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*929 THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000: A CONSTITUTIONAL RESPONSE TO UNCONSTITUTIONAL ZONING PRACTICES

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"Do not separate yourself from the community." [FN1]

Churches [FN2] in the United States are facing ever-increasing pressure by municipal authorities to limit their physical presence in America's cities and towns. According to zoning boards, mayors, and city planners across the nation, churches may belong neither on Main Street [FN3] nor in residential neighborhoods. [FN4] And those whom neighbors deem a "cult" may not belong at all. [FN5] Judicial response to this trend has been hopelessly inconsistent. On September 22, 2000, President Clinton signed the Religious Land Use and *930 Institutionalized Persons Act of 2000 (RLUIPA or the Act), [FN6] which protects religious land uses from discrimination and undue burden, consistent with constitutional limits on federal power. RLUIPA narrowly targets those land use regulations that, for the most part, are already vulnerable to constitutional challenge under the First and Fourteenth Amendments and so allows religious institutions to follow the ancient command of Rabbi Hillel to remain part of the community.

Introduction

While churches are being eliminated from downtown and commercial areas because municipalities believe that such uses do not attract enough traffic to generate retail and tax revenues [FN7] for surrounding areas, they are simultaneously being eradicated from residential districts for creating too much traffic and noise. Regardless of which of these perceptions, if any, is true, this country has a long tradition of churches serving the community by ministering to its population. Their missions may include serving the homeless from a downtown site, reaching out to the community from a strip mall, or engaging in quiet reflection in a tranquil residential location. The freedom to choose how best to fulfill their faith requirements is routinely burdened by overzealous, religiously insensitive, or actively hostile zoning and landmarking authorities.

In many areas such as education, [FN8] employment, [FN9] and prison confinement, [FN10] the First Amendment's Free Exercise Clause has slowly recovered from the United States Supreme Court's onslaught against religious protections in Employment Division v. Smith. [FN11] However, the constitutional protection afforded churches in the land use context remains spotty at best. [FN12] *931 The lower courts' application of First Amendment principles have left churches vulnerable to even the most irrational zoning regulations. Con-

gress has twice attempted to remedy this problem: first in the Religious Freedom Restoration Act of 1993 (RFRA), a failed attempt to apply strict scrutiny review to any and all burdens on religious exercise; [fn13] AND SECOND IN rluipa, a narrOWER ANd more targeted response aimed at burdens on religious exercise in the zoning and prison contexts [FN14] and applicable only in those circumstances in which Congress has the authority to act. [FN15]

This Article is divided into three Parts. The first describes the development of the conflict between churches and zoning authorities and the erratic application of constitutional principles by the judiciary that led to the enactment of RLUIPA. The second provides a guide to the application of the Act using traditional First and Fourteenth Amendment principles. The third is a defense of the constitutionality of RLUIPA, arguing (1) that the Act applies only where the strict scrutiny standard would be appropriate under the Constitution or where Congress is empowered to act pursuant to its Commerce and Spending Clause authority, and (2) that the Act does not violate the Establishment Clause.

I. Background and Recent Legislative Responses

Conflict between municipalities and churches based on land use issues was not a problem for the Framers. Although the physical existence of a church has always depended on land use, the first zoning ordinances were not enacted until the beginning of the Twentieth Century. [FN16] In 1926, such ordinances were held to be within the general police power of the state to regulate for the public welfare. [FN17] Setting the limits of such power two years ***932** later, the Court held unconstitutional another ordinance by finding that it failed to promote the general health, safety, or welfare. [FN18] In a case that involved no countervailing fundamental rights, [FN19] the Court held this police power to include the ability to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." [FN20] Other land use laws affecting churches include the "Landmark Law" [FN21] and government's eminent domain powers. [FN22]

Emerging from the inevitable conflicts [FN23] between government and churches that arose following the adoption of zoning ordinances was the majority rule that "churches cannot be absolutely excluded from residential areas." [FN24] This doctrine also became known as the "New York" rule. [FN25] The ***933** same reasoning also was applied to religious schools. [FN26] A minority of states apply the "California" rule, [FN27] which allows municipalities to exclude churches from residential districts, at least under some circumstances. [FN28] Generally, the decisions of the courts adopting the New York rule were based not only on free exercise grounds, [fn29] BUT ALSO ON The principle that ***934** SUCH A PROHIBition "bears no substantial relation to the public health, safety, morals, peace or general welfare of the community." [FN30] The reasoning for the rule was as obvious then as it is controversial now:

> Practically all zoning ordinances allow churches in all residence districts. It would be unreasonable to force them into business districts where there is noise and where land values are high . . . . Some people claim that the numerous churchgoers crowd the street, that their automobiles line the curbs, and that the music and preaching disturb the neighbors. Communities that are too sensitive to welcome churches should protect themselves by private restrictions. [FN31]

Or, more succinctly, "wherever the souls of men are found, there the house of God belongs." [FN32]

Houses of worship have long been considered "preferred" uses, and were recognized as "bearing a real, sub-

stantial, and beneficial relationship ***935** to the public health, safety and welfare of the community." [FN33] Thus, the exclusion of churches "either from the community as a whole or from a residential district therein--has no reasonable relationship to the public health, safety, morals, or general welfare . . . ." [FN34] Even with the potential attendant traffic and parking effects of weekly religious services, churches were understood to be as much a part of community life as schools:

> The church in our society has long been identified with family and residential life. Churches traditionally have been and should be located in that part of the community where people live. They should be easily and conveniently located to the home. Churches are not super markets, manufacturing plants or commercial establishments and should not be restricted to such areas. How can the exclusion of churches from a residential area promote public morals or the general welfare? To so hold is a failure to understand the purpose and the influence of churches. [FN35]

However, some courts and commentators [FN36] have become less receptive ***936** to the claims of churches whose religious exercise has been burdened by land use laws. [FN37] The doctrine prohibiting the exclusion of churches in residential zones, described above, was even said to violate the Establishment Clause. [FN38]

A few decisions from the federal courts of appeals in the 1980s and 1990s have further limited the right of churches to use land for religious purposes. [FN39] For example, the Sixth Circuit ruled that a congregation of Jehovah's Witnesses had no right under the Free Exercise Clause to construct ***937** its first permanent church in a city that prohibited churches in virtually all residential districts. [FN40] Similarly, the Eleventh Circuit ruled that the governmental interests in enforcing zoning laws to maintain the residential quality of certain zones outweighed an orthodox Jewish shul's free exercise interest in holding religious services at the rabbi's residence. [FN41] However, prior to 1990, many courts--especially state courts--continued to apply the strict scrutiny test of Sherbert v. Verner [FN42] and Wisconsin v. Yoder [FN43] in analyzing free exercise challenges to zoning regulations.

Although its applicability to the church-zoning context is dubious, the Court's seminal 1990 free exercise decision, Employment Division v. Smith, bolstered the trend against churches in zoning cases. [FN44] In that oft-criticized ***938** case, [FN45] the Court held that a neutral and generally applicable criminal law was not subject to strict scrutiny challenge under the Free Exercise Clause. The circuits have subsequently extended Smith's reach to non-criminal laws as well. [FN46] Although Justice Scalia, the author of Smith, asserted confidently that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," [FN47] his opinion also recognized that strict scrutiny still applied in certain situations, some of which commonly arise in the zoning context. [FN48] The state still cannot regulate religious beliefs "as such," [FN49] compel affirmation of religious belief, [FN50] or take sides in religious controversies. [FN51] More importantly, Smith recognizes that the state cannot "impose special disabilities on the basis of religious . . . status," [FN52] or "punish the expression of religious doctrines it believes to be false." [FN53] The rule of deferential scrutiny applies only to laws that are "neutral" [FN54] or "generally applicable."***939** [FN55] That rule also does not apply to what Justice Scalia described as "hybrid situations," or where the "religiously motivated action . . . involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." [FN56] Thus, as will be detailed further below, Smith's rule of deferential scrutiny has limited application in the land use context. [FN57]

Three years later, in Church of the Lukumi Babalu Aye v. City of Hialeah, [FN58] the Court reinforced the Free Exercise principles that limit application of Smith's rule of deferential scrutiny. First, "Free Exercise Clause

(protections) pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." [FN59] Thus, a municipality that permits certain assembly uses, but not religious assembly uses, runs afoul of this principle. [FN60] Second, "laws burdening religious practice must be of general applicability." [FN61] In the context of church zoning cases, the land use laws at issue do not generally prohibit certain uses of land, but they contain procedures to permit some uses while denying similar ones according to a system of individualized assessments. [FN62]

While the federal courts have generally been hostile to free exercise claims in zoning matters since Smith, [FN63] the approach of state courts has been mixed. [FN64] A particularly well-reasoned decision that protected ***940** churches' religious exercise rights from burdensome land use laws is the Supreme Court of Washington's decision in First Covenant Church of Seattle v. City of Seattle, [FN65] which was remanded by the United States Supreme Court in light of Smith. [FN66] The Washington court was sensitive to the importance of the elements of religious exercise that may be affected by land use regulation. In particular, the court acknowledged that the

> church's building itself "is an expression of Christian belief and message" and that conveying religious beliefs is part of the building's function. First Covenant reasons that when the State controls the architectural "proclamation" of religious belief inherent in its church's exterior it effectively burdens religious speech. We agree with First Covenant's reasoning. The relationship between theological doctrine and architectural design is well recognized. The exterior and the interior of the structure are inextricably related. When, as in this case, both are "freighted with religious meaning" that would be understood by those who view it, then the regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech. [FN67]

The Washington court thus took Justice Scalia at his word [FN68] and held that Smith did not control challenges to expression-stifling laws such as landmark ordinances. [FN69] However, without specific guidance such as RLUIPA, many other courts continue to ignore the significant interference ***941** with religious speech and exercise that zoning laws may cause. [FN70]

Given the inevitability of this type of conflict between churches and zoning authorities, Congress and state legislatures have attempted to provide relief. The failure of the courts to create a legal climate conducive to religious worship is the failure to recognize that--unlike in the eighteenth and nineteenth centuries--churches today are more diverse and define their missions in vastly different ways. While many continue in the form of the traditional suburban, stained-glass-and-steeple church, others view their missions differently. Some groups, especially those too small to purchase or rent real property, meet in houses belonging to members of the congregation. [FN71] Others eschew the quiet suburbs in order to minister to those in a commercial or retail zone. [FN72] Still others are called to an agricultural setting to pursue their religious exercise. [FN73] Minority religions may have practices viewed as unfamiliar or distasteful by the general public. [FN74] While all religious institutions "worship" in the narrowest sense of the term, their additional activities differ widely in type and scope. By controlling where churches may locate, governments control the kind of mission they may pursue, and so risk forcing churches to conform to the community's vision ***942** of the "proper" church. [FN75]

Aware of these concerns, Congress passed RFRA in 1993 as a response to Smith. [FN76] A large coalition of religious and civil liberties groups supported RFRA. [FN77] RFRA reestablished Sherbert's compelling interest test to require all substantial government burdens on religious exercise to be "in furtherance of a compelling governmental interest; and . . . the least restrictive means of furthering that compelling governmental interest." [FN78] RFRA applied to "all cases where free exercise of religion is substantially burdened." [FN79]

In 1997, however, the Supreme Court struck RFRA down as applied to the States. City of Boerne v. Flores held that Congress exceeded its Enforcement Clause power under Section 5 of the Fourteenth Amendment, which only allows passage of remedial and preventative legislation designed to correct state laws that violate the substantive provisions of Section 1. [FN80] Justice Kennedy delivered the opinion of the Court, reasoning that RFRA's broad coverage of all federal, state, and local government actions, combined with the demanding (and otherwise inapplicable) compelling interest test, made RFRA's impact disproportionate to the constitutional harms it was designed to prevent. [FN81] This disproportionality between the objective of RFRA and the means it employs indicated that the statute was not a remedial or preventative measure, but an attempt to change constitutional protections. [FN82] Justice Stevens concurred in the judgment, arguing that RFRA gave religious institutions a weapon against government action that was unavailable to an agnostic or atheist, and therefore, violated the Establishment Clause. [FN83] Justice O'Connor dissented because the majority opinion ***943** was predicated on the validity of the Smith standard. [FN84] She argued that neither history nor precedent supported Smith; therefore, because Smith was wrongly decided, City of Boerne was also wrongly decided. [FN85]

