerated in the Bill of Rights, is precisely what the Court said it was not: it is a limit on Congress's power to legislate. In effect, the Court was considering the possible existence of a religious *excuse*, as opposed to a *justification*;<sup>86</sup> in other words, the Court was considering whether to *tolerate* the religious practice in question.

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80. The nineteenth century brought with it expansion both geographic and ideological. As the frontier moved further west, Eastern notions of orthodoxy were challenged by new sects in new places. It has been observed that "[a]s with free expression, of course, politics also shaped religious freedom outside of judicial contexts and legal pronouncements." Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 463 (2006). "The force of politics on the conceptions of free expression and religious freedom changed with the transition from republican to pluralist democracy," in a process marred by the early nineteenth century "tradition of suppression" typified by the treatment of the American Jewish and Mormon communities. *Id.* at 463–64. It is not therefore surprising that when the Supreme Court took its first authoritative pass at free exercise, it was in the case of a Mormon man convicted of bigamy.

81. 98 U.S. 145 (1878).

82. *See id.* at 146.

83. *See id.* at 158–61; *see also id.* at 168 (Field, J., dissenting). Obviously, this makes the Court's definition of religion dictum.

84. *Id.* at 162 (majority opinion).

85. *Id.* (emphasis added).

86. *See* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 205 (5th ed. 2009) ("Whereas a justification claim generally focuses upon an *act* . . . and seeks to show

In addition to the philosophical error of the presumption of toleration,<sup>87</sup> the Court was willing to conflate religious conviction with mens rea, making the free exercise protection not a constitutional protection limiting Congress's ability to legislate in the first place, but an element in a criminal case. Indeed, the Court went on to say that accepting even genuinely held religious convictions would be "introducing a new element into *criminal law*."<sup>88</sup> With the belief-action distinction thus transmuted into conventional elements of the criminal law, the Court's conclusion necessarily followed:

Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. . . .

. . . The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.<sup>89</sup>

The Court, however, failed to recognize that religious exceptionalism is the law of the land—or at least it was at the time of the writing of the Constitution.<sup>90</sup> In their coup de grâce to religious exceptionalism, the *Reynolds* Court went on to conclude that "it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made."<sup>91</sup> Based on this logic, however, would it not be equally "dangerous" for an offender to escape punishment because she believed the search that turned up evidence against her was illicit, or that the law under which she was prosecuted was otherwise unconstitutional? In essence, the *Reynolds* Court was, if not writing the Free Exercise Clause out of the Constitution altogether, at least declaring that it offered less protection than the other guarantees of the Bill of Rights.

Twelve years later, in *Davis v. Beason*, the Court further clarified its position, declaring that the Free Exercise Clause "was never in-

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that the result of the act was not wrongful, an excuse centers upon the actor . . . and tries to show that the actor is not morally culpable for his wrongful conduct."). The Court was, in a sense, giving effect to Garvey, who suggested that the law ought to treat religious belief in a similar fashion to diminished capacity, albeit in a way that diminishes religious freedom, as opposed to protecting it. See John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 798–801 (1986).

87. See *supra* text accompanying notes 71–78.

88. *Reynolds*, 98 U.S. at 166 (emphasis added).

89. *Id.* at 166–67.

90. See McConnell, *supra* note 71, at 1473–1503.

91. *Reynolds*, 98 U.S. at 167.

tended or supposed . . . [to] be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.”<sup>92</sup> Again, the Court upheld a bigamy conviction against a Mormon polygamist.<sup>93</sup> At the same time, however, it offered a way forward for religious adherents seeking exceptions from otherwise neutral laws. That is, they could argue that neither the act for which relief was sought, nor the granting of such relief, would be “inimical to the peace, good order, and morals of society.”<sup>94</sup>

While both *Reynolds* and *Davis* accepted a theistic definition of religion for the purposes of the constitutional inquiry,<sup>95</sup> in neither case was the Court willing to grant an exception that would excuse religious practice from comprehension of the challenged laws. The field remained relatively undisturbed until forty-one years later when, in dissent, Justice Hughes expressed willingness to recognize, as necessary to free religious practice, the granting of religious exceptions. “One cannot speak of religious liberty,” he wrote, “without assuming the existence of a belief in *supreme allegiance* to the will of God,” and “freedom of conscience itself implies respect for an innate conviction of *paramount duty*.”<sup>96</sup> Justice Hughes—basing his dissent on both the peculiarity of religious obligation and the value of avoiding unnecessary conflicts between the state and religion—wrote that the matter is:

in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law . . . and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one’s conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts.<sup>97</sup>

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92. 133 U.S. 333, 342 (1890).

93. *Id.* at 341.

94. *Id.* at 342.

95. Eli A. Echols, Note, *Defining Religion for Constitutional Purposes: A New Approach Based on the Writings of Emanuel Swedenborg*, 13 B.U. PUB. INT. L.J. 117, 125 (2003).

96. *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, J., dissenting) (emphases added).

97. *Id.*

Justice Hughes's acknowledgement would itself stay (largely)<sup>98</sup> dormant until 1963, when a majority of the Court, in *Sherbert v. Verner*, adopted an approach consistent with Justice Hughes's caution.<sup>99</sup> There, the Court distinguished *Reynolds*, stating that "[t]he conduct or actions so regulated"—that is, "overt acts prompted by religious beliefs or principles"—"invariably posed some *substantial* threat to public safety, peace or order."<sup>100</sup> Reiterating an earlier ruling, the *Sherbert* Court declared that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."<sup>101</sup> The Court went on to conclude that the law in question in *Sherbert*:

forces [the plaintiff] 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. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.<sup>102</sup>

The Court's *perestroika*, however, was not to be long-lived. As discussed above,<sup>103</sup> in 1990, the *Smith* Court, by denying protection to religious practice that was only "incidentally" affected by a generalized regulation, effectively ended the era of religious exceptionalism made possible by *Sherbert*'s heightened scrutiny.<sup>104</sup>

### C. *The Functional Argument v. Preferential Treatment*

Taken as a whole, then, the history of the Supreme Court's Free Exercise jurisprudence seems inconsistent with the philosophy of religious obligation, with the history of the Free Exercise Clause, with reason, and, indeed, with itself. Understanding this inconsistency requires some theoretical discussion.

It has been long recognized that religion is "an especially vulnerable target" of majoritarianism;<sup>105</sup> yet "[h]owever erroneous or ridicu-

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98. See Echols, *supra* note 95, at 126–27 (providing an overview of cases in this period).

99. 374 U.S. 398 (1963).

100. *Id.* at 403 (emphasis added).

101. *Id.* at 404 (alteration in original) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)) (internal quotation marks omitted).

102. *Id.*

103. See *supra* Part I.A.

104. See *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990).

105. McConnell, *supra* note 70, at 187; see also Ronald Reagan, Speech, *Politics and Morality Are Inseparable*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 7 (1984)

lous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind who are neither Statesmen nor Philosophers, will continue to view them in a different light.”<sup>106</sup> Madisonian factionalism, believing that liberty is best guaranteed in a system of many competing voices,<sup>107</sup> is therefore fundamentally inconsistent with any view that would promote “reason” by equalizing religious and secular adherents to the level of the one who could shout the loudest. Far from instilling in the populace a unitary identity, such a view represents the imposition by legal abstention of naked majoritarianism.

Nevertheless, it has been argued that religion is undeserving of toleration,<sup>108</sup> since it does not “yield valuable outcomes *often enough* relative to the bad outcomes it yields.”<sup>109</sup> Functionally, however, this argument could be applied to any unpopular, minority, or politically diffuse group or idea, resulting in protection limited to an individual’s willingness to “‘put[ ] up with’ practices of which one disapproves.”<sup>110</sup> While religion may be the first to fail the demand for “*epistemic warrant*”<sup>111</sup> of such a legal regime, the negative equalization it entails would not likely be limited to the zealot.<sup>112</sup> Indeed, as religious conviction wanes and the insularity of those who pursue them becomes more pronounced,<sup>113</sup> the courts arguably should be increasingly sensitive to Free Exercise claims.<sup>114</sup> Yet, there exists a compelling counterargument to this observation: it is morally indefensible for states to exempt those who would assert conflict with their “con-

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(observing that faith, religion, and churches have played critical roles in the nation’s political life).

106. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 THE WRITINGS OF JAMES MADISON 17, 29 (G. Hunt ed., 1904).

107. See McConnell, *supra* note 71, at 1479 (“The best cure for factional oppression is a large republic with many conflicting factions and a representative government with checks and balances.”).

108. See BRIAN LEITER, WHY TOLERATE RELIGION? 133 (2013).

109. *Id.* at 86.

110. *Id.* at 3.

111. *Id.* at 91.

112. See, e.g., Karen Armstrong, *The Myth of Religious Violence*, THE GUARDIAN, Sept. 25, 2014, <http://www.theguardian.com/world/2014/sep/25/sp-karen-armstrong-religious-violence-myth-secular> (“[T]olerance was only skin-deep, and as Lord Acton had predicted, an intolerance of ethnic and cultural minorities would become the Achilles heel of the nation-state. Indeed, the ethnic minority would replace the heretic . . . as the object of resentment in the new nation-state.”).

113. See generally LEITER, *supra* note 108, at 54–67, 92–133 (presenting a contemporary conceptual challenge to religious free exercise).

114. See, e.g., United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (describing a sliding scale of judicial solicitude increasing as the pertinent group becomes more marginalized).

science” from generalized legal duty since—even aside from its institutional ambiguities—such a system would treat the religiously inclined more favorably than the atheist, agnostic, secularist, and even the adherent of both religious and civic duty.<sup>115</sup>

Proceeding from point to counterpoint, these arguments ultimately fail to account for the realities of both constitutional religious exceptionalism (with its concomitant functional safeguard against majoritarianism) and the indefensible illogic of total exemption (with its necessary reduction of the law to a series of suggestions, the enforceability of which are made beholden to the beliefs of society’s least common denominator). This incipient tension is manifest in RLUIPA’s statutory schema, which—by requiring courts to resolve the claims of a religious land user as against the claims of a land regulator without regard for reasonableness—requires present resolution of the ambiguity codified at the Framing. Instead of reflexive recourse to such adversarial and binary litigation, which necessarily vindicates one view at the expense of the other, account must be made for the fact that *both* might be right: free exercise claims undoubtedly protect religious beliefs, and the state may undeniably regulate conduct uniformly.<sup>116</sup> Without resort to some other mechanism to resolve this tension, results will remain at best sporadic and irreconcilable or, worse, *ex ante* preferentialism explained by *ex post* rationalization will occur.

### III.

#### TRANSFORMATION OR ATONEMENT: MAKING SENSE OF RLUIPA LITIGATION

The early history of RLUIPA litigation might fairly be described as a series of tentative and difficult-to-reconcile results, each attempting to interpret and apply the requirements of RLUIPA. Lacking clarity and cohesiveness, RLUIPA could be likened to a “bramble bush,”<sup>117</sup> fundamentally at odds with the notion that it is important for a system of jurisprudence grounded in realism to remain clear to those charged with implementation. This Part examines the confusion that plagues the litigation and interpretation of RLUIPA’s Equal Terms

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115. LEITER, *supra* note 108, at 68–91, 135 n.1 (framing the issue as one of preference between competing ideologies); *see also* DRINAN, *supra* note 75, at 113–33 (discussing the rights of those who “do not have or do not profess religious faith”).