Soon after City of Boerne, the United States House Judiciary Committee began a series of hearings to discuss possible responses to the decision. [FN86] These hearings gathered factual evidence of state laws that were discriminatory or burdensome with respect to religion, and considered legal theories for passing a protective statute consistent with the Court's City of Boerne decision. The result was two bills in two successive Congresses--the Religious Liberty Protection Act of 1998 [FN87] and the Religious Liberty Protection Act of 1999 (RLPA) [FN88]--which would have applied strict scrutiny to every state law falling within the sweep of congressional authority under the Commerce and Spending Clauses, as well as to those state laws that satisfy the Enforcement Clause test in City of Boerne. Although the 1999 RLPA passed the House, it stalled in the United States Senate, mainly because some members of the civil rights community feared that religious adherents could invoke its protections to avoid application of state anti-discrimination statutes. [FN89] In response, the scope of the proposed legislation was limited to land use laws (such as zoning and landmark regulations) and laws governing institutionalized persons (such as prisoners and patients at facilities for the mentally ill). This change not only shored up support from the civil rights community, it narrowed the sweep of the legislation to those areas of law where the congressional record of religious discrimination and discretionary burden was the strongest. [FN90]

On July 13, 2000, Senators Orrin G. Hatch (R-Utah) and Edward M. Kennedy (D-Mass.) amended and reintroduced RLPA as the Religious Land Use and Institutionalized Persons Act of 2000 to “provide protection for houses of worship and other religious assemblies from restrictive land ***944** use regulation that often prevents the practice of faith.” [FN91] A group comprised of over fifty diverse organizations, including the American Civil Liberties Union, People for the American Way, Christian Legal Society, and Family Research Council, supported the new bill. [FN92] In addition to the hearings for RLPA, [FN93] Rep. Henry J. Hyde (R-Ill.) introduced evidence in the House describing numerous violations of the free exercise rights of churches, mosques, and synagogues across the country. [FN94] For example, one church was not allowed to conduct weddings, while another was unable to use a building for worship services where cultural events such as theatrical performances were permitted. [FN95] The Act passed both the House and the Senate on July 27, 2000, [FN96] and was signed by President Clinton on September 22, 2000. [FN97]

In addition to these federal efforts, the states may provide and have provided two general avenues of relief for churches in the zoning context. First, state courts may read their own constitutional provisions as providing more protection than the Federal Constitution. [FN98] For example, the aforementioned First Covenant Church decision held that the state protections of Washington's freedom of conscience provision extend farther than

those of the First Amendment. [FN99] Similarly, the Supreme Court of Indiana recently remanded a church zoning case for determination under its own constitution. [FN100] Other states also interpret their own constitutions more strictly. [FN101] Second, states may enact their own Religious Freedom Restoration Acts, modeled after the federal RFRA. [FN102]

***945** II. The Act

A. Generally

The fundamental importance of RLUIPA is the recognition that the placement, building, and use of churches is more than simply a secular issue of height restrictions and traffic patterns. The physical embodiment of a faith group-- its church--represents its ability to speak, assemble, and worship together: three fundamental rights embodied in the First Amendment. [FN103] RLUIPA explicitly lays out the appropriate free exercise standards [FN104] and puts municipalities on notice that they apply.

Such notice is especially needed in the land use context. For example, the all-too-common attitude on the part of municipal decision makers was recently exhibited in King County, Washington, by County Executive Ron Sims and Councilman Dwight Pelz in the context of a moratorium on any new church building and future size restrictions: “Both resented the fact that the issue was cast by their political opponents not as an environmental dispute but as a war over religious freedom.” [FN105] Fortunately, this mind-set is not universal, and RLUIPA's potential to inform municipalities of their ***946** obligation to protect religious exercise is clear: “Sims' approach will land us in court . . . . The churches and schools will be forced to sue us under the federal statute protecting religious land uses. And they'll win.” [FN106] Similarly, in Haven Shores Community Church v. City of Grand Haven, [fn107] THE CITY RESISted eFforts and a lawsuit by a church attempting to locate in a business district that permitted practically any public assembly use (except for churches). Once RLUIPA was signed, however, the City quickly entered into a consent decree allowing the church to locate there. [FN108]

Of course, the Act does not give churches the right to act with impunity; they remain subject to the overwhelming majority of zoning and landmark laws that meet RLUIPA's standards. [FN109] Moreover, they remain subject to all other local laws not covered by the Act. [FN110] Religious institutions, however, remain free to raise claims against the application of such other laws based on the First and Fourteenth Amendments, and applicable state law protections. [FN111]

RLUIPA's definition of “religious exercise” clarifies one of the most significant issues in judicial review of zoning actions: whether the specific church activity burdened by the application of local law is religious or secular. [FN112] For instance, the congregation at issue in City of Lakewood [FN113] ***947** was deemed to be engaging in “secular” activity by engaging in the act of building a church structure. [FN114] RLUIPA states that the “use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” [FN115] The logical implication of this text, therefore, is that a burden upon the use, building, or conversion of real property for the purpose of religious exercise is a burden on that person's or entity's religious exercise. [FN116] Another corollary of this principle--one adopted by RLUIPA [FN117]--is that courts need not find that the prohibited activity is mandated by an entity's religious beliefs in order to find a substantial burden, [FN118] a standard previously adopted by some courts. [FN119]

The rule adopted in RLUIPA squares better with the way religious institutions actually operate. Unlike an employee or student, the raison d'etre of a church is religious exercise; all activity that a church undertakes is in furtherance of its religious belief, to some degree or another. [FN120] The Supreme Court acknowledged this principle in its “Church Autonomy” jurisprudence [FN121] and recognized that “religious exercise” involves more ***948** than participation in certain sacraments. [FN122] It is no business of the courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. [FN123]

B. Section 2(a): “Substantial Burdens”

The first substantive restriction on land use laws [FN124] found in RLUIPA is the restatement of the substantial burdens test. [FN125] However, unlike in RFRA, this test applies only where the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

> the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved. [FN126]

If the case meets any one of these jurisdictional requirements, RLUIPA forbids a government [FN127] from

> impos(ing) or implement(ing) 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 the imposition of the burden on that person, assembly, or institution--is in furtherance of a compelling interest; and is the least restrictive means of furthering that compelling interest. [FN128]

***949** The plaintiff bears the burden of persuasion to prove that the challenged law substantially burdens the plaintiff's exercise of religion. [FN129] The burden then shifts to the government to prove a compelling interest, and that the means used to achieve that interest are the least restrictive. [FN130]

1. Jurisdictional Requirements

The Supreme Court struck down RFRA as exceeding Congress' enforcement power under Section 5 of the Fourteenth Amendment. [FN131] The substantial burden section of RLUIPA avoids this problem [FN132] by limiting its application only to those situations where Congress is empowered to act under the Commerce Clause or its spending powers, or in situations involving the “individualized assessments” articulated by the Court in Smith and Lukumi. [FN133] Since cases involving such individualized assessments are not “neutral laws of general applicability”--like the general prohibition against peyote use in Smith--the Act does not expand the application of the Free Exercise Clause, as did RFRA, and so does not violate Section 5 of the Fourteenth Amendment.

a. Individualized Assessments

Most determinations of zoning matters that burden religious exercise do not fall under Smith's category of “neutral laws of general applicability.” [FN134] Unlike Oregon's criminal prohibition of peyote use [FN135]--or

even generalized sales tax laws [FN136]--land use issues invariably involve individualized, subjective judgments by zoning officials and other municipal officers. [FN137] Such procedures provide a ready mechanism for excluding ***950** churches out of NIMBY hostility or worse. [FN138] As in the unemployment compensation context, zoning applicants' "eligibility criteria invite consideration of the particular circumstances behind an applicant's" [FN139] situation:

> Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area. [FN140]

Lower courts have recognized the inapplicability of Smith in land use and other free exercise contexts. [FN141] In First Covenant Church, the Supreme Court of Washington held that landmark ordinances that "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions" are not ***951** "generally applicable" laws. [FN142] Furthermore, since the ordinances at issue specifically referred to religious facilities, neither were they "neutral." [FN143]

RLUIPA tracks this standard: it applies strict scrutiny where the state has "formal or informal procedures or practices that permit the government to make individualized assessments of the proposed uses for the property involved." [FN144] This standard avoids the erroneous argument used by the Second and Eighth Circuits in St. Bartholomew's Church v. City of New York and Cornerstone Bible Church v. City of Hastings, respectively, that a land use law is assumed to be "a facially neutral regulation of general applicability" "absent proof of the discriminatory exercise of discretion." [FN145] Sherbert and Thomas v. Review Board certainly did not rely on any proof of discriminatory action on the part of the government officer charged with applying unemployment laws, but rather asked simply whether "the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions." [FN146] If so, "that law is constitutionally invalid even though the burden may be characterized as being only indirect." [FN147]

Zoning decisions are often contentious and the addition of religion to the mix often makes them more so. [FN148] RLUIPA recognizes that the fundamental right to religious exercise enshrined in the Constitution is often ignored in the zoning context, and so the Act scrutinizes decisions that are easily swayed by political pressure regarding fundamental rights. This follows directly from the Court's instruction that

> ***952** (t)he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. [FN149]

Land use decisions generally bear no resemblance to the "across-the-board criminal prohibition(s) on a particular form of conduct" at issue in Smith. [FN150] Evidence of a system of individualized exemptions may be easily shown by procedures such as special or conditional use determinations, [FN151] or use variances. [FN152] Such ordinances invariably have in place "formal procedures to make individualized assessments of the proposed uses for the property involved." [FN153] Inclusion of a special use "is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood." [FN154] Zoning boards have great discretion in ruling upon such proposed uses of property. RLUIPA

merely codifies the First Amendment's prohibition that the government, where it “has in place a system of individual exemptions,” cannot “refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” [FN155]

b. Effects on Interstate Commerce

Congress also enacted RLUIPA pursuant to its Commerce Clause authority. [FN156] The burdens that cities and towns place on churches' religious exercise by prohibiting certain uses may easily affect interstate commerce ***953** to a substantial degree. Churches will often be denied a building permit to create, or build an addition to, a structure used for religious exercise. Such a burden directly stifles the commercial activities necessary to complete a building project: employing construction workers, purchasing and transporting building materials and supplies, raising and transferring funds, and entering contracts. [FN157] Similarly, this burden would inhibit smaller-scale, but longer-term economic activities, associated with the mere use of land and structures: employment of paid staff such as a minister, administrative staff, music directors, and janitors. [FN158] Also involved is the ongoing purchase and consumption of supplies and utilities. Such burdens, “taken together with . . . many others similarly situated,” would “substantially affect interstate commerce.” [FN159] Notably, even the aggregate effect of burdened commercial transactions limited solely within one state may still implicate the commerce power. [FN160] At least in cases involving the construction, renovation, or operation of a church, the jurisdictional element of RLUIPA based on the Commerce Clause would seem to be easily satisfied. [FN161]

c. Federal Programs

The substantial burdens test may also apply to land-use regulations pursuant to Congress' Spending Clause power. [FN162] In order to take advantage of this provision, a plaintiff must show that the government action at issue is federally subsidized. This proof should include citation to the statutory and regulatory authority that provides federal funds to local regulators, as well as some evidence of the receipt of such funds by the particular local authority.

Although this should not typically prove burdensome, especially when discovery is available, there is one potential pitfall plaintiffs should avoid. ***954** The Spending Clause does not permit Congress to impose retroactive conditions on the use of federal funds. [FN163] Therefore, plaintiffs do well to allege either discrete violations of RLUIPA that occurred after the Act was signed on September 22, 2000, or continuing violation, regardless of when it began.