116. *See generally* Eisgruber & Sager, *supra* note 78, at 1260 (discussing what they refer to as the “sectarian defect”: the inherent tension between competing claimants to epistemological truth in a society that presupposes a quantum of authority to pass laws of general applicability). Principled toleration does not equal total exemption. LEITER, *supra* note 108, at 133.

117. *See generally* KARL LLEWELLYN, *THE BRAMBLE BUSH* (1930).



provision, which codifies the notion that religious institutions should not be treated unequally as compared to secular institutions for purposes of land use decision-making.<sup>118</sup> At present, there is no uniform national acceptance of any one test to adjudicate an Equal Terms challenge.<sup>119</sup> A circuit split exists between the Courts of Appeals for the Eleventh,<sup>120</sup> Third,<sup>121</sup> and Seventh<sup>122</sup> Circuits (the only courts to provide specific evaluative methods in this area).<sup>123</sup> Absent adoption of one all-encompassing test by a wide majority of circuit courts (or, less likely still, congressional repeal of the statute altogether), the current conflicting jurisprudence seems destined to be resolved by the U.S. Supreme Court.

Yet from the din of internecine circuit opinions construing the statute, two rival claimants to analytical primacy emerge: the Third Circuit Court of Appeals's "regulatory purpose" analysis in *Lighthouse Institute for Evangelism v. City of Long Branch*,<sup>124</sup> and the Seventh Circuit's consideration of "conformity to zoning criteria" drawn from *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*.<sup>125</sup> Within the context of these two major contemporary cases, the lack of clarity and confusion in interpreting and applying RLUIPA's

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118. See 42 U.S.C. § 2000cc(b)(1) (2013) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less-than-equal terms with a nonreligious assembly or institution.").

119. Nor is there a uniform test for determining whether a substantial burden exists under Section 2000cc(a)(1) of RLUIPA. *Id.* § 2000cc(a)(1).

120. See *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308 (11th Cir. 2006); see also *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004) (noting that "while [RLUIPA's Equal Terms provision] has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis").

121. See *Lighthouse Inst. for Evangelism v. City of Long Branch (Lighthouse II)*, 510 F.3d 253, 262–70 (3d Cir. 2007).

122. See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (plurality opinion).

123. The Ninth Circuit recently muddied the waters of analysis by appearing to adopt—simultaneously—both the Third Circuit's and the Seventh Circuit's analytical constructs. See *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011).

124. See *Lighthouse II*, 510 F.3d at 266 (holding that "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*"). Cf. *Midrash Sephardi*, 366 F.3d at 1230–31 (holding that a zoning ordinance that allows any "assembly," broadly defined, must allow a church to locate in the same district).

125. *River of Life Kingdom Ministries* 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (plurality opinion) (stating a test that considers the regulatory criteria used in a zoning decision).

Equal Terms requirement<sup>126</sup> is best analyzed. After providing an overview of the RLUIPA litigation, this section will demonstrate why broad adoption of the test used in *River of Life* will provide for the fairest and most objective judicial approach to determine when a violation of the Equal Terms provision of RLUIPA has occurred.

#### A. First Steps

Some early RLUIPA cases held that a plaintiff alleging a violation of the Equal Terms provision was required to show a substantial burden on its religious exercise *in addition to* a showing of disparate treatment.<sup>127</sup> However, more recent circuit court opinions have widely rejected this requirement.<sup>128</sup> Treating the Equal Terms provision as distinct from any substantial burden requirement creates a slightly lesser burden on the plaintiff in an Equal Terms challenge since what remains is that a plaintiff must show some level of disparate treatment.<sup>129</sup> The Eleventh Circuit, for example, has described “three distinct kinds of Equal Terms statutory violations,” to wit:

(1) a statute that facially differentiates between religious and non-religious assemblies or institutions; (2) a facially neutral statute that is nevertheless “gerrymandered” to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions.<sup>130</sup>

Using this broad test, the Eleventh Circuit concluded in *Midrash Sephardi, Inc. v. Town of Surfside* that, since “churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of ‘assembly or institution,’” a town ordinance treating the latter more favorably than the former constituted “differential treatment,” and as such was a violation of RLUIPA’s Equal Terms provision.<sup>131</sup>

Similarly, the Second Circuit found a violation of the Equal Terms provision where New York City allowed secular institutions in

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126. 42 U.S.C. § 2000cc(b)(1) (2013).

127. *See, e.g.*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch (Lighthouse I)*, 406 F. Supp. 2d 507, 518–19 (D.N.J. 2005); *Vineyard Christian Fellowship of Evanston v. City of Evanston*, 250 F. Supp. 2d 961, 992–93 (N.D. Ill. 2003).

128. *See, e.g.*, *Lighthouse II*, 510 F.3d at 262; *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1329 (11th Cir. 2005) (per curiam); *Midrash Sephardi*, 366 F.3d at 1228–35; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003).

129. *See* 42 U.S.C. § 2000cc(b)(1) (2013).

130. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308 (11th Cir. 2006).

131. *Midrash Sephardi*, 366 F.3d at 1219, 1231.

a particular neighborhood to conduct catered events, but prohibited a church in the same neighborhood from using its facilities to host the same type of events.<sup>132</sup> Observing that RLUIPA “is less concerned with whether formal differences may be found between religious and non-religious institutions—they almost always can—than with whether, in practical terms, secular and religious institutions are treated equally,” the Second Circuit held that the conclusion of the court below that the city had treated the church less favorably than the secular institutions was “within the range of reasonableness.”<sup>133</sup> The Second Circuit found that the institutions were “similarly situated for all functional intents and purposes relevant here.”<sup>134</sup>

Despite the appealing reductiveness of their broad, general analyses, neither approach fully clears the “bramble bush” of judicial indecisiveness<sup>135</sup> Rather, by failing to incorporate the real differences between religious and secular land uses, these approaches lack interpretive clarity. The confusion in applying RLUIPA’s requirements is therefore best analyzed within the context of two major contemporary cases: one from the Third Circuit, *Lighthouse Institute for Evangelism v. City of Long Branch*,<sup>136</sup> and one from the Seventh Circuit, *River of Life Kingdom Ministries v. Village of Hazel Crest*.<sup>137</sup>

B. *A Lighthouse With a Different “Beam”*: Lighthouse Institute for Evangelism v. City of Long Branch

At issue in *Lighthouse Institute for Evangelism v. City of Long Branch* was whether the City of Long Branch, New Jersey, violated RLUIPA’s Equal Terms provision when it denied the Lighthouse Institute for Evangelism—“a Christian church that [sought] to minister to the poor and disadvantaged in downtown Long Branch, New Jersey”—a permit to open its religious services in an area of the town that did not enumerate a church as a permitted use and was subsequently marked for the redevelopment of retail and restaurant properties.<sup>138</sup> Based on the structure of RLUIPA, its legislative history, and

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132. See *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 668 (2d Cir. 2010).

133. *Id.* at 671–72.

134. *Id.* at 668.

135. See generally LLEWELLYN, *supra* note 117, at 115–16 (discussing the general need for legal clarity).

136. *Lighthouse Inst. for Evangelism v. City Of Long Branch (Lighthouse II)*, 510 F.3d 253 (3d Cir. 2007).

137. *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010) (en banc) (plurality opinion).

138. *Lighthouse II*, 510 F.3d at 256–58 (internal quotation marks omitted).

interpretations by courts in other jurisdictions, including the Eleventh and Seventh Circuits, the Third Circuit held that: (1) Section 2(b)(1)'s Equal Terms provision does not incorporate the "substantial burden" requirement outlined in Section 2(a)(1), (2) a plaintiff bringing a Section 2(b)(1) RLUIPA action must show the existence of a similarly situated comparator as to the challenged action's effect on the purpose of the regulation at issue, and (3) Section 2(b)(1) does not require a strict scrutiny analysis.<sup>139</sup>

*1. The Case in Chief: Factual Background*

In 1994, Lighthouse purchased property in a commercial area of Long Branch subject to a city ordinance that outlined specific permitted uses for the property, including use for educational services, use as an assembly hall, and use as a restaurant.<sup>140</sup> A church was not one of the enumerated permitted uses. Between 1995 and 2000, Lighthouse unsuccessfully filed for various permissions to use its property as a soup kitchen, for job training skills, for education, and as a residence for the church's pastor, respectively.<sup>141</sup> Each time, the permit was denied "because the application was incomplete or because the requested use was not permitted."<sup>142</sup>

Lighthouse filed suit against the city, claiming that the ordinance violated both its constitutional free exercise rights and the Equal Terms provision of RLUIPA.<sup>143</sup> Subsequent to the filing of the suit, in October 2002, Long Branch changed the zoning regulations of the commercial area by enacting a redevelopment plan to supersede the disputed ordinance.<sup>144</sup> The new plan strictly limited the types of land uses in the area, now called the "Broadway Corridor."<sup>145</sup> The stated purpose of the plan was to "achieve redevelopment of an underdeveloped and underutilized segment of the City" by, among other things, encouraging retail and restaurant properties to enter the area.<sup>146</sup> When Lighthouse sought to open its services under the plan, it was again denied a permit.<sup>147</sup> The City determined that opening a church in the area would "jeopardize" the development of the Broadway Corri-

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139. *Id.* at 262–69.

140. *Id.* at 257.

141. *Id.*

142. *Id.*

143. *See id.* at 257–58.

144. *See id.* at 258.

145. *Id.*

146. *Id.* (internal quotation marks omitted).

147. *Id.* at 259.

dor.<sup>148</sup> In part, the City was concerned that a church would prevent entertainment properties from opening due to a New Jersey statute prohibiting the issuance of a liquor license within two hundred feet of a church.<sup>149</sup> In light of Lighthouse's continued inability to open a church on its property, it claimed that both the ordinance and the plan violated RLUIPA Section 2(b)(1).<sup>150</sup>

## 2. *The District Court Decision*

The District Court of New Jersey held that, as applied to Lighthouse, neither the ordinance nor the plan violated RLUIPA's Equal Terms provision.<sup>151</sup> The court determined that a plaintiff claiming a violation of Section 2(b)(1) must show, as Section 2(a) requires, that the land use regulation imposes a "substantial burden" on the claimant's exercise of religion.<sup>152</sup> The district court also held that Section 2(b)(1) requires the plaintiff to show that a similarly situated secular assembly or institution had been treated more favorably.<sup>153</sup> According to the court, Lighthouse had failed to fulfill both of these requirements.<sup>154</sup>

## 3. *The Third Circuit's Holdings*

### a. *The "Substantial Burden" Requirement of RLUIPA Section 2(a)(1) Does Not Apply to Section 2(b)(1)'s Equal Terms Provision*

The Third Circuit found that the district court had erred in holding that a plaintiff bringing a claim under Section 2(b)(1)'s Equal Terms provision need show that the land use regulation at issue imposes a "substantial burden" on the plaintiff's free exercise of religion.<sup>155</sup> The first factor that the Third Circuit relied upon in its determination was the structure of RLUIPA. Citing *Russello v. United*

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148. *Id.*

149. *Id.*

150. *See id.* at 257–59. Lighthouse also challenged the city's redevelopment plan on the ground that it violated Lighthouse's free exercise rights. *see id.* at 259; *see generally* DANIEL P. DALTON, *LITIGATING RELIGIOUS LAND USE CASES* (2014) (discussing strategies for religious institutions litigating cases under RLUIPA and the First Amendment).

151. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch (Lighthouse I)*, 406 F. Supp. 2d 507, 519 (D.N.J. 2005).

152. *Id.* at 519.

153. *Id.* at 517.

154. *See id.* at 518–19.

155. *Lighthouse II*, 510 F.3d at 262.

*States*,<sup>156</sup> the Third Circuit recognized that when Congress includes language in one section of legislation and excludes it from another, a court must presume that the disparate treatment of the sections was intentional.<sup>157</sup> The Third Circuit noted that Section 2(a) explicitly includes the term “substantial burden” and that Section 2(b) does not.<sup>158</sup> Thus, applying the interpretative rule to RLUIPA, the Third Circuit concluded that the inclusion and exclusion were done purposefully by Congress, and, accordingly, the substantial burden requirement of Section 2(a) did not apply to Section 2(b)(1).<sup>159</sup>

The second factor that the Third Circuit considered was the legislative history of RLUIPA.<sup>160</sup> The Third Circuit began by noting that neither the sponsors of the bill in the House nor those in the Senate used the term “substantial burden” when discussing Section 2(b).<sup>161</sup> The court then pointed out a number of flaws in the district court’s analysis of the legislative history. For instance, the Third Circuit noted that Section 2(b)(1) of RLUIPA was designed to enforce the same rights as the Free Exercise Clause.<sup>162</sup> Because under the *Smith-Lukumi* line of cases, the Free Exercise Clause generally does not include a substantial burden requirement (unless, as was the case in *Lukumi* itself, the challenged law is neither neutral nor generally applicable),<sup>163</sup> the Third Circuit found that Section 2(b) of RLUIPA should not include that requirement, either.<sup>164</sup> Further, the Third Circuit addressed the District Court’s reliance on a statement in the legislative history that “the party asserting a violation of [RLUIPA] . . . bear[s] the burden of proof that the government action in question constitutes a substantial burden on religious exercise.”<sup>165</sup> The court concluded that this statement concerned RLUIPA’s burden-shifting provision, not the requirements of Section 2(b).<sup>166</sup> For these reasons, the Third Circuit found that the legislative history of RLUIPA indi-

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156. 464 U.S. 16, 23 (1983).

157. *See Lighthouse II*, 510 F.3d at 262–63.

158. *Id.*

159. *Id.*

160. *See id.* at 263–64.

161. *Id.* at 263.

162. *Id.*

163. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–46 (1993).

164. *Lighthouse II*, 510 F.3d at 263 (citing *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002)).

165. *See id.* (internal quotation marks omitted).

166. *Id.*; *see also* 42 U.S.C. § 2000cc-2(b) (2013) (RLUIPA’s burden-shifting provision).

cated that Section 2(b)(1) did not include Section 2(a)'s substantial burden requirement.<sup>167</sup>

Finally, the Third Circuit considered interpretations of Section 2(b)(1) by other courts, specifically the Eleventh and Seventh Circuits.<sup>168</sup> The court noted that “[t]he two Courts of Appeals that have interpreted RLUIPA’s Equal Terms provision have agreed that a plaintiff need not show substantial burden to prevail under it.”<sup>169</sup> In two cases, *Konikov v. Orange County*<sup>170</sup> and *Midrash Sephardi, Inc., v. Town of Surfside*,<sup>171</sup> the Eleventh Circuit held that a zoning code and zoning ordinance, respectively, violated Section 2(b)(1) of RLUIPA despite the fact that neither caused a substantial burden on the plaintiff’s free exercise of religion. The Seventh Circuit made similar findings in *Digrugilliers v. Consolidated City of Indianapolis*<sup>172</sup> and *Civil Liberties for Urban Believers v. City of Chicago*.<sup>173</sup> In *Civil Liberties for Urban Believers*, the Seventh Circuit stated that “the substantial burden and nondiscrimination provisions [of RLUIPA] are operatively independent of one another.”<sup>174</sup> Because of this precedent and the other factors outlined above, the Third Circuit in *Lighthouse* held that the substantial burden requirement of Section 2(a) of RLUIPA did not apply to Section 2(b)(1)’s Equal Terms provision.<sup>175</sup> The Third Circuit thus found that the district court had erred in requiring *Lighthouse* to show that it was substantially burdened by the plan or the city ordinance.<sup>176</sup>

*b. RLUIPA Section 2(b)(1) Does Require a Showing of a Similarly Situated Secular Comparator*

On appeal to the Third Circuit, *Lighthouse* also argued that a plaintiff bringing a Section 2(b)(1) Equal Terms claim need not identify a similarly situated comparator that has been treated more favorably.<sup>177</sup> On that claim, the Third Circuit held that the district court was

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167. *Lighthouse II*, 510 F.3d at 263.

168. *See id.* at 264.

169. *Id.*

170. 410 F.3d 1317, 1324–29 (11th Cir. 2005) (per curiam).

171. 366 F.3d 1214, 1228–31 (11th Cir. 2004).

172. 506 F.3d 612, 616–18 (7th Cir. 2007).

173. *City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003).

174. *Id.*

175. *Lighthouse Inst. for Evangelism v. City of Long Branch (Lighthouse II)*, 510 F.3d 253, 263–64 (3d Cir. 2007).

176. *Id.*

177. *Id.* at 264 (“*Lighthouse* . . . urges us to take the position that a plaintiff, asserting a violation of the Equal Terms provision, needs to show nothing more than that the challenged land-use regulation treats one or more nonreligious assemblies or insti-

correct in finding that a Section 2(b)(1) plaintiff must identify a similarly situated comparator, but that such a determination is appropriately made in light of the purpose of the regulation at issue.<sup>178</sup> Put another way, the analysis first requires identification of the “regulatory purpose” of the regulation at issue,<sup>179</sup> that is, whether the zoning regulation is aimed at certain land impacts or use categories—or, simplifying the analysis, whether it is in fact aimed at certain disfavored land users, in which case it is likely to fail perforce.<sup>180</sup> The second step of the Third Circuit’s analysis considers whether two users—one religious, one secular—are treated unequally despite the fact that each equally implicates the regulatory purpose. In the Third Circuit’s words, “Heightened scrutiny [is] warranted only when a principled distinction [can]not be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives.”<sup>181</sup>

In making this determination, the Third Circuit again noted that Section 2(b)(1) was intended to be a codification of existing Free Exercise jurisprudence.<sup>182</sup> Based on the *Smith-Lukumi* line of cases, as well as Third Circuit precedent, the court concluded that “the relevant comparison for purposes of a Free Exercise challenge to a regulation is between its treatment of certain religious conduct and the analogous secular conduct that *has a similar impact on the regulation’s aims*.”<sup>183</sup> An example of such disparate treatment is found in *Lukumi* itself, where “[d]espite the city’s proffered interest in preventing cruelty to animals, the ordinances [were] drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons [were] either not prohibited or approved by express provision.”<sup>184</sup>

The Third Circuit’s analysis declined to follow the approach of the Eleventh Circuit in *Midrash Sephardi*.<sup>185</sup> As discussed above,<sup>186</sup>

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tutions better than a religious assembly or institution, without regard for the objectives of the regulation or the characteristics of the secular and religious comparators.”).

178. *Id.*

179. *Id.*

180. *See, e.g.,* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–40 (1993); *cf.* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (per curiam) (vindicating “class of one” equal protection challenge to variance conditioned on granting of easement).

181. *Lighthouse II*, 510 F.3d at 266 (3d Cir. 2007).

182. *Id.* at 262–64.

183. *Id.* at 266.

184. *Lukumi*, 508 U.S. at 543.

185. *See Lighthouse II*, 510 F.3d at 267–68.

186. *See supra* text accompanying notes 130–131.



this approach requires the court to “first evaluate whether an entity qualifies as an ‘assembly or institution,’ as that term is used in RLUIPA,” and then simply “consider[ ] whether the governmental authority treats a religious assembly or institution differently than a non-religious assembly or institution.”<sup>187</sup> According to the Third Circuit, such an expansive interpretation of RLUIPA would force the government to allow any religious institution to locate wherever any other type of secular institution or assembly was established, which result the court believed to be “contrary to the text of the statute and to the expressed intent of Congress.”<sup>188</sup>

The Third Circuit proceeded to analyze whether, under the initial city ordinance, Lighthouse had been treated disparately as compared to other organizations or businesses that would have affected the purpose of the ordinance in a similar manner.<sup>189</sup> First, the Third Circuit noted that the goals of the ordinance were “not well documented,”<sup>190</sup> making it difficult to compare how the construction of Lighthouse’s church would affect those goals as compared to other uses. Second, the court found that it was unclear how a church would harm the ordinance’s objectives more than permitted uses, such as use as a “public utility,” a “motor vehicle service station,” or an “assembly hall.”<sup>191</sup> Therefore, the Third Circuit determined that Lighthouse was entitled to summary judgment and damages for the period during which the ordinance was enforced against the church.<sup>192</sup>

As to the subsequent redevelopment plan, however, the Third Circuit made the opposite finding.<sup>193</sup> Unlike the ordinance, the goal of the plan was clearly outlined as redeveloping a segment of the city into a retail corridor.<sup>194</sup> The creation of a church was not permitted because the presence of a church, unlike other types of assemblies, would, under state law, prevent surrounding businesses from obtaining liquor licenses.<sup>195</sup> In that regard, schools were a similarly situated comparator regarding the plan’s purpose of revitalizing the area and permitting bars and restaurants, since the presence of a school would

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187. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 (11th Cir. 2004).

188. *Lighthouse II*, 510 F.3d at 268.

189. *Id.* at 272–73.

190. *Id.* at 272.

191. *Id.*

192. *Id.* at 273.

193. *Id.* at 270.