2. Substantial Burden

To invoke section 2(a) of RLUIPA, plaintiffs must first prove that their religious exercise is substantially burdened [FN164] by the government. [FN165] The Act defines “Religious Exercise” as:

> IN GENERAL--The term ‘religious exercise includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
>
> RULE--The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose. [FN166]

In the zoning context, lower courts have failed to apply consistently the principle of “substantial burden” on

religious exercise. [FN167] The Supreme Court has described the kind of government action that constitutes a substantial burden on religious exercise in the context of a taxation case:

> The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. 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. We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one. Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically. Any burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or ***955** fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent. [FN168]

The ability of a congregation to construct a church and to worship inside of it without governmental interference clearly meets the "substantial burden" standard of both the Free Exercise Clause and section 2(a). [FN169] There are few examples of religious exercise that are more fundamental than group worship. However, this principle is notably overlooked in church zoning cases. [FN170] For example, in Grosz v. City of Miami Beach, the Eleventh Circuit upheld a city's zoning ordinance--which the city construed to prohibit churches, synagogues, and other organized religious gatherings in single-family residential zones--by arguing that the shul could simply worship elsewhere. [FN171] In Christian Gospel Church v. City & County of San Francisco, the Ninth Circuit ruled that a church, which claimed that home worship was important to its religious practice and desired a location isolated from certain commercial establishments, was not substantially burdened by San Francisco's denial of a conditional use permit to establish a church in a residential district. [FN172] In City of Lakewood, the Sixth Circuit held that the denial of a building permit was merely an "inconvenient economic burden on religious freedom" that does "not rise to a constitutionally impermissible infringement of free exercise." [FN173] In fact, the court held that construction of a church building has no religious or ritualistic***956** significance for the Jehovah's Witnesses. [FN174] There was no evidence, according to the Sixth Circuit, that the construction of a Kingdom Hall is a ritual, a "fundamental tenet," or a "cardinal principle" of its faith. [FN175] At most, the court reasoned, the Congregation can claim that its freedom to worship is tangentially related to worshipping in its own structure; however, building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs. [FN176]

Such an astonishing holding--that building a church has no religious significance for a congregation [FN177] --clearly demonstrates the need for guiding and reinforcing legislation. [FN178] Likewise, courts have disagreed on the question of whether it is a substantial burden to require churches to engage in certain activities integral to their religious mission in a location away from their present site. [FN179] Furthermore, courts may not always understand the significance of specific religious exercises, especially for minority religions. [FN180] But in the context of examining exemptions from land use laws under the Establishment Clause, several circuits have more recently described***957** those exemptions as necessary or important in preventing burdens on religion. The Fourth Circuit recently justified an exemption from a special exception requirement for religious schools as protecting religious exercise:

> The very existence of the school is premised on a religious mission. . . . And necessary to the fulfillment of this mission is the existence of facilities which Connelly School deems adequate to carry on its

> religious instruction. An official of the school stated this explicitly, averring that the school "needs to renovate in order to meet the educational and religious mission of the Roman Catholic Church, the Society (of the Holy Child Jesus), and the School." By removing the requirement to obtain a special exception, Montgomery County not only lifts a burden from the school's exercise of religion but also extricates itself from potential interference with the school's religious mission. [FN181]

The First, [FN182] Second, [FN183] and Seventh [FN184] Circuits have made similar declarations.

As described above, perhaps the most critical function of RLUIPA is to provide courts with an accurate understanding of the effect land use laws may have upon religious exercise. [FN185] The "use, building or conversion of real property for the purpose of religious exercise" [FN186] is religious exercise. Moreover, religious exercise "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." [FN187] These principles are critical. For example, a fundamental aspect of virtually any church is group worship and activity. [FN188] A church may seek to locate in a commercial or retail site specifically to attract the visitors to such areas. [FN189] ***958** Locating centrally to the residences of the congregants may be critical, [FN190] or even within residences themselves. [FN191] A church may have a special, religious connection to an agricultural environment. [FN192] Its physical appearance, both exterior and interior, may be a channel for communicating its religious belief. [FN193] It may need to grow to accommodate its congregation, [FN194] or to accommodate certain activities it deems necessary for its religious mission. [FN195] The potential impact of land use laws on religious exercise is ***959** evident in an example involving the Boston Landmarks Commission, where the commission approved landmark designation for portions of the church's interior: "(t)he designation restricted permanent alteration of the "nave, chancel, vestibule and organ loft on the main floor--the volume, window glazing, architectural detail finishes, painting, the organ, and organ case." [FN196] Finally, a church may further its mission by changing the property that it owns. [FN197]

Significantly, RLUIPA's definition avoids the Sixth Circuit's conundrums over whether construction of a church building is only "tangentially related" to religious worship. [FN198] In a later case involving a religious cemetery, that court rejected a free exercise claim by holding that while the Catholic "Church prefers and encourages burial in a Catholic cemetery to witness the belief in resurrection and the community of the faithful," such "burial in a Catholic cemetery (is not) a fundamental or essential tenet of the religion." [FN199] Similarly, in a suit brought by a church claiming that its faith mandated a change in religious exercise to home worship, the Ninth Circuit held that the free exercise clause does not protect changes in religious practice. [FN200]

Rulings like these are in direct conflict with the Supreme Court's holding in Hobbie v. Unemployment Appeals Commission. [FN201] In the context of unemployment benefits, the Court in Hobbie rejected the claim that the religious convert should be "single(d) out . . . for different, less favorable treatment." [FN202] Rather, "(t)he timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved." [FN203] This language casts further doubt on these already dubious holdings of the Sixth and Ninth Circuits.

***960** Courts have also struggled with determining which accessory uses are permitted by examining whether such accessory uses are "traditional," [FN204] or whether they are part of the religious exercise of the church. [FN205] Both approaches are problematic. The former leads to discriminatory results by preferring "traditional" faiths over unconventional or minority religions; [FN206] the latter replaces the church's judgment about what its religious exercise entails with the court's judgment. [FN207] The appropriate standard is that enunciated by the Supreme Court: "(R)eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." [FN208]

While specific real property may hold religious significance to a congregation, such as the birthplace of a denomination, [FN209] or land with special ***961** significance to Native Americans, [FN210] such a showing--that a particular plot of land has religious significance--should not be required. “Localities may not bar religious uses on the ground that they had not met a burden of proving that suitable location elsewhere could not be found.” [FN211] As described above, however, some courts have held that where a church may find alternative locations from which to worship, there is no substantial burden on their religious exercise. [FN212] Such a harsh rule appears to be unique to the zoning context. Defending a claim of substantial burden on the religious liberty of a government employee by arguing that she may find employment elsewhere, or by telling a public school student that he is free to attend another school would be inconceivable.

Substantial burdens may also be ones that impose significant administrative [FN213] or financial [FN214] costs. While the Supreme Court has held that expense may not be a sufficient justification for a successful Free Speech claim in the adult entertainment context, [FN215] the Court has been more receptive***962** to similar claims for higher-value speech, such as political speech. [FN216] In the hierarchy of expressive activity, religious speech certainly is closer to the latter than the former. [FN217] Finally, it should be noted that the inability to participate in public welfare programs (such as the unemployment compensation benefit program at issue in Sherbert v. Verner) is an economic burden. [FN218] While “ churches are not entitled to purchase the cheapest land,” [FN219] at some point [FN220] a financial burden becomes a religious one when the law imposes costs that substantially interfere with a church's ability to worship. [FN221]

3. Compelling Interests [FN222]

Once the religious entity has proven that the state actor's conduct has substantially burdened religious exercise, [FN223] section 4(b) of RLUIPA shifts the burden to the state [FN224] to prove that such burden was justified by a compelling interest [FN225] and that the burden was the least restrictive means of achieving that interest. [FN226] The Supreme Court defines those interests that may justify burdens on religious exercise as “(o)nly the gravest abuses, endangering paramount interests,” [FN227] and “only those interests of the highest ***963** order.” [FN228] Compelling state interests in the land use context are those that prevent “a clear and present, grave and immediate danger to public health, peace, and welfare.” [FN229] Fire safety [FN230] and occupancy requirements [FN231] are obvious examples of compelling interests.

However, courts in the past have granted great deference to the interests claimed by municipalities in excluding churches. The starting point of this analysis is the principle that zoning in general is a legitimate municipal tool. [FN232] Unfortunately, courts often go no further than this general rule. [FN233] As discussed above, as a matter of both constitutional law, and RLUIPA, the governmental entity must justify its burden on religious exercise with a ***964** compelling state interest. [FN234]

Common justifications also include traffic, [FN235] parking, [FN236] noise levels, [FN237] effect on property values, [FN238] and aesthetic interests. [FN239] While legitimate, such interests do not rise to the level of “compelling state interest” as defined by the Court in City of Hialeah. [FN240] The concern over incremental increases in traffic is particularly slight, [FN241] especially given the fact that church traffic usually occurs at off-peak hours. [FN242] Aesthetic interests are not ***965** compelling interests. [FN243] Another interest frequently asserted by municipalities is enhancing the commercial or retail character of an area. [FN244] This interest is closely related to a municipality's interest in enhancing tax revenue, [FN245] which does not appear to be a “compelling governmental interest” within the meaning of City of Hialeah. [FN246] Not only are such revenues

unrelated to “clear and present, grave and immediate danger(s) to public health, peace, and welfare,” [FN247] but even if they were held so, that interest could then be used to justify a complete exclusion of religious institutions from any city's jurisdiction, since such nonprofit entities generally are exempt***966** from property taxes. [FN248] Moreover, evidence that other noncommercial uses are permitted where churches are excluded serves to refute a claim of compelling interest. [FN249] Finally, preservation of property values cannot justify the burden on a congregation's religious exercise. [FN250]

The inconveniences that may be visited upon inhabitants of a residential neighborhood by a church are simply part of the fabric of society. The words of a Wisconsin Supreme Court Justice ring as true today as they did forty years ago:

> The church in our society has long been identified with family and residential life. Churches traditionally have been and should be located in that part of the community where people live. They should be easily and conveniently located to the home. Churches are not super markets, manufacturing plants, or commercial establishments and should not be restricted to such areas. [FN251]

Furthermore, municipalities must prove why burdening religious exercise to protect these interests is necessary while uses with similar external effects are not so burdened. [FN252] Finally, whatever interests a municipality asserts as justification for burdening religious exercise must be proven by something more than simply the government's bare allegation. [FN253] Churches may also contradict such evidence with their own data, [FN254] which should ***967** allow it to survive a city's motion for summary judgment [FN255] or a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). [FN256]

Even if a municipality were to demonstrate a compelling land use interest that may be harmed by a church, it must still demonstrate that its actions are the least restrictive means of protecting that interest. In most cases, those interests may easily be served by restrictions that fall short of denial of a variance or special use permit. [FN257] For instance, in Western Presbyterian Church v. Board of Zoning Adjustment, the District of Columbia conceded that it had “no compelling governmental interest in prohibiting Western Presbyterian from conducting its feeding program at 2401 Virginia Avenue, N.W., so long as appropriate controls are in place.” [FN258] In enjoining a cease-and-desist order prohibiting plaintiffs from hosting prayer group meetings, a court applying RLUIPA recently held that such an order was not the least restrictive means of achieving a compelling governmental interest:

> The Court finds no evidence on the record that the issuance of the cease and desist order based on the Commission's opinion was the “least restrictive means” of protecting the health and safety of their community. Defendants' primary concern with plaintiffs' activities was the increased level of traffic on the street, and the safety issues that are inherent in an increased volume of traffic. . . . To the extent cul-de-sac parking was deemed a problem, the ZEO's decision to bar off-street parking in the Murphy's driveway and rear yard seems inconsistent with the expressed concerns of the neighbors. [FN259]

In sum, the interests asserted in zoning determinations simply do not rise to the level of those interests that the Supreme Court has found to justify burdens on religious exercise, such as protecting children from exploitative labor [FN260] or maintaining an all-inclusive social security program. [FN261] These interests prevailed mainly because they reflect a concern for uniform application that is virtually absent from the zoning context, where government interests are routinely achieved consistent with affording a wide range of exceptions. Accordingly, where it can be shown that otherwise similar excepted uses do not thwart the government's objectives, the least restrictive means for the government to achieve its ends is to create an exception for religious uses.