194. *Id.*

195. *Id.*

also prevent the issuance of liquor licenses under state law.<sup>196</sup> Because schools were also not permitted under the plan, Lighthouse could not show that it was treated unfavorably when compared to other assemblies with the same effect on the plan's purpose.<sup>197</sup>

*c. RLUIPA Section 2(b)(1) Does Not Require a Strict Scrutiny Analysis*

The final issue addressed by the Third Circuit was whether Section 2(b)(1)'s Equal Terms provision required strict scrutiny analysis.<sup>198</sup> The district court had determined in the alternative that even if Lighthouse was treated unfavorably as compared to a secular institution, the ordinance and plan did not violate Section 2(b)(1) because both survived a strict scrutiny analysis.<sup>199</sup> The Third Circuit, to the contrary, held that Section 2(b)(1) of RLUIPA must be analyzed using a strict liability standard, not strict scrutiny.<sup>200</sup>

To reach this conclusion, the Third Circuit again relied upon the analysis discussed above<sup>201</sup>—namely, that if Congress includes language in one section but excludes it from another, the inclusion and exclusion must be considered intentional.<sup>202</sup> While Section 2(a) of RLUIPA includes a strict scrutiny provision, Section 2(b)(1) does not.<sup>203</sup> For this reason, the Third Circuit found that Congress intended for Section 2(b)(1) to not require strict scrutiny analysis.<sup>204</sup> The court acknowledged that its finding on strict scrutiny differed from that of the Eleventh Circuit,<sup>205</sup> which had held that Section 2(b)(1) of RLUIPA codified the *Smith-Lukumi* line of cases, including its requirement of strict scrutiny analysis for laws that are not neutral or generally applicable.<sup>206</sup> According to the Third Circuit, however, the

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196. *See id.* at 272.

197. *Id.* at 271–72.

198. *See id.* at 268–69.

199. The district court stated in dicta that “Long Branch ha[d] a compelling interest in limiting a church within this particular zone.” *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch (Lighthouse I)*, 406 F. Supp. 2d 507, 516 (D.N.J. 2005). Though the court made the statement in the context of the plaintiff's Section 2(a) “substantial burden” claim—rather than its Section 2(b)(1) Equal Terms claim—the district court further concluded that “Section (a)'s ‘substantial burden’ test is applicable to the more precise provisions in Section (b).” *Id.* at 519.

200. *Lighthouse II*, 510 F.3d at 269 (3d Cir. 2007).

201. *See supra* text accompanying notes 155–159.

202. *Lighthouse II*, 510 F.3d at 269.

203. *Id.*

204. *Id.*

205. *Id.*

206. *See* *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004).

intent of Congress to not include a strict scrutiny requirement in Section 2(b)(1), which was clear from the language and structure of RLUIPA, overrode the *Smith-Lukumi* line of case law.<sup>207</sup> The Third Circuit therefore held that if a land use regulation treats a religious institution less favorably than a secular assembly with a similar effect on the purpose of the regulation, that regulation violates RLUIPA without further analysis.<sup>208</sup> The Third Circuit thus agreed with the district court that the City of Long Branch was entitled to summary judgment as to the plan,<sup>209</sup> with the presumptive result that Lighthouse was forced to relocate to another part of town.

C. *A New River of Judicial Opportunity: River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*

*River of Life Kingdom Ministries v. Village of Hazel Crest*, the Seventh Circuit's paradigmatic Equal Terms case, concerned a small church that wanted to relocate to a building in a part of town zoned as a "commercial district."<sup>210</sup> The relevant zoning ordinance excluded new non-commercial uses, including "community centers, schools, and art galleries" in addition to churches.<sup>211</sup> River of Life's suit to enjoin enforcement of the ordinance was initially denied by the district court<sup>212</sup> and by a panel of the Seventh Circuit.<sup>213</sup> However, the Seventh Circuit subsequently granted rehearing en banc in order to delineate the appropriate test to be used to evaluate Equal Terms challenges.<sup>214</sup>

Writing for a plurality, Judge Posner rejected the Eleventh Circuit's approach<sup>215</sup> as being so broad that it would actually reverse discriminate against secular institutions.<sup>216</sup> In expressing concern about the Eleventh Circuit's "differential treatment" test, Judge Posner pointed out that such a test failed to take into account the different effects on a municipality and its residents that a church may have as

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207. See *Lighthouse II*, 510 F.3d at 269.

208. *Id.*

209. *Id.* at 272.

210. 611 F.3d 367, 368 (7th Cir. 2010) (en banc).

211. *Id.*

212. *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, No. 08-0950, 2008 WL 4865568, at \*13 (N.D. Ill. July 14, 2008).

213. *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 585 F.3d 364 (7th Cir. 2009).

214. *River of Life*, 611 F.3d at 368.

215. See *supra* text accompanying notes 130–131, 185–187.

216. See *River of Life*, 611 F.3d at 369 ("Pressed too hard, this approach would give religious land uses favored treatment—imagine a zoning ordinance that permits private clubs but not meeting halls used by political advocacy groups.").

compared to secular land uses.<sup>217</sup> The Eleventh Circuit’s test, moreover, might prove “*too* friendly to religious land uses, unduly limiting municipal regulation.”<sup>218</sup> Such a result could amount to a violation of the First Amendment’s Establishment Clause “by discriminating in favor of religious land uses.”<sup>219</sup>

While looking more favorably on the Third Circuit’s approach in *Lighthouse II*,<sup>220</sup> Judge Posner concluded that a slight tweaking of that test would yield the preferred result.<sup>221</sup> The critical distinction between Judge Posner’s approach and that of the Third Circuit is that Judge Posner’s test examines whether the zoning authority used accepted “zoning *criteria*” instead of looking at the authorities’ “regulatory *purpose*.”<sup>222</sup> Noting that this distinction was more than semantic, Judge Posner’s plurality posited: “‘Purpose’ is subjective and manipulable, so asking about ‘regulatory purpose’ might result in giving local officials a free hand in answering the question ‘equal with respect to what?’ ‘Regulatory criteria’ are objective—and it is federal judges who will apply the criteria to resolve the issue.”<sup>223</sup>

After establishing the appropriate test to be used in Equal Terms challenges, the court then engaged in a review of land use treatises and scholarship in order to properly delineate the accepted zoning criteria for a certain land use in a commercial district.<sup>224</sup> The court determined that a host of accepted zoning criteria (including, among others, tax, traffic, parking, community shopping needs, and pedestrian concerns) went into a decision of whether to allow a particular use in a commercially zoned district.<sup>225</sup> The court concluded that the Village of Hazel Crest had applied such conventional zoning criteria when it banned non-commercial land uses from a part of the municipality that was particularly suitable for a commercial district due to its proximity to public transportation.<sup>226</sup> Although future cases involving “variances and special-use permits and grandfathered non-conforming uses [that] blur the character of particular zoning districts” might be tougher calls, the court noted that “should a municipality create what purports

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217. *Id.* at 370.

218. *Id.*

219. *Id.*

220. *See* *Lighthouse Inst. for Evangelism v. City of Long Branch (Lighthouse II)*, 510 F.3d 253, 266 (3d Cir. 2007); *see also supra* Part III.B.3.b.

221. *River of Life*, 611 F.3d at 371.

222. *Id.*

223. *Id.*

224. *See id.* at 371–73.

225. *Id.*

226. *Id.* at 373–74.

to be a commercial district and then allow other uses, a church would have an easy victory if the municipality kept it out.”<sup>227</sup>

*River of Life* was a plurality opinion, however. Of note is Judge Sykes’s lengthy dissent, which, after a recitation of RLUIPA’s legislative history and precedents, preferred an adherence to the Eleventh Circuit’s test.<sup>228</sup> Judge Sykes expressed concern that adopting either Judge Posner’s test or the Third Circuit’s test would doom practically all Equal Terms claims.<sup>229</sup> She worried that “‘economic development’ and ‘tax-enhancement’ objectives—which can be characterized as ‘regulatory purposes’ or ‘accepted zoning criteria’—w[ould] immunize the exclusion of religious land uses from commercial, business, and industrial districts because religious assemblies do not advance these objectives and for-profit secular assemblies do.”<sup>230</sup> To Judge Sykes:

[T]he court’s emphasis on the police-power legitimacy of exclusionary zoning evinces a degree of deference toward land-use regulation that is fundamentally inconsistent with RLUIPA and the First Amendment’s guarantee of the right of free religious exercise. The presumptive validity of exclusionary zoning under *Village of Euclid v. Ambler Realty Co.* is a presumption of validity against property-rights claims, which trigger only the very deferential rational-basis standard of scrutiny. Laws that burden free-exercise rights are not reviewed so leniently—not, that is, unless the law is truly neutral on its face, in its operative effect, and in its enforcement. The equal-terms provision reflects a congressional judgment about state and local regulation of religious land uses: Regulations that treat religious assemblies or institutions less well than nonreligious assemblies or institutions are *inherently not neutral*.<sup>231</sup>

The problem with such a presumption, however, is that it “leaves a gap between discriminatory local government action on one side and obviously-neutral, compelled local government action on the other. . . . Into this gap fall many land use decisions that might not be discriminatory at all, and which have always before been within the exclusive province of state and local governing authorities.”<sup>232</sup> Or, in

227. *Id.*

228. *Id.* at 385–86 (Sykes, J., dissenting); *see also supra* text accompanying notes 130–131, 185–187 (outlining the Eleventh Circuit’s approach).

229. *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting).

230. *Id.*

231. *Id.* at 388–89 (Sykes, J., dissenting) (emphasis added) (citation omitted). *See generally* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (emphasizing broad local discretion in land use matters).

232. Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41, 72 (2010).

the words of the plurality, “‘equality,’ except when used of mathematical or scientific relations, signifies not equivalence or identity but proper relation to relevant concerns.”<sup>233</sup> Unlike the plurality’s “accepted zoning criteria” test, Judge Sykes’s position lacks a limiting principle, throwing into doubt the validity of a wide range of genuinely non-discriminatory zoning decisions that had always been the unique province of localities.<sup>234</sup>

The “accepted zoning criteria” test, by contrast, both assures courts that local land use decisions are not expressions of *sub rosa* animus and allows them to adopt uniform, objective criteria. Where certain zoning criteria are deemed to be generally accepted,<sup>235</sup> a court can be confident that religious uses are being treated equally to secular ones. Solace can be had in noting that the municipality has evaluated a religious land use under the same criteria it uses to evaluate secular uses. Indeed, the very characterization of a particular criterion as “accepted” implies that it is used to evaluate secular and clerical uses alike. This approach is further bolstered by the fact that, were a secular use treated arbitrarily in a similar situation, that plaintiff would have an actionable constitutional claim.<sup>236</sup>

In sum, while both *Lighthouse* and *River of Life* are improvements on the broad approaches adopted by the Eleventh and Second circuits,<sup>237</sup> *River of Life* represents the best solution for the future of RLUIPA’s Equal Terms provision from within the judiciary. Reliance on accepted zoning criteria prevents conflating injury—whether the proposed religious land user has been treated on less-than-equal terms—with explanation; if regulatory purpose is to be determinative, the existence of an “injury” is necessarily contingent on the ability of the defendant zoning authority to articulate some believable purpose after the fact. Reliance on zoning criteria, on the other hand, supposes *both* that an injury may exist—with the proposed use excluded—and that the injury may be explainable as consistent with objective factors. By going down the *River of Life*’s “tributary,” then, objective uniformity will be achieved and courts will be assured that their decisions embody the true spirit of RLUIPA’s Equal Terms provision. Moreo-

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233. *River of Life*, 611 F.3d at 371.

234. *Vill. of Euclid*, 272 U.S. at 393–94.

235. Such an analysis should be undertaken in precisely the same fashion as Posner’s opinion in *River of Life*, drawing upon land use treatises and other scholarly materials. See *River of Life*, 611 F.3d at 371–73.

236. See, e.g., *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing a “class of one” discrimination claim in the context of arbitrary zoning decisions).

237. See *supra* Part III.A.

ver, under this approach, a range of local autonomy is preserved, idiosyncratic religious uses are protected from discriminatory exclusion, and the congressional object of moving the needle of Free Exercise solicitude more firmly in favor of putative plaintiffs is achieved.

#### IV.

##### RETURN TO THE KNOWN: ALTERNATIVE REMEDIAL CONSTRUCTS

Two additional remedial structures offer the promise of analytical clarity as well as fairer, more predictable results, allowing for local land use decision-making freed from the costs and uncertainties inherent in the RLUIPA status quo. Both of the additional structures are drawn from the common law of nuisance. The first uses the doctrine to inform—with the aid of a procedural device—an analysis in which both putative plaintiff and defendant are put to their proof. The second would achieve the same result, albeit by a role reversal: a local zoning authority would be required to show, under the aegis of nuisance law, that a particular religious use would constitute a nuisance, thus permitting recognition of the distinctively, irreducibly local concerns that have traditionally justified deference to local government in the area of zoning. Each is discussed in turn.

##### A. *The Legacy of McDonnell-Douglas: Shifting Burdens and the Federal Common Law of Nuisance*

After the passage of Title VII of the Civil Rights Act of 1964,<sup>238</sup> individuals, companies and ultimately the judiciary were left to reconcile the new statutory guarantee with both a rapidly evolving economy and the more traditional concerns of management-labor relations. And so it came to pass that, in the early summer of 1965, Percy Green, a former McDonnell-Douglas employee and longtime civil rights activist, participated in two acts of protest at the St. Louis-area plant where he had worked—each of which sought to protest racial bias in the company's employment and discharge practices.<sup>239</sup> When just a week later McDonnell-Douglas sought qualified mechanics, Mr. Green, who was qualified, sought reemployment.<sup>240</sup> Citing his partici-

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238. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2013)).

239. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 794–95 (1973). The extent of Mr. Green's participation in the second act of protest was a matter of factual dispute. *Id.* at 795.

240. *Id.* at 796.

pation in the labor actions, the company refused to rehire him.<sup>241</sup> As a result, Mr. Green filed a formal complaint with the Equal Employment Opportunity Commission, which, after lengthy proceedings, informed him of his right to sue in federal court.<sup>242</sup> After winding its way up through the lower courts, Mr. Green's case made it to the Supreme Court,<sup>243</sup> sounding claims under Section 704(a) of the Civil Rights Act of 1964.<sup>244</sup>

By 1973, the Supreme Court was left with a dilemma: how to give effect to congressional concerns about racial discrimination in employment without chilling the job market and insulating a class of employees from economic reality. The provision of the Civil Rights Act at issue provided, in relevant part, that “[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [the employee or applicant] has opposed any practice made an unlawful employment practice by this subchapter.”<sup>245</sup> The Court's solution—surprisingly simple—was not to surreptitiously amend the statute in question, but to provide an evidentiary vehicle by which the adversaries in litigation would hone the judicial analysis.

To reach this solution, the Court began with a teleological examination of statutory purpose,<sup>246</sup> seeking to demarcate the scope of congressional intent by also paying attention to what Congress did not want to do.<sup>247</sup> Applying the same purposive analysis to RLUIPA, it could be concluded that Congress intended to protect religious land uses from discriminatory treatment predicated on religious animus, but that it did not intend to provide religious land users with a blanket exception from zoning ordinances.<sup>248</sup> The language of the respective

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241. *Id.*

242. *See id.* at 796–97.

243. *Id.* at 797–98.

244. Pub. L. No. 88-352, 78 Stat. 241, 257 (codified as amended at 42 U.S.C. § 2000e-3(a) (2013)).

245. 42 U.S.C. § 2000e-3(a).

246. *See McDonnell Douglas*, 411 U.S. at 800 (“The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”).

247. *See id.* (“Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.” (citation and internal quotation marks omitted)).

248. *See* 146 CONG. REC. 16,700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) (“This Act does not provide religious institutions with immunity from land use regulation,



statutes bears this comparison out. Title VII of the Civil Rights Act of 1964, at issue in *McDonnell Douglas*, makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>249</sup> RLUIPA employs very similar language in Section 2(b)(2)’s “nondiscrimination” provision, making it unlawful for a local zoning authority to “impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”<sup>250</sup> In fact, save for RLUIPA’s use of “on the basis of” in lieu of Title VII’s “because of,” the language of the statutes is virtually identical. The analogy is made more compelling by the effect of the passage of RLUIPA, which was to reinstate, by statute, a constitutional strict scrutiny analysis—like that used in the constitutional discrimination claims that informed Title VII<sup>251</sup>—to certain religious land use decisions.<sup>252</sup>

RLUIPA and Title VII, then, contain similar language, impose the same level of heightened scrutiny on challenged actions, and are both phrased in terms of “civil rights.” As with a Title VII claim, moreover, “[t]here are societal as well as personal interests on both sides of [the] equation”<sup>253</sup> when a RLUIPA plaintiff (a religious complainant) makes his *prima facie* Equal Terms<sup>254</sup> (or, for that matter, nondiscrimination<sup>255</sup> or exclusion<sup>256</sup>) showing.<sup>257</sup> These similarities

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nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.”).

249. 42 U.S.C. § 2000e-2(a)(1).

250. *Id.* § 2000cc(b)(2). Though a distinct provision, the statutory nondiscrimination language provides a helpful point of reference in construing the similarly worded Equal Terms provision.

251. *See, e.g.*, Lawrence Rosenthal, *Saving Disparate Impact*, 34 *CARDOZO L. REV.* 2157, 2176 (2013) (discussing the interrelationship between Title VII and equal protection in the context of the statutory requirement “to utilize an equally valid but less discriminatory alternative”).

252. John Kenneth Felter, *Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act (RLUIPA)* in 10 *BUS. & COM. LITIG. FED. CTS.* § 110:42 (2011).

253. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

254. *See* 42 U.S.C. § 2000cc(b)(1).

255. *See id.* § 2000cc(b)(2).

256. *See id.* § 2000cc(b)(3).

257. Since 42 U.S.C. § 2000cc(a) contains its own qualifications in subsections (A) and (B), it could be argued that a *McDonnell Douglas*-style burden-shifting framework is inappropriate, as Congress’ definition manifests an intent that the analysis be performed at only one stage, with little room left for the defendant to rebut the

suggest that it is both rational and fair to graft onto RLUIPA litigation a burden-shifting framework similar to that which the Court outlined in *McDonnell Douglas*.<sup>258</sup>

In brief, the *McDonnell Douglas* burden-shifting framework first requires the plaintiff to present a prima facie case of discrimination.<sup>259</sup> In *McDonnell Douglas* itself, Mr. Green met this first step by proving:

(i) that he belong[ed] to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>260</sup>

While this threshold showing is by no means dispositive, “it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.”<sup>261</sup> Thereafter, the burden shifts to the defendant to articulate a “legitimate, non-discriminatory reason” for its action.<sup>262</sup> Finally, “should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”<sup>263</sup>

A similar framework could easily be applied to claims under RLUIPA's Equal Terms provision. An important question remains, however: how might a local zoning authority respond? In *McDonnell Douglas*, the company was able to rebut Mr. Green's prima facie case by articulating “some legitimate, nondiscriminatory reason for the employee's rejection,”<sup>264</sup> to wit, his “unlawful conduct” in protest against the company.<sup>265</sup> This minimal rebuttal showing was deemed satisfactory in light of the similarly minimal prima facie burden born by the plaintiff.<sup>266</sup> The logic of *McDonnell Douglas* thus suggests a propor-

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claimed discrimination. *See, e.g.,* *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 389 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (“The equal-terms provision reflects a congressional judgment about state and local regulation of religious land uses: Regulations that treat religious assemblies or institutions less well than nonreligious assemblies or institutions are inherently not neutral.”).

258. *See McDonnell Douglas*, 411 U.S. at 802.

259. *Id.*

260. *Id.*

261. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981).

262. *Id.* at 254; *see also McDonnell Douglas*, 411 U.S. at 802.

263. *Burdine*, 450 U.S. at 253; *see also McDonnell Douglas*, 411 U.S. at 804.

264. *McDonnell Douglas*, 411 U.S. at 802.

265. *Id.* at 803.

266. *See id.* 803–04 (“[W]e think the court below seriously underestimated the rebuttal weight to which [McDonnell Douglas's] reasons were entitled. . . . [McDonnell

tionality between the quantum of proof necessary to make a prima facie showing of discrimination and that necessary to rebut it. Courts evaluating RLUIPA actions, however, have generally been less willing to infer discrimination without more particularized evidence of disparate treatment.<sup>267</sup>

This Article proposes that where a RLUIPA plaintiff succeeds in making the threshold showing of a *McDonnell Douglas*-type prima facie case, the defendant zoning authority ought to be allowed to rebut that showing by demonstrating that the religious land user's proposed use disregards "the character of the locality," imposing a social harm not outweighed by the benefits of its proposed use.<sup>268</sup> In other words, the locality's rebuttal would take the form of a showing of anticipatory nuisance,<sup>269</sup> wherein the locality would "interfere by injunction to restrain a party from so using his own property as to destroy or materially prejudice the rights of his neighbor"<sup>270</sup> pursuant to "a balancing test 'plus'" that weighs "the plaintiffs' rights to protect themselves from apparent threats of injury . . . against the defendants' rights to use their property as they wish."<sup>271</sup> The "plus" refers to the requirement that the court "decide what standard of imminence and severity the plaintiff must establish *before* an injunction will issue."<sup>272</sup> The use of federal anticipatory nuisance is neither unprecedented nor remarkable,<sup>273</sup> and the defendant zoning authority should not have difficulty meeting its burden (unless, of course, it was in fact motivated by religious animus or was acting in a manifestly irrational manner). Finally, in following the *McDonnell Douglas* framework to its conclusion,

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Douglas's] reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end there.").

267. See, e.g., *supra* text accompanying notes 178–181 (articulating the similarly situated comparator requirement).

268. See RESTATEMENT (SECOND) OF TORTS §§ 827–828 (1979) (discussing nuisance).

269. For a detailed discussion of the doctrine of anticipatory nuisance, see George P. Smith, II, *Re-validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687 (2005).

270. *Id.* at 696 (quoting *Adams v. Michael*, 38 Md. 123, 125 (1873) (internal quotation mark omitted)).

271. *Id.* at 697.

272. *Id.* at 697–98.

273. See *Cal. Tahoe Reg'l Planning Agency v. Jennings*, 594 F.2d 181, 194 (9th Cir. 1979) (discussing federal nuisance cases *Missouri v. Illinois*, 180 U.S. 208 (1901), and *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971)); see also Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 868 (2000) ("Prior to this century, conflict between churches and neighbors generally would have been handled under the law of nuisance, which forbids uses of property that unreasonably interfere with others' rights to use and enjoy their property.").

should the zoning authority meet its burden, thus rebutting the plaintiff's prima facie case, the plaintiff might then offer direct evidence of anti-religious animus or, alternatively, the matter would then proceed to a fact-finder to resolve.