***968** C. Section 2(b)(1): "Equal Terms"

RLUIPA's section 2(b)(1) requires 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." [FN262] This provision clearly implicates free speech, [FN263] free exercise, [FN264] freedom of association, [FN265] and equal protection [FN266] concerns.

The purpose of this section is to forbid governments from prohibiting religious assembly uses while allowing equivalent, and often more intensive, non-religious assembly uses. For example, [FN267] Grand Haven, Michigan's Zoning Ordinance [FN268] permits, inter alia, "private clubs," "fraternal organizations," "theaters," "assembly halls," "concert halls," and "other similar places of public assembly," but not churches in its "Community Business District." [FN269] Indianola, Iowa, forbids churches from its "C-3 General Retail and Office District" while allowing as permitted principal uses "clubs and lodges," "restaurant(s), nightclub(s), café(s) or tavern(s)," "commercial amusements," and "public or private museums or art galleries." [FN270] Reidsville, Georgia, allows "clubs and lodges catering exclusively ***969** to members and their guest," and "indoor theater or other place of indoor amusement or recreation," but not churches. [FN271]

Recently, a federal district court ruled that a zoning ordinance that permits a "train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, (or) country club" [FN272] to request a special exception to locate in a residential district-- but not houses of worship--unconstitutionally discriminated against religious uses:

> Not only does a house of worship inherently further the public welfare, but defendants' traffic, noise and light concerns also exist for the uses currently allowed to request a special exception. Indeed, there can be no rational reason to allow (the permitted uses) to request a special exception under the 1996 Ordinance, but not (Congregation) Kol Ami. [FN273]

The court primarily relied on the Equal Protection analysis of City of Cleburne for its holding. [FN274]

In the free exercise context, the "equal terms" rule, which prohibits such discrimination, is reflected in the Supreme Court's requirement of "neutrality" with respect to religion. [FN275] For example, in McDaniel v. Paty, the Court struck down a law prohibiting ministers or priests of any denomination from serving in the Tennessee legislature. [FN276] Later, in City of Hialeah, the Court held that a law "lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." [FN277] The ordinance at issue in City of Hialeah was not neutral because it used the terms "sacrifice" and "ritual" and thus targeted religious practices. [FN278] Likewise, land use ordinances that explicitly treat "churches" and "places of worship" differently than other assembly uses lack facial neutrality. In Western Presbyterian Church, the district court questioned the motivation of local authorities in prohibiting a church's feeding program for the homeless:

> As it did in its prior decision, the Court takes judicial notice that within three blocks of the ***970** Church's premises is a popularly priced restaurant. The Court knows of no attempt by the zoning authorities to dictate which persons may or may not be served at that facility. It seems rather incongruous that no objection could be raised if a needy person can buy his or her food, but it becomes inappropriate if that needy individual can obtain food at no cost from a benevolent source. The Court wonders what position authorities would take if instead of providing the meal on its premises, the Church provided the needy with funds and sent them to the nearby restaurant to be fed. [FN279]

Other jurisdictions have prohibited churches while allowing non-religious clubs, lodges, theaters, and other

uses, which would have impact on communities that is, for all practical purposes, indistinguishable from churches. [FN280] While the concept of nondiscrimination is understood today in terms of nonneutrality, [FN281] viewpoint discrimination, [FN282] equal protection, [FN283] and underinclusiveness, [FN284] originally such practices were simply struck down as "arbitrary and discriminatory." [FN285] Regardless of the label, the practice is as inconsistent with the Constitution as it is illegal under RLUIPA.

The "equal terms" provision, which also correctly applies free speech principles, [FN286] precludes a court from reaching the result of the Eighth Circuit in Cornerstone Bible Church v. City of Hastings. [FN287] The court in that case held that prohibiting church uses within a zoning district while permitting***971** "private clubs" such as the American Legion and the Masonic Lodge was a content-neutral distinction and thus subject to time, place, and manner analysis. [FN288] The court based this determination solely on its finding that the City's intent in circumscribing religious worship was to enhance economic vitality. [FN289] However, this goal cannot justify governmental discrimination against religious speech based on its content or motivating ideology. [FN290] Although municipalities could potentially eliminate an equal terms violation by eliminating assembly uses altogether, they then become subject to a potential overbreadth challenge. [FN291]

Finally, in the context of a zoning case, the Supreme Court has said that the Equal Protection Clause is a "direction that all persons similarly situated should be treated alike." [FN292] There, the Court held that a zoning ordinance that prohibited a group home for the mentally impaired violated the Equal Protection Clause because it permitted other types of residential buildings with comparable external effects. [FN293] The decision was based on the finding that there was no rational basis to demonstrate that "the . . . home and those who occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." [FN294] Likewise, municipalities that prohibit religious assembly uses from a zone while permitting nonreligious assembly uses must justify such discrimination with a compelling interest. [FN295]

***972** D. Section 2(b)(2): "Nondiscrimination"

The most invidious form of free exercise violation is discrimination among different religious denominations or sects. RLUIPA's section 2(b)(2) forbids such action, [FN296] just as the Free Exercise, [FN297] Free Speech, [FN298] and Equal Protection Clauses do. [FN299] Contrary to the beliefs of the Act's opponents, [FN300] such discrimination continues to exist. Statements made by objectors to religious land uses such as, "Hitler should have killed more of you," [FN301] or "(T)he only reason we formed this village is to keep those Jews from Williamsburg . . . out of here," [FN302] obviously evince this sort of discrimination. [FN303] The authors' clients have similarly observed such prejudice. In a request to amend a zoning ordinance to allow churches within a district that already permitted every other place of assembly, the City Council of Grand Haven, Michigan, displayed just such bias: "The common vernacular church (sic) can mean a lot of things, many of them non-Christian, as a matter of fact . . . . The activities of a church--something defined as a church--could be so bizarre and so intimidating as to discourage neighboring retail activity." [FN304] In fact, neighbors have united to fight against Hale O Kaula church in their Maui, Hawaii neighborhood based on their belief that the church is a "cult." [FN305] RLUIPA, as well as the First and Fourteenth ***973** Amendments, prohibits denials of zoning permits when motivated by such discriminatory public opposition. [FN306]

The Fifth Circuit confronted such a case in Islamic Center of Mississippi, Inc. v. City of Starkville, where it found that the City of Starkville, Mississippi had denied a Muslim organization a special use permit three times,

while granting such permits to every Christian church that had applied. [FN307] The court held that "the City did not act in a religiously neutral manner when it rejected an exception for the Islamic Center." [FN308]

The Fourth Circuit has also dealt with a City's refusal to grant a conditional use permit based solely on the grounds that the neighbors disapproved of the religious practices of the applicant. [FN309] In Marks, the plaintiff sought to operate a palmistry. [FN310] At the City Council meeting where Marks applied for final approval of the permit, eight neighbors voiced religious objections to the operation of a palmistry; seven of the eight objections arose from the view that "God is opposed" to palmistry. [FN311] Without further discussion, the City Council voted unanimously to deny Marks' permit application. [FN312] The Fourth Circuit upheld the district court's ruling that the Council's "deliberations were impermissibly tainted by 'irrational neighborhood pressure' manifestly founded in religious prejudice" and, thus, "by denying Marks' application, the Chesapeake City Council acted both arbitrarily and capriciously." [FN313]

As in Islamic Center, granting to other churches the permit or other relief denied the plaintiff church may be evidence of such discrimination. [FN314] Municipalities may not adopt the bigotry of their residents by simply citing "the will of the people." [FN315] A more difficult case involves the "grandfathering" of equivalent religious uses while disallowing new uses. The effect ***974** of such an ordinance, which permits existing churches to continue as nonconforming uses, would be to prefer traditional, long-standing (and for the most part, Christian) denominations over new denominations. [FN316] Finally, as Professor Laycock has mentioned, race may be also a factor in such land use decisions. [FN317]

E. Section 2(b)(3): "Total Exclusion and Unreasonableness"

Section 2(b)(3) of RLUIPA forbids a municipality from "totally exclud(ing) religious assemblies from a jurisdiction." [FN318] As noted above, [FN319] this doctrine has its genesis in the state courts, [FN320] and reflects current Supreme Court precedent, [FN321] which the Sixth Circuit even acknowledged in City of Lakewood. [FN322] "It requires little theological investigation or sophistication . . . for a court to find that a city's use of its zoning regulations to keep a congregation from obtaining any place to meet within the city ***975** boundaries burdens the church members' right of religious association." [FN323]

RLUIPA's requirement that "(n)o government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction" [FN324] is merely a restatement of the longstanding principle that laws regulating land use must be rational. In Village of Euclid, the Court held that such laws are unconstitutional if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." [FN325] Following Euclid, in the case of an as-applied challenge, courts should examine the reasonableness of the particular circumstances surrounding a plaintiff's case when applying this provision of RLUIPA to a land use law. [FN326]

F. Remedies

"A person may assert a violation of this Act as a claim or defense in a judicial proceeding . . . ." [FN327] Thus, claims under RLUIPA are available in both proceedings brought by a church plaintiff proactively or in a proceeding brought by a municipality enforcing its land use laws against a church, in either a state or federal forum. [FN328] Any "appropriate relief" is available against the government. [FN329] In most cases, where a land use law continues to burden religious exercise, even for minimal periods of time, injunctive relief should be

available. [FN330] “Appropriate relief” includes equitable, [FN331] declaratory, [FN332] and monetary relief. [FN333] Attorneys' fees are also available under ***976** RLUIPA. [FN334]

III. RLUIPA Is a Constitutional Response to the Widespread Deprivation by Land-Use Authorities of the First and Fourteenth Amendment Rights of Churches

Although the constitutionality of RLUIPA has been challenged on several grounds, [FN335] its provisions were carefully designed to withstand each of those challenges. Specifically, critics have charged that RLUIPA: (1) exceeds Congress' authority under the Enforcement Clause of the Fourteenth Amendment; [FN336] (2) exceeds Congress' authority under the Commerce Clause of Article I; [FN337] (3) exceeds Congress' authority under the Spending Clause of Article I; [FN338] and (4) violates the Establishment Clause of the First Amendment. [FN339] Each of these arguments is discussed in detail below; none of them suffices to overcome the strong presumption of constitutionality***977** that the courts ordinarily afford acts of Congress. [FN340]

First, in accordance with City of Boerne v. Flores [FN341] and its progeny, the RLUIPA provisions passed under the Enforcement Clause essentially restate the Supreme Court's own religious freedom jurisprudence under the First and Fourteenth Amendments. Congress was presented with “massive evidence” [FN342] demonstrating that these provisions were sorely needed, because the very constitutional standards they restate have been violated frequently and nationwide. Moreover, these provisions exhibit the “congruence and proportionality” required of Section 5 remedies, both because they add scarcely anything to existing constitutional standards, and because the widespread violation of those standards could justify far more sweeping preventive measures. [FN343]

Second, as required by United States v. Lopez [FN344] and subsequent cases, the RLUIPA provisions passed under the commerce power are supported by an express jurisdictional element and regulate economic activity having a direct, rather than an attenuated, link to interstate commerce. That link not only is clear on the face of RLUIPA, but is further supported by evidence contained in the Act's legislative history.

Third, the RLUIPA provisions founded on the Spending Clause meet the four requirements for constitutionality under South Dakota v. Dole. [FN345] Those provisions serve the “general welfare”; they clearly notify states what conditions they must fulfill for receipt of the federal funds; they are related to the general federal policy against religious discrimination and burdening religion; and they do not violate any other provision of the Federal Constitution, such as the Establishment Clause.

Fourth, under the analysis set forth in Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, [FN346] RLUIPA is consistent with the Establishment Clause. The Act does not have the impermissible***978** purpose or effect of advancing or inhibiting religion. The federal courts of appeals have consistently rejected Establishment Clause challenges both to RFRA, RLUIPA's predecessor, and to other state and local laws similarly designed to alleviate burdens on the exercise of religion. And as a final safeguard, by its own terms, RLUIPA calls for a judicial construction consistent with the Establishment Clause. [FN347]

Finally, even if one of these constitutional challenges should succeed, RLUIPA contains a severability provision that would allow the remainder of the Act to survive. [FN348]

A. The RLUIPA Provisions Based on Congress' Enforcement Clause Authority Are Constitutional

The obvious starting point for analyzing an Enforcement Clause challenge to RLUIPA is City of Boerne, [FN349] in which the Court struck down RFRA as applied to the States. Certainly, RFRA and RLUIPA bear a resemblance in that both are concerned with protecting religious liberty, both require application of the strict scrutiny standard, and both passed Congress by overwhelming margins, supported by a broad coalition of religious and civil rights groups. RLUIPA, however, differs profoundly from RFRA for all purposes relevant to the Court's analysis in City of Boerne. This crucial difference is the result of painstaking efforts by legislators and legal scholars to comply fully with the requirements of City of Boerne.

The power of Congress under Section 5 of the Fourteenth Amendment to enforce the substantive provisions contained in Section 1 includes the power to legislate judicial remedies for constitutional violations, such as monetary damages, injunctive relief, and attorneys' fees. [FN350] In City of Boerne, the Court reaffirmed a long line of cases holding that Section 5 also authorizes Congress to fashion legislation that "deters" or "prevent(s)" constitutional violations, "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" [FN351] City of Boerne, however, represented a significant departure from prior Section 5 jurisprudence, [FN352] marking***979** the beginning of a string of cases in which the Court applied with unprecedented vigor the traditional limitations on Section 5 power. [FN353]

Thus, although the City of Boerne Court still described the enforcement power as "broad," it emphasized that the power does not authorize Congress "to decree the substance of the Fourteenth Amendment's restrictions on the States," or otherwise "to determine what constitutes a constitutional violation." [FN354] To protect this prerogative of the Court, it has set out the general rule that "(Section) 5 legislation reaching beyond the scope of (Section) 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" [FN355] More specifically, "(p)reventive measures prohibiting certain types of (state and local) laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." [FN356]

In sharp contrast to RFRA, RLUIPA readily satisfies this standard. First, far from redefining the substance of constitutional law, RLUIPA provisions based on the Enforcement Clause were designed to restate current First Amendment and Fourteenth Amendment standards. [FN357] Second, RLUIPA's legislative history contains an extensive factual record establishing that these standards are violated frequently and nationwide. [FN358] Third, to the extent RLUIPA contains "preventive" or "deterrent" measures at all, they are "congruent" and "proportional" to these extensive constitutional injuries. [FN359] Thus, Congress had ample "reason to believe that many of the laws affected by (RLUIPA) have a significant likelihood of being unconstitutional." [FN360] Each of these three points will be elaborated in turn.

1. RLUIPA Precisely Targets--in Accordance with Current Supreme Court Precedent--State Land-Use Laws That Are Unconstitutional

The RLUIPA provisions based on the Enforcement Clause affect only unconstitutional state land-use laws, because those provisions were designed to do little, if anything, more than codify existing First Amendment and Fourteenth Amendment jurisprudence.

***980** a. RLUIPA's "Substantial Burdens" Provision Codifies Existing Law

As discussed above, [FN361] RLUIPA sections 2(a)(1) and 2(a)(2)(C) provide that where a land-use regulation involving "individualized assessments of the proposed uses for . . . property" imposes a "substantial burden on . . . religious exercise," the government must prove that the regulation furthers "a compelling governmental interest" by the "least restrictive means." [FN362]

This restates an important--but often overlooked--principle of post-Smith Free Exercise jurisprudence: strict scrutiny applies when the government substantially burdens religion through legal systems involving exceptions or administrative discretion. [FN363] Such systems are commonly described interchangeably as involving "individualized assessments," or as lacking the quality of "general applicability"--in either case triggering the same heightened scrutiny. [FN364]

There are at least two rationales for applying heightened scrutiny to this particular type of substantial burden on religion, while applying deferential scrutiny to most others. [FN365] First, allowing an exception--whether categorical or discretionary--to a general requirement based on nonreligious reasons without allowing a similar exception for religious reasons "devalues religious reasons . . . by judging them to be of lesser import than ***981** nonreligious reasons." [FN366] Second, where a legal system is discretionary--and so "requires an evaluation of the particular justification" for allowing an exception to a general rule--the risk of devaluing religious justifications is highest. [FN367]

Although RLUIPA plaintiffs bear the burden to show that the land-use system at issue involves "individualized assessments," most zoning and landmarking systems plainly fit this description, as lower courts have consistently found. [FN368]

b. RLUIPA's "Equal Terms" Provision Codifies Existing Law

RLUIPA section 2(b)(1) prohibits land use laws from "treat(ing) a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." [FN369] This reflects the long-standing ban under the First Amendment against official preference for the secular over the religious. [FN370] The rule is further reinforced by the Equal Protection prohibitions***982** against treating similarly situated parties differently, and against governmental distinctions based on suspect classifications, such as religion. [FN371]

c. RLUIPA's "Nondiscrimination" Provision Codifies Existing Law

Section 2(b)(2) of RLUIPA bars "land use regulation that discriminates . . . on the basis of religion or religious denomination." [FN372] This provision overlaps with section 2(b)(1) in forbidding any governmental preference for irreligion over religion, but goes farther by codifying the constitutional prohibition on governmental preference among religious denominations. [FN373]

d. RLUIPA's "Exclusions and Limits" Provision Codifies Existing Law

Finally, RLUIPA section 2(b)(3), which bans "land use regulation that-- totally excludes religious assemblies" or "unreasonably limits" them in a given jurisdiction, [FN374] is based on two constitutional protections. First, the total exclusion provision tracks the Free Speech Clause requirement of heightened scrutiny for land-use regulations that wholly exclude "a broad category of protected expression." [FN375] Second, the unreasonable limits provision reflects the Equal Protection Clause and Due Process Clause requirement that legislation

pass rational basis scrutiny. [FN376] Unconstitutionally unreasonable***983** regulation of religious land use can take various forms, including the total exclusion of houses of worship from residential areas, [FN377] and the prohibition of houses of worship based on external effects such as traffic, light, and noise, while allowing other uses that impose such externalities to a similar or greater degree. [FN378]

e. Conclusion

Because the land-use provisions of RLUIPA so closely track current First Amendment and Fourteenth Amendment standards, Congress did not just have a "reason to believe"--but knew--that not just "many"--but virtually all--of the state laws affected by these RLUIPA provisions did not just "have a significant likelihood of being"--but actually were--unconstitutional. [FN379] This tight correlation between legislative and constitutional standards puts to rest any claim that these RLUIPA provisions "alter the ***984** meaning of the Free Exercise Clause," as RFRA did. [FN380] Thus, for this reason alone, any challenge to RLUIPA on Enforcement Clause grounds should fail.

2. RLUIPA's Legislative History Firmly Establishes a Pattern of Constitutional Violations Caused by State Land-Use Laws

Congress has "compiled massive evidence" [FN381]--based on nine hearings over a period of three years--that establishes what RFRA's record did not: a "widespread pattern of religious discrimination in this country" in land-use regulation, including "examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices." [FN382] The record identified land-use laws passed out of anti-religious bigotry, as well as laws applied with that animus. [FN383] Discriminatory application is particularly common because zoning laws across the country are overwhelmingly discretionary; in other words, the "generally applicable" laws described in Smith are virtually nonexistent in the land-use context. [FN384] Opponents of RLUIPA simply ignore or mischaracterize these facts. [FN385]

This evidence was presented to Congress in various forms, which were cumulative and mutually reinforcing. Some evidence was statistical, including national surveys of churches, zoning codes, and public attitudes. [FN386] ***985** Some was judicial, including "decisions of the courts of the States and . . . the United States (reflecting) extensive litigation and discussion of the constitutional violations." [FN387] Some was anecdotal evidence, paired with testimony by experienced witnesses indicating that the anecdotes were representative. [FN388]

Based on this evidence, Congress found substantial evidence of violations of each of the constitutional standards that RLUIPA codifies: [FN389] individualized assessments that substantially burden religious exercise; [FN390] discrimination between religious and nonreligious assemblies; [FN391] discrimination among religious assemblies; [FN392] and total exclusions or other unreasonable limits on religious assemblies. [FN393]

***986** 3. To the Extent RLUIPA "Prevents" or "Deters" Constitutional Injuries at All, It Employs "Congruent" and "Proportional" Means to That End

The prohibitions of RLUIPA based on the Enforcement Clause correspond so closely to current First Amendment and Fourteenth Amendment jurisprudence that they scarcely require justification as the type of "preventive" or "deterrent" measures that trigger the congruence/proportionality inquiry under City of Boerne.

[FN394] Rather than “prohibit() conduct which is not itself unconstitutional,” [FN395] they merely restate frequently violated constitutional standards and provide familiar judicial remedies for their violation. Specifically, RLUIPA provides a federal cause of action for “appropriate relief,” including attorneys' fees, [FN396] and facilitates those actions by shifting the burden of persuasion to the government on certain issues, under certain circumstances. [FN397] Notably, none of these remedies “alters the meaning of the Free Exercise Clause.” [FN398]

Moreover, these remedies apply only in the area of “land use regulation,” which the statute defines quite narrowly, [FN399] and where enforcement is amply justified by the congressional record. [FN400] RFRA, by contrast, applied to all areas of law, and so was faulted for “(s)weeping coverage . . . displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” [FN401]

Also unlike RFRA, RLUIPA's application of the compelling interest test is not a disproportionate remedy, [FN402] because that test applies under the Enforcement Clause only where land-use laws involve “individualized assessments,” that is, where the test would apply anyway. [FN403] Codifying the ***987** Court's existing constitutional standard to facilitate the enforcement of that standard cannot be a disproportionate means of enforcement. [FN404]

Having identified widespread and substantial constitutional injuries to religious liberty in the area of land-use regulation, Congress passed RLUIPA to codify those precise constitutional standards and to provide judicial remedies--in the narrowest sense--for violations of those standards. To the extent RLUIPA's provisions are “preventive” or “deterrent” at all, they are “congruent” and “proportional” to the constitutional injuries targeted. Thus, RLUIPA contrasts sharply with the “sweeping coverage” of RFRA and falls well within the boundaries of Congress' Enforcement Clause authority, as defined in City of Boerne and Garrett.

B. The RLUIPA Provisions Based on Congress' Commerce Clause Authority Are Constitutional

Since the Commerce Clause provides Congress with an independently sufficient basis to enact RLUIPA's “Substantial Burdens” provision, Section 5 enforcement power is unnecessary in cases where the burden affects (or removal of the burden would affect) interstate commerce. [FN405] The starting point for Commerce Clause analysis is United States v. Lopez, [FN406] in which the Supreme Court struck down a federal statute that imposed criminal penalties for knowing possession of a firearm in a school zone. [FN407] Unlike the statute in Lopez, however, RLUIPA contains an “express jurisdictional element,” and regulates “economic activity”--namely, burdens on the use and development of land--whose connection to interstate commerce is not “attenuated,” but “visible to the naked eye,” and is further supported by evidence in the legislative history. [FN408]

The Supreme Court recently clarified the factors courts should consider when assessing whether congressional legislation represents “regulation of an activity that substantially affects interstate commerce”: [FN409] (1) whether the statute contains an express “jurisdictional element which ***988** would ensure, through case-by-case inquiry, that the (regulated activity) in question affects interstate commerce”; [FN410] (2) whether the statute regulates “economic activity”; [FN411] (3) whether “the link between (the regulated activity) and a substantial effect on interstate commerce was attenuated”; [FN412] and (4) whether the statute's “ legislative history contain(s) express congressional findings regarding the effects upon interstate commerce.” [FN413] Although none of these four factors is strictly required to satisfy the demands of the Commerce Clause, RLUIPA satisfies all four.