The proposed burden-shifting framework has the advantage of providing clarity in litigation, consistency with precedent,<sup>274</sup> and internal statutory consistency.<sup>275</sup> More foundationally, the framework promotes economic efficiency by streamlining the dispute resolution process and allowing more reliable judicial resolution of religious land use disputes, each of which acts as an incentive to solve disputes before they reach trial. In addition, by incorporating the doctrine of anticipatory nuisance, the framework effectively balances fragile religious freedoms against local economic interests manifested in zoning ordinances.<sup>276</sup>

*B. The Federal Common Law of Nuisance as an Alternate  
Framework Within Which to Settle Religious  
Land Use Disputes*

Whereas the preceding discussion proposed a procedural use for the law of nuisance in the litigation of RLUIPA's Equal Terms provision, a direct, substantive use is also conceivable. The federal common law of nuisance provides an alternate analytic framework under which to assess the myriad competing justifications implicated in a religious land use case. While it is an oft-repeated maxim that "[t]here is no

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274. See, e.g., *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (plurality opinion) (articulating test that considers the regulatory criteria used in a zoning decision, and noting concern that "'equality,' except when used of mathematical or scientific relations, signifies not equivalence or identity but proper relation to relevant concerns," thus requiring some reference to extrinsic considerations).

275. See 42 U.S.C. § 2000cc-2(b) (2013) (providing that once plaintiff has stated a prima facie case of violation under RLUIPA, the burden of persuasion shifts to the defendant local government except as regards proof of a substantial burden on plaintiff's exercise of religion).

276. While alternate tests may incidentally accomplish this same goal, they do so in an uncertain, post hoc fashion, dissuading reliance and granting the court greater discretion than intended by the statutory regime. See, e.g., Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1469 (1999) (discussing the "common-law exemption model": "[S]tate RFRA's (and the federal RFRA applied to federal laws) let courts decide in the first instance whether an exemption is to be granted. But because RFRA's may be revised by the legislature, the courts' decisions aren't final. Ultimately, the tough calls will be governed by the political process, just as they have been in the common-law system under which American law has generally evolved."). The incidental lack of finality in such a model fails to resolve the issue of clarity ex ante and leaves open the possibility of continuing political retrenchment.

federal general common law,”<sup>277</sup> eight decades of Supreme Court jurisprudence dispel the apparent certitude of *Erie*’s axiom.<sup>278</sup> In *Illinois v. City of Milwaukee*, the Court held that “§ 1331 [federal question] jurisdiction will support claims founded upon federal common law.”<sup>279</sup> Although the federal common law of nuisance has in particular enjoyed a renaissance in the field of environmental protection,<sup>280</sup> its application is not necessarily limited to such matters.<sup>281</sup> The question, then, is not whether there is a federal common law of nuisance, but whether that law is broad enough to comprehend religious land use disputes.

### 1. *Extending the Federal Common Law of Nuisance to Land Disputes*

While there does not appear to be a bright line defining the appropriate purview of the federal common law, a number of factors have proved dispositive in determining whether a particular substantive matter is within such purview. The first of these factors considers the existence of a federal right that justifies judicial intervention. As the Court recognized in *Textile Workers Union of America v. Lincoln Mills of Alabama*, “[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned.”<sup>282</sup> A second factor considers the potential antagonism between national and local interests by determining whether or not the matter in question is susceptible to local solution.<sup>283</sup> While the inability of a local concern to internalize externalities is an argument in favor of the creation of a federal common law right, it does not necessitate a complete disregard

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277. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

278. See *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 393 (1959), (Brennan, J., dissenting) (declaring that “laws” within the meaning of 28 U.S.C. § 1331(a) embraces claims founded on federal common law and that rules of substantive law fashioned by the federal courts “are as fully ‘laws’ of the United States as if they had been enacted by Congress”).

279. 406 U.S. 91, 100 (1972); see also 28 U.S.C. § 1331 (2013).

280. See, e.g., *City of Milwaukee*, 406 U.S. at 91.

281. *Id.* at 103 n.5 (“While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision.”); see also Richard A. Epstein, *Federal Preemption, and Federal Common Law in Nuisance Cases*, 102 Nw. U. L. REV. 551 (2008) (discussing property-based nuisance claims).

282. 353 U.S. 448, 457 (1957).

283. See, e.g., *City of Milwaukee*, 406 U.S. at 107 (citing *Missouri v. Illinois*, 200 U.S. 496, 520–21 (1906)) (using hypothetical of an upstream nuisance in Danube, which would amount to a *casus belli* for a downstream state, thus justifying the Court’s use of its equity powers).

for the laws of that local entity.<sup>284</sup> Related to this second factor is a third: the need for uniformity in matters of national concern.<sup>285</sup> Taken together, these three factors might properly be regarded as establishing a test to determine whether a particular matter is within the comprehension of the federal common law of nuisance.

In the matter of religious land disputes, each of these factors militates in favor of a finding that the federal common law of nuisance is properly applied. The free exercise of religion<sup>286</sup>—the so-called “first freedom”<sup>287</sup>—is undoubtedly a federal right; indeed, it is arguably the most frangible of the rights enumerated in the Constitution.<sup>288</sup> Additionally, it is long-established precedent that a zoning authority is permitted to exercise substantial control over the development of the local area for which it is responsible, which affords that zoning authority broad discretion of action.<sup>289</sup> As opposed to the penumbras of statutory rights mentioned in *Textile Workers*,<sup>290</sup> the rights implicated by a religious land use dispute are substantially clearer, if not more worthy of protection. The second factor also favors a pro-common law finding. The history of the passage of RLUIPA shows a congressional finding of discrimination against religious practice, suggesting not only the unavailability of a local *solution*, but a local *contribution to the problem*.<sup>291</sup> A finding that religious land use disputes are within

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284. *See id.* at 107 (“While federal law governs, consideration of state standards might be relevant.”).

285. *See id.* at 107 n.9.

286. *See* U.S. CONST. amend I.

287. *See* Michael W. McConnell, *Why is Religious Liberty the “First Freedom?”*, 21 CARDOZO L. REV. 1243, 1243 (2000).

288. *See* McConnell, *supra* note 70, at 172–81 (describing the modern conception of liberalism and the threats that this ideology poses to religious freedom); *see also* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149–50 (1991) (arguing that the Constitution’s guarantee of religious freedom is “self-negating,” given the law’s increasing insensitivity to citizens’ religious liberty).

289. *See, e.g.,* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–89 (1926) (upholding an allegedly overinclusive local zoning ordinance, reasoning that the ordinance was not one that “‘passes the bounds of reason and assumes the character of a merely arbitrary fiat’” (quoting *Purity Extract Co. v. Lynch*, 226 U.S. 192, 204 (1912))).

290. *See* *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957).

291. *See* 146 CONG. REC. 16,698 (2000) (joint statement of Sen. Hatch & Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) (“The right to build, buy, or rent such a space [for religious uses] is an indispensable adjunct of the core First Amendment right to assemble for religious purposes. The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude

the appropriate consideration of the federal common law of nuisance would not be so onerous as to exclude genuinely local concerns, moreover, for local standards may be accounted for in the federal common law analysis.<sup>292</sup> Finally, the issue of religious land use is undoubtedly one of national concern, at least insofar as it implicates the Free Exercise Clause of the First Amendment. The import of the issue demands a measure of uniformity in order to allow and encourage reliance by local land use authorities on judicial guidance regarding the treatment of religious land use.

## 2. *Application of the Federal Common Law of Nuisance in Practice*

Practically, this approach has the benefit of easy application. Nuisance, a common-law cause of action, would be proved in the same manner and by the same evidence as it would be between private party litigants. Thus, “a federal anticipatory nuisance claim [could] succeed by showing that a nuisance will ‘necessarily’ result from an activity and is thereby ‘real and immediate.’”<sup>293</sup> In a given case, these showings might be based, in part, upon a party’s proof of:

- (a) The extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm.<sup>294</sup>

Operationally, the anticipatory-nuisance-as-RLUIPA-defense would require that the notional “plaintiff”—here, a local zoning authority—demonstrate “that damage and irreparable injury will naturally and necessarily be occasioned by acts of the”<sup>295</sup> non-conforming religious land user and that the “controversy involved is one which is entitled to the application of federal common law as a basis for the

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churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.”) *But see* Hamilton, *Federalism and the Public Good*, *supra* note 21, at 354–56 (arguing that the congressional record undergirding the passage of RLUIPA was constitutionally inadequate).

292. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) (“While federal law governs [in federal common-law nuisance analysis], consideration of state standards might be relevant.”).

293. Smith, *supra* note 269, at 723 (quoting *Missouri v. Illinois*, 180 U.S. 208, 248 (1901)).

294. RESTATEMENT (SECOND) OF TORTS § 827 (1979) (outlining factors to be considered in an action for nuisance).

295. *Missouri v. Illinois*, 180 U.S. 208, 248 (1901).

existence and determination of the rights in the situation.”<sup>296</sup> In effect, the defense is counterfactual, with the locality as defendant in a RLUIPA action proving that had it brought a nuisance action against the challenged use it would have won in an independent nuisance action as plaintiff.

C. *Full Circle: Applying the Federal Common Law of Nuisance to Square RLUIPA and Free Exercise*

It has been observed that, in light of “First Amendment constitutional concerns requir[ing] that local government zoning actions be subject to closer scrutiny than legislative actions involving secular uses,” “‘judicial zoning’ through nuisance concepts may be the appropriate way for neighborhoods to control the use of land by religious institutions in their community.”<sup>297</sup> By reframing the issue in such a way, the Court avoids the entanglement—both practical and syntactic—with matters of distinctively religious import that characterized its earlier jurisprudence, while at the same time striking a balance between reasonable zoning restrictions and fundamental constitutional protections for the exercise of religion.<sup>298</sup>

1. *Religiosity and Sincerity*

By considering religious land use claims under the doctrinal heading of nuisance—either through a substantive use or by incorporating it into a burden-shifting framework—the law recognizes the twin challenges faced by courts in defining religion and determining the sincerity of the individual adherent’s belief. The Supreme Court has long recognized that defining religion is “a difficult and delicate task.”<sup>299</sup> Despite this marked reticence, the Court has held that to con-

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296. *Texas v. Pankey*, 441 F.2d 236, 242 (10th Cir. 1971).

297. Shelly Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 KY. L.J. 507, 509–10 (1995).

298. See Ostrow, *supra* note 14, at 724 (“RLUIPA is clearly inappropriate for as-applied land use decisions that impact neither fundamental rights nor suspect classes. Yet, given RLUIPA’s recognition of the discretionary nature of local land use regulation, traditional judicial deference seems equally inappropriate.”); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (acknowledging that “‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries’” but cautioning that “[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless” (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (applying RLUIPA))).

299. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). While in the past, the question of what constitutes a religious institution (for First Amendment purposes) has



stitute religious belief, a particular conviction must be more than “[a] way of life, however virtuous and admirable, . . . based on purely secular considerations.”<sup>300</sup> Beyond this, “religious belief” has been given a liberal reading, comprising all sincere beliefs “based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.”<sup>301</sup> The liberalism of such definition is bolstered by the Court’s cognizance of its own limited ability to determine whether something is a “religious belief,” as it has held that “the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”<sup>302</sup>

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probed the “underlying structure of the institution in order to determine whether it is religious in nature,” Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013), with its decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the Court signaled that “the corporate structure of the institution” was of less importance in determining this issue than “the extent to which the religious character of the institution was open and obvious to its employees,” Helfand, *supra*, at 1936, thus providing an unmistakable endorsement of religious institutional autonomy regarding those matters seen as core to the particular religious faith. See Helfand, *supra*, at 1935–36, 1960; see also *Hosanna-Tabor*, 132 S. Ct. at 704; Schragger & Schwartzman, *supra* note 71, at 984–85 (discussing the conceptual problems with modern First Amendment doctrinal treatment of churches as institutions).

According to Professor Richard Epstein, *Hosanna-Tabor* has undermined the validity of *Employment Division, Department of Human Resources v. Smith* to such an extent that *Smith* “should not survive.” EPSTEIN, *supra* note 57, at 472. Epstein concludes that referring to peyote consumption as dealing with “only outward physical acts,” as the Court later did when addressing *Smith* in *Hosanna-Tabor*, is a perplexing description of conduct deemed as integral to a religious practice. *Id.* at 473 (internal quotation marks omitted) (quoting *Hosanna-Tabor*, 132 S. Ct. at 697).

If that core religious practice lies outside constitutional protection, why then protect instructional activities that are at least one step further removed from core religious practices? . . . The only defensible line is that the internal affairs of religious institutions [as were involved in *Hosanna-Tabor*] are beyond the scope of the government’s power to regulate employment relations.

*Id.* at 473.

300. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

301. *United States v. Seeger*, 380 U.S. 163, 176 (1965).

302. *Thomas*, 450 U.S. at 714. Kent Greenawalt suggests that the judiciary should not seek “an encompassing account of what counts as religious,” but rather be cognizant of societal reference to “beliefs, practices and organizations,” which include commonly “a belief in God; a comprehensive view of the world and human purposes; a belief in some forms of afterlife; communication with God through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God’s nature; practices involving repentance and forgiveness of sins; ‘religious’ feelings of awe, guilt and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices.”

The key determinant in the religiosity of a given belief, then, is the claim of the adherent who claims to hold the belief. Thus, while clearly outrageous and patently non-religious beliefs are unprotected,<sup>303</sup> those held by an individual “‘struggling’ with his position” or unable to articulate his beliefs “with the clarity and precision that a more sophisticated person might employ,” may be considered “religious” and thus protected.<sup>304</sup>

In addition to being “religious,” a given belief must be “sincerely held,”<sup>305</sup> a holdover from the *Sherbert*<sup>306</sup> era of constitutional claims.<sup>307</sup> At a minimum, a plaintiff must show that his religion is more than an “obvious[] sham[] and absurdit[y] . . . whose members

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Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 767–68, 769 n.60 (1984). Insofar as general usage is concerned, the absence of any single feature would not preclude classifying conduct as religious because “no single feature is indispensable.” *Id.* at 768. Yet, of necessity, judicial applications of the analogical approach would be guided by previous precedents, which had determined or recognized conduct as being religious within a similar context. *Id.* at 769 n.60. Perhaps the closest thing to a rule of thumb that can be found in the Supreme Court’s treatment of free exercise claims is captured in theologian Paul Tillich’s dictum that “every person has a religion” and that “the essence of religion [is located] in the phrase ‘ultimate concern,’” which is defined as “the underlying concern which gives meaning and orientation to a person’s whole life.” Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066–67 (1978) (citing PAUL TILlich, DYNAMICS OF FAITH 1–2 (1958), PAUL TILlich, THE PROTESTANT ERA 58, 87 (1948), and PAUL TILlich, THE SHAKING OF THE FOUNDATIONS 53–55, 181 (1972)).

303. See *Thomas*, 450 U.S. at 715 (“One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . .”); see also Jamie Coots, Op-Ed., *The Constitution Protects My Snake-Handling*, WALL ST. J., Oct. 4, 2013, <http://online.wsj.com/articles/SB10001424052702303796404579101831593270054> (discussing the arrest and conviction of the author—a pastor—in relation to his possession of snakes for religious purposes).

304. *Thomas*, 450 U.S. at 715.

305. See *Yoder*, 406 U.S. at 215–19 (1972); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765–66, 2772–75, 2778–79, 2784 (2014) (applying RLUIPA’s definition of “exercise of religion” to RFRA case and finding closely held corporations’ objections to insurance coverage of certain contraceptives to be sufficiently “sincere”—based on, *inter alia*, the companies’ “Vision and Values Statement” and “statement of purpose”—to present statutorily cognizable claims, and reaffirming the ability of the federal judiciary to distinguish between sincerely-held religious beliefs and those that are merely pretextual); *United States v. Quaintance*, 608 F.3d 717 (10th Cir. 2010) (discussing pretextual and insincere religious exercise).

306. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

307. See John T. Noonan Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713 (providing overview of the state of the law on sincerity and arguing that the test should be abandoned); see also MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 776 (2011) (recognizing a definition of religion under which “[w]hat matters most is how deeply a person believes, not who or what or why,” and noting that this definition avoids “content-based definitions” and that

are patently devoid of religious sincerity.”<sup>308</sup> As with the “religiosity” inquiry, however, there is unlikely to be much judicial scrutiny beyond this threshold since “[c]ourts are not arbiters of scriptural interpretation.”<sup>309</sup> Thus, under this subjective standard, the peculiar beliefs of an individual adherent are likely to be deemed sincere.<sup>310</sup>

To carry the point further, it must be noted that the religiosity and sincerity of a given belief are to be determined by *exclusive* reference to the claimant himself, without regard for “authorities” or “doctrines” considered orthodox within the claimant’s particular religion.<sup>311</sup> As has been observed, “it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith,”<sup>312</sup> since that would “necessitate[] a judgment as to what a religion requires of its believers.”<sup>313</sup> The Supreme Court has held that “Man’s

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“not every sincere claim for exemption, immunity, or special treatment will qualify as religious in this scheme”).

308. *Therault v. Carlson*, 495 F.2d 390, 395 (5th Cir.), *cert. denied*, 419 U.S. 1003 (1974); *see also* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 521 & n.89 (2005) (discussing requirement that religious beliefs be “sincerely held” and listing cases in support).

309. *Thomas*, 450 U.S. at 716; *see also* *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

310. *See* Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395, 1413 & n.53, 1414, 1418 (2014) (book review) (discussing the judicial sincerity inquiry and concluding that “the nation’s long embrace of religious exemptions is likely to persist and thrive”).

311. *See, e.g., Rouser v. White*, 944 F. Supp. 1447, 1454–55 (E.D. Cal. 1996) (“While this court . . . is not sanguine as to the ease with which bogus claims concerning a subject state may be weeded out, it does not follow that the difficulty in resolving the question justifies resort to the standards of orthodoxy, even assuming they could be ascertained with confidence. First of all, determining whether a particular practice is mandated by the orthodox doctrine of a sect injects the court into religious controversies in a manner that the First Amendment, in restricting the making of law ‘respecting an establishment of religion,’ specifically prohibits. Moreover, proving a requisite motive or mental state is hardly an unknown burden on plaintiffs.”); *see also* *Werner v. McCotter*, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995) (“A plaintiff, however, need not hew to any particular religious orthodoxy; it is enough for the plaintiff to demonstrate that a government has interfered with the exercise or expression of her or his own deeply held faith.”); *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993) (“In religious matters, we take judicial notice of the fact that often the keenest disputes and the most lively intolerance exists among persons of the same general religious belief, who, however, are in disagreement as to what that faith requires in particular matters. In this case, Ward is entitled to argue . . . that his religious belief is different from the interpretation provided by the witness for the state.”).

312. *Thomas*, 450 U.S. at 716.

313. Gaubatz, *supra* note 308, at 523.

relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.”<sup>314</sup> This was because “little indeed would be left of religious freedom”<sup>315</sup> if juries were free to question the truth or falsity of an individual adherent’s belief, instead judging them by an orthodoxy, secular or religious.

## 2. *Reconciliation: Judicial Zoning Through the Law of Nuisance*

Axiomatically, “[l]and use regulation is among the most individualized and least generally applicable bodies of law in our legal system.”<sup>316</sup> Thrust into the often-delicate balance struck by zoning authorities, “[a] growing church in too small a place can impose substantial costs on its neighbors, especially if it lacks parking or other facilities and, thus, spills over into surrounding properties.”<sup>317</sup> By applying the doctrine of anticipatory nuisance to religious land use disputes, courts could chart a middle course recognizing the irreparable nature of the threatened harm—disruption of the “zero-sum exercise” of land use regulation<sup>318</sup>—by allowing a city, for example, to prevent the harm before “the externalities that [religious land] uses generate—both positive and negative—also grow in size and number.”<sup>319</sup>

Remedially, nuisance represents a possibility of “splitting the baby” through the use of a compensated injunction, an ideal solution that would both (a) compensate the religious land user for the inconvenience it faces in possibly relocating the practice implicated in the nuisance act (thus forcing the locality to internalize the cost of burdening fragile religious practices *ex ante*),<sup>320</sup> and (b) allow courts to balance “the injury done and the convenience and necessity of the product of the alleged nuisance to the general public” (thus considering anew the balance struck by the locality between religious practice and zoning coherence and, in so doing, reviewing it *ex post*).<sup>321</sup> This,

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314. *United States v. Ballard*, 322 U.S. 78, 87 (1944).

315. *Id.*

316. Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 767 (1999).

317. *Id.* at 756.

318. MacLeod, *supra* note 232, at 78.

319. *Id.*

320. *See, e.g., Spur Indus. v. Del. E. Webb Dev. Co.*, 494 P.2d 700, 708 (Ariz. 1972).

321. J.D. LEE & BARRY LINDAHL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 35:1 (2008); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783–85 (discussing implicitly a social balancing between externalities imposed by exemption and—alternatively—externality avoidance as justification for everything else).

then, is a fundamental benefit of using the rubric of the federal common law of nuisance as an analytical framework in which to decide religious land use disputes. It promotes uniformity and reliance (each of which promotes efficiency), while also tolerating a measure of flexibility that engenders localism and incentivizes pre-dispute resolution by the parties themselves.

In the religious land use context, the federal common law of nuisance accomplishes many of the same economic ends as does its state equivalent in local disputes.<sup>322</sup> As has been observed:

Nuisance litigation provides a possible remedy to landowners who are actually damaged by an unreasonable interference with the quiet enjoyment of their property. Nuisance litigation also provides a less restrictive means than zoning for regulating religious land uses and avoids the problem of prior restraint that is inherent in proactive zoning regulation. However, even when nuisance law is used and the court balances the gravity of the harm to the residential landowner with the utility of the conduct of the religious institution, a heavy thumb should be placed on the scale of a religious use which serves a greater social purpose—helping those in need.<sup>323</sup>

Significantly, the federal common law of nuisance accomplishes these laudable economic ends (such as the promotion or protection of efficiency gains) in a manner and a venue more likely to be sympathetic to idiosyncratic religious land uses (thus protecting the free exercise of religion), than if those religious users were forced to resort to the relief offered by the zoning authority itself, or a state court, or perhaps even a federal court hearing a RLUIPA action.<sup>324</sup> And it does so in a manner accommodating states, free exercise, and the statute itself.