1. RLUIPA Contains an “Express Jurisdictional Element”

In contrast to Lopez and United States v. Morrison, section 2(a)(1) of RLUIPA is supported by an “express jurisdictional element that limits its reach to a discrete set of (discriminatory burdens on land use) that additionally have an explicit connection with or effect on interstate commerce.” [FN414] As a matter of law and logic, the presence of this provision ensures the facial constitutionality of the statute under the Commerce Clause: by its own terms, the statute applies only to conduct affecting “commerce with foreign nations, among the several States, or with Indian tribes.” [FN415] Thus, RLUIPA's jurisdictional element narrows the Commerce Clause question to whether the substantial burden test may be applied in a particular case; if the facts satisfy the jurisdictional requirement of section 2(a)(2)(B), they may be regulated under the commerce power. [FN416]

2. RLUIPA Regulates “Economic Activity”

RLUIPA clearly regulates “economic activity”: burdens on the use or ***989** development of land that also substantially affect interstate commerce. [FN417] The Fifth Circuit recently held that congressional regulation of local zoning laws to combat housing discrimination fell within the commerce power, based in part on a finding that Congress was regulating “ economic activity.” [FN418] The court reasoned that “an act of discrimination that directly interferes with a commercial transaction”--there, the purchase, sale, or rental of residential property--“is an act that can be regulated to facilitate an economic activity.” [FN419]

In addition, the development of land, especially those activities involving construction of a new building, is at least as “commercial” or “economic” as the purchase or sale of that land. Indeed, RLUIPA's legislative history repeatedly identifies the “construction project” as an example of “a specific economic transaction in commerce” that discriminatory land-use regulations may burden. [FN420] The conclusion that zoning and landmark law constraints on the purchase and development of land affect interstate commerce squares with the more general proposition that such constraints affect the economic value of the regulated property. [FN421] Therefore, unlike the statutes at issue in Lopez and Morrison, both of which pertained to violent crime, RLUIPA directly regulates “economic activity.”

Some are uncomfortable with this analysis because it emphasizes that religious land use has a commercial component. [FN422] The purchase or development of land is no less an “economic activity” when undertaken by a religious group or nonprofit organization. [FN423] Courts have consistently held that the commercial activities of religious institutions are subject to regulation under the Commerce Clause. [FN424] If commercial activities of religious entities fall within the commerce power when Congress would regulate ***990** them, they cannot fairly be said to fall beyond that power when Congress would exempt them from regulation. [FN425]

3. The Link Between the Class of Activity RLUIPA Regulates and Interstate Commerce is Direct, Not “Attenuated”

Even after Lopez and Morrison, courts will assess whether the regulated economic activity “substantially affects interstate commerce” by examining the activity at issue “taken together with that of many others similarly situated.” [FN426] Even these aggregated effects, however, fall beyond the commerce power if they are “so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local.” [FN427]

The typical zoning action subject to RLUIPA involves a religious community's application to purchase, rent, construct, expand, or renovate a house of worship for purposes of religious exercise. [FN428] Prohibiting the purchase, sale, or rental of land stops activities that are unquestionably commercial. Similarly, forbidding a construction or rehabilitation project directly stifles the multiple, large-scale, commercial activities necessary to complete it: employing construction workers, purchasing and transporting building materials and supplies, raising and transferring funds, entering contracts, and others. And local officials' refusal to permit either sales or improvements of land additionally precludes smaller-scale but longer-term economic activities associated with mere use of the property: employment of maintenance workers and any additional paid staff for activities there, as well as ongoing purchase and consumption of supplies and utilities. [FN429] Burdens like these, "taken together with . . . many others similarly situated," ***991** would "substantially affect interstate commerce." [FN430]

Even if every commercial transaction at issue in a particular case occurred exclusively within the borders of one state, the aggregate effect of similar suppression elsewhere would still implicate the commerce power. [FN431] By contrast, the regulated activity in Lopez--possessing a gun in a school zone-- was not one "that might, through repetition elsewhere, substantially affect any sort of interstate commerce." [FN432]

Moreover, courts need not "pile inference upon inference" [FN433] to get from the regulated category of activity to an effect on interstate commerce: the application of land-use restrictions directly and immediately prohibits the commercial activities of the sale, improvement, and/or ongoing operation and maintenance of real property. [FN434]

Finally, RLUIPA does not remotely threaten "the distinction between what is national and what is local." [FN435] RLUIPA neither replaces local zoning systems with a federal one, nor provides religious uses a blanket exemption from such local laws. Instead, the RLUIPA provision based on the commerce power requires local authorities to provide additional justification for a limited category of land-use restrictions, namely, those that both substantially burden religious exercise and substantially affect interstate commerce. [FN436] The land-use restrictions within RLUIPA's reach therefore affect national commerce sufficiently to warrant congressional regulation under the Commerce Clause.

4. RLUIPA's Legislative History Contains Evidence That RLUIPA Regulates Activity That "Substantially Affects Interstate Commerce"

Both Lopez and Morrison make clear that Congress is not generally required to make formal findings of the regulated activity's effect on interstate***992** commerce. [FN437] Rather, congressional findings may help courts assess whether that effect is substantial when "no such substantial effect (is) visible to the naked eye." [FN438] Because RLUIPA regulates activities whose effects on commerce are "visibl(y)" substantial, [FN439] courts need not rely on congressional findings to conclude that Congress has acted within its Commerce Clause bounds. Nevertheless, Congress still found in RLUIPA's legislative history that certain particular burdens on religious land use--such as prohibitions on building construction--substantially affect interstate commerce. [FN440] These findings, moreover, are based on extensive testimony, studies, and other evidence demonstrating the nationwide magnitude of the commercial activity of religious institutions, in construction and otherwise. According to one study in the legislative history, in 1992 alone, religious communities spent $6 billion on capital investments and new construction, up from $4.8 billion five years earlier. [FN441] Paired with the substantial evidence of widespread discriminatory land-use regulation discussed above, [FN442] Congress had far more than a "rational basis . . . for concluding that (such regulation) sufficiently affected interstate commerce."

[FN443]

C. The RLUIPA Provisions Based on Congress' Spending Clause Authority are Constitutional

Finally, the substantial burdens test may apply under RLUIPA where the burden was "imposed in a program or activity that receives Federal financial assistance." [FN444] This provision invokes congressional authority under the Spending Clause, which empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." [FN445] "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." [FN446] "When Congress acts pursuant to its spending power, it generates legislation much in the ***993** nature of a contract: in return for federal funds, the state agrees to comply with federally imposed conditions." [FN447] Thus, Congress may achieve indirectly through the spending power what it could not achieve directly otherwise. [FN448]

Since Steward Machine Co. v. Davis, the Supreme Court has consistently respected the power of Congress to attach conditions to federal spending. [FN449] Although Congress' power to attach such conditions is not unlimited, a party attacking them bears a heavy burden to show that they are invalid. [FN450] Specifically, conditions on federal funds are permitted so long as they satisfy the four requirements set out in South Dakota v. Dole: they (1) must serve "the general welfare" rather than a purely private or local interest; [FN451] (2) must be imposed "unambiguously . . ., enabl(ing) the States to exercise their choice knowingly, cognizant of the consequences of their participation"; [FN452] (3) must bear a reasonable or minimal relationship "to the federal interest in particular national projects or programs"; [FN453] and (4) must not violate any independent constitutional provisions. [FN454]

To date, the authors are unaware of any challenges to land-use laws based on this subsection. Indeed, only institutionalized persons have invoked RLUIPA provisions that are based on the Spending Clause authority. [FN455] However, in applying Spending Clause principles to RLUIPA, the Act plainly satisfies their modest requirements, as one district court has ***994** already found. [FN456]

First, RLUIPA's conditions on the use of federal funds are designed better to secure religious liberty, unquestionably a purpose within the broad rubric of "general welfare." [FN457] This congressional finding is especially secure because "courts should defer substantially to the judgment of Congress" in this regard. [FN458]

Second, the conditions that RLUIPA imposes are sufficiently clear to give states notice of the regulatory burdens they are undertaking along with federal funds. The substantial burdens/strict scrutiny standard of RLUIPA section 2(a) is unambiguous, both because the standard is set forth prominently in the text of the statute, and because the standard is well-developed and familiar as the result of years of free exercise litigation, both before and after Employment Division v. Smith. Thus, this condition is indistinguishable from those upheld under the Spending Clause as a part of other civil rights legislation. [FN459]

Third, regardless of the particular federally funded program at issue, the conditions of RLUIPA always relate to the same federal purpose: that public funds "not be spent in any fashion which encourages, entrenches, subsidizes, or results" in discrimination against, or burdens on, religious exercise. [FN460]

Fourth, RLUIPA does not violate any independent constitutional requirement. Although the likeliest claim of

such a violation would arise under the Establishment Clause of the First Amendment, such a claim against RLUIPA is extremely unlikely to succeed, as detailed below.

D. RLUIPA Does Not Violate the Establishment Clause

Opponents of RLUIPA argue not only that Congress lacked the authority to pass the law, but also that the Act itself violates the Establishment Clause by favoring religious uses of land. However, only under a ***995** strict separationist [FN461] theory does RLUIPA even approach offending this prohibition. [FN462] Under both the "benevolent neutrality" [FN463] or "accommodationist" [FN464] readings of the religion clauses, RLUIPA passes muster.

RLUIPA has both a secular purpose and effect. [FN465] Although RLUIPA section 2(a) is properly viewed as an accommodation of religious exercise that is not available to equivalent secular activity, only one current member of the Supreme Court would likely find RLUIPA unconstitutional based on this theory. [FN466] Furthermore, none of the federal courts of appeals have ruled that such exemptions from zoning laws at the state and local level violate the Establishment Clause. [FN467] The First Circuit recently upheld Massachusetts' "Dover Amendment," which provides that zoning regulations may not restrict the use of land for religious or educational purposes:

> Of particular note is the phenomenon of churches being unwanted either in residential areas--because of increased traffic or noise, or impact on aesthetics--or in business zones--because tax-exempt churches dampen the vibrancy of commercial developments. . . . Certainly in the face of such evidence, the state's decision to give religion an assist in the local land-use planning process is consistent with the Supreme Court's holding in Amos that legislation isolating religious groups for special treatment is permissible when done for the ***996** "proper purpose" of alleviating a burden on the exercise of religion. [FN468]

This decision mirrors similar holdings by the Fourth and Seventh Circuits. In Ehlers-Renzi v. Connelly School of the Holy Child, [FN469] the Fourth Circuit held that a zoning ordinance that exempts parochial schools from a special exception requirement does not violate the Establishment Clause: "such an exemption removes the State from forums in which religious conflict might otherwise require improper State action." [FN470] And in Cohen v. City of Des Plaines, [FN471] the Seventh Circuit held that an ordinance that accommodates nursery schools operated by religious institutions is constitutional, holding that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." [FN472] RFRA--a much more expansive statute than RLUIPA--has also been repeatedly upheld against Establishment Clause attack. [FN473]

The Supreme Court has held that when the government accommodates people's private religious practices--as Congress did in enacting RLUIPA [FN474]--it "follows the best of our traditions. For it then respects the ***997** religious nature of our people and accommodates the public service to their spiritual needs." [FN475] The Court noted generally in Lynch v. Donnelly [FN476] that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." [FN477]

That the government has substantial leeway under the Establishment Clause to "follow() the best of our traditions" [FN478] and accommodate private religious activities was reinforced three years later in Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, [FN479] where the Court held that "there is ample room for accommodation of religion under the Establishment Clause." [FN480] The Court in

Amos unanimously upheld Title VII's exemption permitting employment decision making by religious organizations on the basis of religion--an act forbidden by Title VII to all other employers. The Court observed that it "has long recognized that the government may (and sometimes must) accommodate religious practice and that it may do so without violating the Establishment Clause." [FN481] The Court also recognized that legislatures have an important role in accommodating private religious activity, stressing that there is no per se rule against "giv(ing) special consideration to religious groups" [FN482] through legislative accommodations, and that "the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." [FN483] This was particularly true in Amos, which, as with zoning laws, involved exempting religious organizations from a regulatory scheme that could potentially ***998** intrude on the religious organizations' autonomy: "Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities." [FN484]

In Smith, the Court magnified its statement in Walz that legislatures may accommodate faith. Indeed, Smith held that the Free Exercise Clause does little to protect people of faith from generally applicable laws. [FN485] For such protection, Smith instructs, people of faith should turn to the legislative and executive branches, and not the courts, for protection of their religious liberty:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. [FN486]

By accommodating the religious exercise of citizens by granting a measure of autonomy to religious organizations from intrusive zoning regulation, RLUIPA has a permissible and sufficient legislative purpose "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." [FN487]

It is also clear that alleviating the burdens on religious exercise caused by zoning regulation does not have the effect of advancing religion. It merely reduces intrusion and oversight by the government regarding how churches carry out their mission. While this may enable various religious institutions to advance their religious purposes, the Supreme Court has held this to be a permissible effect:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in Walz, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious ***999** activity." [FN488]

Furthermore, RLUIPA's "Equal Terms," "Nondiscrimination," and "Exclusions and Limits" sections do not even fall within the category of governmental accommodation of religion. Instead, these provisions simply restate Supreme Court precedent from City of Hialeah, City of Cleburne, Village of Euclid, and Schad. For example, in ruling that a township unconstitutionally applied its zoning ordinance against a synagogue by not allowing places of worship to apply for a special exception when other, more intense uses could apply, a district court held that "(i)n the same way that it would be illogical to conclude that the Supreme Court 'endorsed' men-

tal handicap in City of Cleburne, this Court did not 'endorse' the Reform Jewish tradition, or religion in general, in its Opinion." [FN489] Such a holding is clearly within the realm of City of Cleburne [FN490] and McDaniel v. Paty. [FN491] (However, religious neutrality, for some, is insufficient to satisfy the demands of the Establishment Clause. [FN492])

Discrimination "on the basis of religion or religious denomination" [FN493] is clearly unconstitutional. [FN494] Schad [FN495] prohibits a zoning ordinance from "totally exclud(ing)" [FN496] a "broad category of protected expression." [FN497] The prohibition of regulations that "unreasonably limit() religious assemblies, institutions, or structures within a jurisdiction" [FN498] comes directly from the Supreme Court's first zoning ruling. [FN499] Codification of any existing constitutional standards cannot possibly violate the Establishment Clause.

Finally, RLUIPA has a provision that specifically ensures that its application does not violate the Establishment Clause:

> SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED. Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to ***1000** the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions. [FN500]

Therefore, any chance that RLUIPA could possibly violate the Establishment Clause in a particular circumstance is foreclosed by this subsection, ensuring the Act's conformity with the First Amendment.

Conclusion

From the incorporation of the Religion Clauses against the States until the 1980s, constitutional principles were applied consistently to protect religious land uses from discrimination, arbitrariness, and undue burden by local authorities. Since the Supreme Court's Smith decision in 1990, however, it is the lower federal courts, ironically, that have led the retreat from protecting even those constitutional rights that survive Smith, as described above. RLUIPA aims to assure that all courts (federal and state alike) purporting to apply federal constitutional protections do not ignore their continuing vitality. To claim that this codification of existing federal limits on local discretionary power represents some novel infringement on States' rights is to mischaracterize not only the statute and the constitutional jurisprudence it enforces, but also the history of the States' concern for local abuses of religious freedom.

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[FNaa1]. General Counsel, The Becket Fund for Religious Liberty.

[FN1]. Pirkei Avot 2:5 (teachings of Rabbi Hillel). The Pirkei Avot, translated usually as The Ethics of the Fathers, transmits the moral advice and insights of the leading rabbinic scholars.

[FN2]. Throughout this article, the term “church” is used generically to refer to synagogues, mosques, temples, and all other places of worship.

[FN3]. “‘The main thing we're getting away from here is making Main Street what it's supposed to be,’ (Mayor of Forest Park, Georgia, Chuck) Hall said. ‘What Main Street is supposed to be,’ (Forest Park Director of Planning, Building, and Zoning Steve) Pearson said, ‘is a central commercial zoning district, and all uses should essentially be of a business nature.”’ Ed Brock, National Group Backs Suit Against Forest Park, News Daily (Clayton County, Ga.), Apr. 26, 2001, http://www.zwire. com/site/news.cfm? newsidf+728672&BRD =1099&PAG=461&dept_id=99012&rfi=6. Hall and Pearson were commenting on a lawsuit brought by an African-American church and its minister who were seeking to locate a ministry in a downtown zone but were denied a special use permit. Id. Other assembly uses such as “private clubs,” “fraternal orders,” “lodges,” “theaters,” “auditoriums,” and “dance halls” could locate in that zoning district by right, without a special use permit to do so. Complaint at ¶ 22, Refuge Temple Ministries v. City of Forest Park, No. 01-0958 (N.D. Ga. complaint filed Apr. 12, 2001). The city has since repealed the offending ordinance. Forest Park, Ga., Ordinance No. 01-06 (June 4, 2001). The authors represent the church and its minister.

[FN4]. In Los Angeles, according to Deputy City Attorney Tayo Popoola, the city opposed permitting religious services in a neighborhood because it feared the services would harm the character of the Hancock Park neighborhood by attracting traffic and creating noise. Benjamin Pimental, Putting Their Faith in New Religious Act, S.F. Chron., Mar. 11, 2001, at A17. Popoola was discussing a suit brought by Congregation Etz Chaim, an Orthodox Jewish congregation engaged in a four-year battle with the city over its request to hold services in a residential neighborhood. Id.

[FN5]. “Although their public opposition to church plans has focused on protecting the rural nature of their subdivision, privately the other Anuhea Place landowners have accused Hale O Kaula of being a cult.” Susan Roth, Congregation Looks to Law for New Church, Honolulu Advertiser, June 4, 2001, at A1, available at http://www.the.honoluluadvertiser.com/article/2001/June/ln/ln18a.html. The authors represent Hale O Kaula.

[FN6]. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. §§ 2000cc to--5 (West Supp. 2001).

[FN7]. Professor Marci Hamilton explained: “The reason local communities are so intent to keep churches out of the commercial district is concern for the tax base. . . . If churches aren't tax exempt, I might have a different position.” Charles Toutant, Making a Federal Case of Zoning, 162 N.J. L.J. 506, 506 (2000).

[FN8]. See, e.g., Peter v. Wedl, 155 F.3d 992, 996-97 (8th Cir. 1998) (holding that prohibition on special education services in parochial school setting amounted to religious discrimination in violation of Free Exercise Clause).

[FN9]. See, e.g., Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365-66 (3d Cir. 1999) (holding that denial of religious exemption to no-beard rule for police officers violated the Free Exercise Clause).

[FN10]. See, e.g., Sasnett v. Litscher, 197 F.3d 290, 292-93 (7th Cir. 1999) (holding that prison regulation that allowed inmate to wear cross only when attached to rosary violated Free Exercise Clause).

[FN11]. 494 U.S. 872 (1990). In Smith, the Court held that “the right of free exercise does not relieve an indi-

vidual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'" Id. at 879 (citation omitted).

[FN12]. See Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221, 1225 (9th Cir. 1990) (denying zoning conditional use permit for church did not violate either Free Exercise Clause); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 823-26 (10th Cir. 1988) (holding that zoning ordinance that precluded church building in agricultural zone did not violate the Free Exercise Clause); Grosz v. City of Miami Beach, 721 F.2d 729, 738-40 (11th Cir. 1983) (holding that application of zoning ordinance to prohibit plaintiffs from using their residence for organized religious services did not violate the Free Exercise Clause); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307-08 (6th Cir. 1983) (holding that the city's comprehensive zoning plan that prohibited the construction of a church in a residential district did not violate Free Exercise Clause).

[FN13]. 42 U.S.C.A. §§ 2000bb to--4 (West Supp. 2001). RFRA was struck down as unconstitutional as applied to the States in City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

[FN14]. In addition to land use laws, RLUIPA prohibits the government from substantially burdening the "religious exercise of a person residing in or confined to an institution . . . ." 42 U.S.C.A. § 2000cc-1. This portion of the Act is outside the scope of this Article.

[FN15]. City of Boerne, 521 U.S. at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

[FN16]. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926).

[FN17]. Id. at 387-88. The Court held that zoning restrictions were permissible unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. at 395. Interestingly, the Supreme Court of Ohio said of the Village of Euclid decision: "The Village of Euclid case, while deciding that commercial and industrial structures may, consistently with the Fourteenth Amendment, be excluded from residential districts, decides nothing with regard to the exclusion of humanitarian, public and semi-public uses like churches, schools and libraries." State ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph, 39 N.E.2d 515, 522 (Ohio 1942).

[FN18]. Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928).

[FN19]. The Court has held that the standard deference granted to land use laws is not applicable where fundamental rights are at state. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) ("When a city undertakes such intrusive regulation of the family, neither Belle Terre nor Euclid governs; the usual judicial deference to the legislature is inappropriate.").

[FN20]. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[FN21]. See Scott David Godshall, Note, Land Use Regulation and the Free Exercise Clause, 84 Colum. L. Rev. 1562, 1565-66, 1565 n.22 (1984) (describing landmark laws and their application to churches); Elizabeth C. Williamson, City of Boerne v. Flores and the Religious Freedom Restoration Act: The Delicate Balance

Between Religious Freedom and Historic Preservation, 13 J. Land Use & Envtl. L. 107 (1997). See also Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978) (describing landmarks laws generally and New York City's Landmarks Preservation Law in the context of a Fifth Amendment Takings case).

[FN22]. See, e.g., Denver Urban Renewal Auth. v. Pillar of Fire, 552 P.2d 23, 25 (Colo. 1976) (allowing government agency to use its power of eminent domain to condemn and demolish church property).

[FN23]. See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (stating that zoning regulations are an example of "necessary and permissible contacts" between church and state). However, it is doubtful that the Court in Euclid could have predicted the application of such ordinances to preclude religious uses. See Edward M. Bassett, Zoning 70 (1936) ("When in 1916 the framers of the Greater New York building zone resolution were discussing what buildings and uses should be excluded from residence districts, it did not occur to them that there was the remotest possibility that churches, schools, and hospitals could properly be excluded from any district.").