#### *D. Difficulties in Application*

The application of the federal common law of nuisance—either directly or as a “legitimate non-discriminatory reason” to rebut a prima facie case of discrimination—to religious land use disputes is not without its difficulties. Most significantly, the Supreme Court has recently limited the scope of the doctrine in the environmental context,

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322. See Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 237–76 (1990) (describing the economic milieu in which contemporary nuisance law is understood).

323. Saxer, *supra* note 297, at 512.

324. See Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2189–90 (2007) (discussing the categories of RLUIPA cases that have failed in federal court).

belying perhaps a broader discomfiture with the federal common law of nuisance in other contexts.<sup>325</sup> Moreover, even in the absence of this potential jurisprudential shift, the application of the federal common law of nuisance in the specific context of religious land use is complicated by the doctrine of displacement, which posits that “when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”<sup>326</sup> Referencing this doctrine, the Court has rejected the application of the federal common law of nuisance to behavior governed by the Clean Water Act<sup>327</sup> and the Clean Air Act,<sup>328</sup> while holding that certain federal common-law property claims were not displaced by federal statute.<sup>329</sup> The Court has declared that “[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute ‘speak[s] directly to [the] question’ at issue.”<sup>330</sup> In the matter of religious land use disputes, Congress has spoken in the form of RLUIPA. Whether RLUIPA speaks directly to the question at issue is a point of argument, and is, as of the time of this writing, unresolved. This uncertainty is, admittedly, the largest drawback to reliance on the doctrine of the federal common law of nuisance by a religious land use claimant.

#### CONCLUSION

As seen, “RLUIPA has had profound impacts on land use planning and control.”<sup>331</sup> The foreseeable future for judicial interpretation of this legislation holds a course of action that will yield a “patchwork of federal intrusions into state and local land use” prerogatives, with a coincident, concomitant erosion of local control.<sup>332</sup> Even the mere

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325. *See* *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

326. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981).

327. *See id.* at 317–18 (concluding, as regards the Clean Water Act, that “Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency”).

328. *See Am. Elec. Power*, 131 S. Ct. at 2537 (holding that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants”).

329. *See County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 236–37 (1985) (holding that the Nonintercourse Acts did not displace Native American tribes’ federal common law right of action).

330. *Am. Elec. Power*, 131 S. Ct. at 2537 (alterations in original) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

331. Salkin, *Quiet Revolution*, *supra* note 2, at 294.

332. *See* Salkin, *Quiet Revolution*, *supra* note 2 at 304–05.

threat of RLUIPA litigation and the unpredictable costs associated with cases of this nature are sufficient to “give local governments a strong disincentive to impose limitations on development projects proposed by religious groups”<sup>333</sup>—as a necessary part of these groups’ “religious exercise”<sup>334</sup>—“even where [the projects] might conflict with long term plans and legitimate community concerns.”<sup>335</sup>

In the present religious land use context, the law is faced with an intractable conflict between interests that are inherently federal and those that are necessarily local. If the extremes of this continuum are defined on one side by the free exercise of religion and on the other by Euclidian deference to the need of local communities to define the character of their community through the zoning process, then perhaps RLUIPA, if properly conceived, might bridge the chasm between the two. Indeed, under such a regime, RLUIPA would not so much be a response to *Smith*,<sup>336</sup> but an obviation of the necessity of its holding as regards religious land uses.

In passing RLUIPA, Congress created a new statutory right, giving rise to a unique cause of action, “designed to provide protection from discrimination for . . . those seeking municipal permits or approvals in order to exercise their religion.”<sup>337</sup> Congress’s decision to do so was *perhaps* recognition of religion’s aberrational illiberalism<sup>338</sup>—its irreducibility to monetizable comparison<sup>339</sup> and idiosyncratic non-utilitarianism (in a world where economic public purpose reigns *über alles*).<sup>340</sup> The reactions to RLUIPA’s passage run the

333. Salkin, *Quiet Revolution*, *supra* note 2, at 293; *see also* Patricia E. Salkin & Amy Lavine, *God and the Land: A Holy War Between Religious Exercise and Community Planning and Development*, 2 ALB. GOV’T. L. REV. vi, viii (2009).

334. *See* 42 U.S.C. § 2000 cc-5(7) (2013) (defining “religious exercise” for RLUIPA purposes).

335. Salkin, *Quiet Revolution*, *supra* note 2, at 293.

336. Emp’t Div., Dep’t of Human Res. v. Smith, 494 U.S. 872 (1990).

337. Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 195 (2008).

338. *See* McConnell, *supra* note 70 (discussing the fraught interaction of religiosity with evolving conceptions of modernity).

339. *See* Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 477 (1996) (“[B]ecause ‘[r]eligious belief need not be founded in reason, guided by reason, or governed in any way by the reasonable,’ it can place demands on believers that are unjustifiable under the epistemology of the secular state.” (second alteration in original) (quoting Eisgruber & Sager, *supra* note 78, at 1256)).

340. *See, e.g.,* Kelo v. City of New London, 545 U.S. 469, 484–90 (2005) (holding that economic public purpose is sufficient justification for eminent domain, even when property is being transferred from one private party to another private party); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 386 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (recognizing that, under the Equal Terms test

gamut—from considering the statute to be federal overreach into an area of the law that is paradigmatically and axiomatically local,<sup>341</sup> to provide necessary relief from a pattern of antagonistic and unconstitutional zoning practices aimed at underrepresented religious practices,<sup>342</sup> to violate the Establishment Clause of the First Amendment,<sup>343</sup> to have a chilling effect on reasonable zoning plans<sup>344</sup>—but the truth is rather less extreme.<sup>345</sup> For all the doomsaying and prognostication, the practical result of RLUIPA’s passage has been, at worst, indeterminate.<sup>346</sup> The question, then, is how to clarify

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articulated by the majority, economic development plans may be used to defeat or exclude a religious presence in a community); Lucinda Harper, *Upscale Stores Craft Bans Against Storefront Churches*, WALL ST. J., Mar. 15, 2000, <http://www.wsj.com/articles/SB953071169248039466> (emphasizing the disadvantage churches find themselves suffering when economic development influences zoning); cf. *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002) (“Whatever the true percentage of cases in which religious organizations have improperly suffered at the hand of local zoning authorities, we certainly are in no position to quibble with Congress’s ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country.”).

341. See Hamilton, *Federalism and the Public Good*, *supra* note 21.

342. See Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001).

343. See Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001).

344. See Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 805–06 (2006).

345. Opposition generally falls into one of two categories. Either it is argued that there is insufficient empirical basis to award special protection to religion:

Either the unconstitutional conduct of the states was so notorious (think back to the Civil Rights Era) that all could agree without further proof that the states required federal correction burdening them with federal regulation exceeding constitutional requirements, or Congress needed to put together a record that showed a *widespread recent pattern of unconstitutional conduct* in the states. They failed rather abysmally.

Hamilton, *Federalism and the Public Good*, *supra* note 21, at 344–45 (discussing the RLPA, which—though never passed—comprises the legislative basis for the later, narrower RLUIPA). Or, it is argued that the Act’s protection amounts to a subsidy to religion in violation of the Establishment Clause. See, e.g., Walsh, *supra* note 343, at 201–07; see also U.S. CONST. amend. I. Neither adequately accounts, however, for the Constitution’s specific protection of religion in the Free Exercise Clause of the First Amendment, which suggests that the Framers believed religion was a valuable public good deserving of some form of special treatment. See, e.g., McConnell, *supra* note 287, at 1244 (positing that religion warrants special constitutional protection due both to the historical reality of the period in which the Constitution was written, and to the significance of religion in a classically liberal society).

346. See Note, *supra* note 324, at 2188–93 (providing an overview of cases cutting both ways, in favor and against churches, since the passage of RLUIPA). *But see*



this indeterminacy in such a way as to give effect to competing religious and local interests.

Multiple solutions from within the courts have been discussed herein in the specific context of RLUIPA Section 2(b)(1) Equal Terms challenges, including the Third Circuit's "regulatory purpose" analysis,<sup>347</sup> the Seventh Circuit's analysis of conformity to "accepted zoning criteria,"<sup>348</sup> and the Eleventh Circuit's "differential treatment" analysis.<sup>349</sup> Of these approaches, Judge Posner's provides the strongest objective standard for determining whether RLUIPA's Equal Terms provision has been violated. The approach would—by providing judges with a real, useful template by which to evaluate Equal Terms challenges—address the confusion that has heretofore marred RLUIPA litigation. Nonetheless, while each represents an attempt at squaring the circle left incomplete by Congress, each fails, in its own way, by conflating what are best understood as separate inquiries. In essence, each of these circuit tests tries, in one step—that of a Section 2(b)(1) Equal Terms showing—to account for *both* purported injury and possible explanation.

If Congress sought to heighten the scrutiny of quasi-legislative actions affecting religious land use by passing RLUIPA, it was, in effect, turning religious communities burdened by zoning provisions into a suspect class. As in cases of racial discrimination, RLUIPA actions involve "societal as well as personal interests on both sides of the equation."<sup>350</sup> To conflate these countervailing interests would be a manifest injustice; to avoid doing so, this Article has proposed looking to the law of nuisance. Reconciling the mandate of Congress with the dictates of common sense requires a new tack, whether *procedural*—the imposition of a *McDonnell Douglas*-style burden-shifting framework on RLUIPA claims—or *substantive*—as by recontextualizing

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Serkin & Tebbe, *supra* note 53, at 17–48 (observing the prophylactic nature of RLUIPA and the political significance of eminent domain in the RLUIPA "equation").

347. See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch* (*Lighthouse II*), 510 F.3d 253, 266 (3d Cir. 2007) ("A regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." (emphasis added)).

348. See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (stating test that considers the regulatory criteria used in a zoning decision).

349. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004) (holding that churches and private clubs are both "assemblies" under RLUIPA, and thus cannot be treated differently in zoning ordinances).

350. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

RLUIPA claims within the established, accommodating framework of nuisance. Either paradigm has the advantage of analytical clarity and candor, and would allow the courts greater freedom in resolving the often-fraught relationship between zoning authorities and the religious subjects of their actions.

“[C]ommon sense often makes good law.”<sup>351</sup> Though not directed at it precisely, perhaps Justice Douglas’s aphorism rings true with RLUIPA. Perhaps common sense might make good on the promise of a law soon to enter its fifteenth year without certainty as to meaning. Each of the three approaches above would help clarify RLUIPA within the broader context of federalism and free exercise, and each has greater claim to “common sense” than the present ad hoc approach bred of inter-circuit conflict.

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351. *Peak v. United States*, 353 U.S. 43, 46 (1957) (Douglas, J.).