[FN24]. R.P. Davis, Annotation, Zoning Regulations as Affecting Churches, 74 A.L.R.2d 377 § 2 (1960); see also Eugene McQuillin, 8 The Law of Municipal Corporations 485-86 (3d ed. 2000); Arden H. Rathkopf & Daren A. Rathkopf, The Law of Zoning and Planning 20-3 (4th ed. 1975). See also Grace Cmty. Church v. Planning & Zoning Comm'n, 615 A.2d 1092, 1102-03 (Conn. Super. Ct. 1992) ("Cases from other states have held that it is illegal for a municipality to exclude churches in all zones, from all residential zones, to allow them in the municipality only with a special permit, or have held that there was no compelling reason to deny a special permit."); State v. Maxwell, 617 P.2d 816, 820 (Haw. 1980) (recognizing that "(t)he wide majority of courts hold that religious uses may not be excluded from residential districts"); Goffinet v. County of Christian, 333 N.E.2d 731, 735 (Ill. App. Ct. 1975) (recognizing the "special rule regarding the construction of churches in areas zoned residential." (citing O'Brien v. City of Chicago, 105 N.E.2d 917 (Ill. App. Ct. 1952)); Bd. of Zoning Appeals v. Schulte, 172 N.E.2d 39, 44 (Ind. 1961) ("The law is well settled that the building of a church may not be prohibited in a residential district." (quoting Bd. of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 119 (Ind. 1954))); Milharcic v. Metro. Bd. of Zoning Appeals, 489 N.E.2d 634, 636 & 636 n.2 (Ind. Ct. App. 1986) ("Irrespective of specific uses permitted or prohibited by a particular zoning ordinance, a religious use is always a permitted use of property in a residentially zoned area. . . . Indiana is in accord with the majority view that churches may not be lawfully excluded from residential districts."); Jewish Reconstructionist Synagogue, Inc. v. Inc. Village of Roslyn Harbor, 342 N.E.2d 534, 540 (N.Y. 1975) (holding unconstitutional ordinances that "authorize the denial of a special use permit for location of religious institutions in a residential district without setting reasonable requirements for adaptations which would mitigate their effects . . ."); Bright Horizon House, Inc. v. Zoning Bd. of Appeals, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) ("(T)he general policy, as applied in this State, is that religious institutions are virtually immune from zoning restrictions."); State ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph, 39 N.E.2d 515, 524 (Ohio 1942) ("We do not believe it is a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions."); Congregation Comm. v. City Council, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956) ("(A) city cannot legally exclude a church from a residential district by a zoning ordinance . . . ."); State ex rel. Lake Drive Baptist Church v. Village of Bayside Bd. of Trs., 108 N.W.2d 288, 293-94 (Wis. 1961) (recognizing the majority rule); id. at 300 (Hallows, J., concurring) (collecting cases). Cf. Mass. Gen. Laws ch. 40A § 3 (West Supp. 2001) (limiting zoning regulations that can be imposed on religious and other uses); Village Lutheran Church v. City of Ladue, 935 S.W.2d 720, 722 (Mo. Ct. App. 1996) (ruling that church did not need a special use permit to construct in a residential district; recognizing that state law "does not give municipalities power over the use of property used for religious purposes by religious organizations whose rights to free exercise of religion are pro-

tected by constitutional guaranties." (citing Congregation Temple Israel v. Creve Coeur, 320 S.W.2d 451 (Mo. 1959))).

[FN25]. See Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1534 (N.D. Ala. 1990).

[FN26]. See Roman Catholic Welfare Corp. v. City of Piedmont, 289 P.2d 438, 443 (Cal. 1955) (ruling that a zoning ordinance that allowed public but not private schools in a residential district was unconstitutional); Catholic Bishop v. Kingery, 20 N.E.2d 583, 585 (Ill. 1939) (holding that an ordinance permitting public schools in a residential district while excluding private schools amounts "to a capricious invasion of the property rights of the appellee . . ."); Lutheran High Sch. Ass'n v. City of Farmington Hills, 381 N.W.2d 417, 421 (Mich. Ct. App. 1985) (recognizing the majority view that parochial schools are a "preferred use"). But see Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1299-1301 (Alaska 1982).

[FN27]. See Church of Jesus Christ of Latter Day Saints, 741 F. Supp. at 1534.

[FN28]. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 825 (Cal. Ct. App. 1949); W. Hartford Methodist Church v. Zoning Bd. of Appeals, 121 A.2d 640, 643 (Conn. 1956); Miami Beach United Lutheran Church v. Miami Beach, 82 So. 2d 880, 882 (Fla. 1955); Milwaukie Co. of Jehovah's Witnesses v. Mullen, 330 P.2d 5, 20 (Or. 1958).

[FN29]. Decatur, Ind. Co., 117 N.E.2d at 121 (stating that zoning regulation prohibiting a church would "restrict the right of freedom and worship and assembly to an extent that outweighs any benefit to the safety, health and general welfare of the public"); Cmty. Synagogue v. Bates, 136 N.E.2d 488, 496 (N.Y. 1956) ("The men and women who left Scrooby for Leyden and eventually came to Plymouth in order to worship God where they wished and in their own way must have thought they had terminated the interference of public authorities with free and unhandicapped exercise of religion. . . . (A) court may not permit a municipal ordinance to be so construed that it would appear in any manner to interfere with the 'free exercise and enjoyment of religious profession and worship.'"); Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 834 (N.Y. 1956) ("No discrimination need be alleged or proved to establish the claim that an ordinance has been construed and applied so as to violate such constitutional (free exercise) rights."). See also Shelley 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, 513 (1996) ("This majority rule is, at times, supported by an application of the Free Exercise Clause, but many cases have upheld the rule based on state constitutional grounds or a finding that the exercise of the local government's police power was arbitrary and in violation of due process."). The Free Exercise Clause was not incorporated against the States until 1940. See Cantwell v. Connecticut, 310 U.S. 296 (1940). See generally Mark W. Cordes, Where to Pray? Religious Zoning and the First Amendment, 35 U. Kan. L. Rev. 697 (1987) (arguing that church zoning claims should be brought under the Free Exercise Clause rather than Due Process).

[FN30]. Diocese of Rochester, 136 N.E.2d at 834. See also Cordes, supra note 29, at 698; Berman v. Parker, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."); Nectow v. Cambridge, 277 U.S. 183, 187-88 (1928) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding that the determination of public officers should not be set aside unless their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public

health, the public morals, the public safety or the public welfare in its proper sense")); State v. Maxwell, 617 P.2d 816, 820 (Haw. 1980) (basing rule on freedom of religion grounds); Milharcic v. Metro. Bd. of Zoning Appeals, 489 N.E.2d 634, 636 (Ind. Ct. App. 1986) (basing rule on First and Fourteenth Amendments and Indiana Constitution); Jewish Reconstructionist Synagogue, Inc. v. Inc. Village of Roslyn Harbor, 342 N.E.2d 534, 542 (N.Y. 1975) (basing rule on federal Free Exercise Clause); Church of Jesus Christ of Latter-Day Saints v. Planning Bd., 687 N.Y.S.2d 794, 794 (N.Y. App. Div. 1999) ("It is well settled that religious institutions are presumed beneficial to a community, and consequently proposed religious uses should be permitted absent convincing evidence that they pose a direct and immediate threat to public health, safety or welfare."); Young Israel Org. v. Dworkin, 133 N.E.2d 174, 178 (Ohio Ct. App. 1956) (examining whether the denial of the zoning application "has any reasonable relationship to the public health, safety, morals and general welfare . . ."); Appeal of Stark, 72 Pa. D. & C. 168, 188 (Pa. Ct. Com. Pleas 1950) ("(A) zoning ordinance which operates to exclude the erection of church buildings in residence districts is invalid, either as violative of the due process and equal protection clauses of the state and Federal Constitutions, or as being an arbitrary or unreasonable enforcement of the ordinance.") (quoting A.M.S., Annotation, Zoning Regulations as Affecting Churches, 138 A.L.R. 1287, 1288 (1942)); Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 197 (Wash. 1957) (collecting cases); McQuillin, supra note 24, at 486; Davis, supra note 24, at § 2 (such ordinances are "invalid, either as violative of the due process or equal protection clauses of the state or federal constitutions, or as being an arbitrary or unreasonable enforcement of the ordinance . . .").

[FN31]. Young Israel Org., 133 N.E.2d at 179 (quoting Edward M. Bassett, Bassett on Zoning 200 (2d ed. 1940)).

[FN32]. O'Brien v. City of Chicago, 105 N.E.2d 917, 920 (Ill. App. Ct. 1952).

[FN33]. Congregation Dovid Ben Nuchim v. City of Oak Park, 199 N.W.2d 557, 559 (Mich. Ct. App. 1972).

[FN34]. Rathkopf & Rathkopf, supra note 24, at 20-24. See also Lakewood Residents Ass'n v. Congregation Zichron Schneur, 570 A.2d 1032, 1035 n.95 (N.J. Super. Ct. Law Div. 1989) ("(C)ourts have held that religious activity itself is in furtherance of public morals and the general welfare . . . .") (quoting State v. Cameron, 498 A.2d 1217, 1227 (N.J. 1985)); Bd. of Zoning Appeals v. Schulte, 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that churches and schools promote the common welfare and the general public interest."); Am. Friends of the Soc'y of St. Pius v. Schwab, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979) (recognizing the "public benefit and welfare which is itself an attribute of religious worship in a community") (quoting Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 496-97 (1968)); Bright Horizon House, Inc. v. Zoning Bd. of Appeals, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) ("In dealing with zoning restrictions, New York adheres to the majority view that religious institutions, by their very nature, are beneficial to the public welfare."); State ex rel. Anshe Chesed Congregation v. Bruggemeier, 115 N.E.2d 65 (Ohio Ct. App. 1953); Congregation Comm. v. City Council, 287 S.W.2d 700, 705 (Tex. App. 1956) ("The church in our American community has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals."). See Robert W. Tuttle, Governing Two Cities: Civil Law and Religious Institutions, A Symposium: Regulating Sacred Space: Religious Institutions and Land Use Control: How Firm a Foundation? Protecting Religious Land Uses After Boerne, 68 Geo. Wash. L. Rev. 861, 877-78 (2000).

[FN35]. State ex rel. Lake Drive Baptist Church v. Village of Bayside Bd. of Trs., 108 N.W.2d 288, 301 (Wis. 1961) (Hallows, J., concurring). See also Young Israel Org. v. Dworkin, 133 N.E.2d 174, 183 (Ohio Ct. App. 1956) ("The place of the church is to be found in that part of the community where the people live. It is associ-

ated with the home, its influence is concerned with family life. It is an institution to which we look for leadership in furtherance of the brotherhood of man, in molding the moral progress of our children and sustaining and giving strength to purity of our family life. To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society.") (quoting Bruggemeier, 115 N.E.2d at 69).

[FN36]. Professor Gedicks argues that "(i)f (he is) right that contemporary American society no longer holds religion as an especially valuable activity, then no argument can save religious exemptions, and much will be lost in the hopeless attempt to defend them." Frederick Marks Gedicks, A Symposium: Regulating Sacred Space: Religious Institutions and Land Use Controls: Towards a Defensible Free Exercise Doctrine, 68 Geo. Wash. L. Rev. 925, 951 (2000). Fortunately, recent developments indicate that he is not right. See Boyajian v. Gatzunis, 212 F.3d 1, 9 (1st Cir. 2000) ("The 'dominant status' of churches and schools 'is based on a recognition that religious and educational institutions are, by their very nature, beneficial to the public welfare."') (quoting Terry Rice, Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses, 8 Pace L. Rev. 1, 3 (1988)); In re Four Three Oh, Inc. v. Bd. of Adjustment, 256 F.3d 107, 113 (3d Cir. 2001) (describing the parties' agreement that the "proposed temple constitutes an 'inherently beneficial' use of the subject property" and then requiring the grant of a variance under New Jersey law if a four-part test is satisfied); Congregation Kol Ami v. Abington Township, No. 01-1919, 2001 U.S. Dist. LEXIS 9690, at *13 (E.D. Pa. July 11, 2001) ("(H)ouses of worship inherently further the public welfare . . . ."), appeal docketed, No. 01-3077 (3d Cir. Aug. 3, 2001); Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 189 (D. Conn. July 5, 2001) ("Foregoing or modifying the practice of one's religion because of governmental interference or fear of punishment by the government is precisely the type of 'substantial burden' Congress intended to trigger the RLUIPA's protections; indeed, it is the concern which impelled adoption of the First Amendment."); Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 760 (1999) ("Some Americans are hostile to all religion. They believe it is irrational, superstitious, and harmful. This is the view of a small minority, but in my experience, this view is overrepresented in elite positions.") (internal citations omitted).

[FN37]. At least one treatise argues that "a general decline of opinion as to the importance of church attendance" may have led to this change in attitude. Rathkopf & Rathkopf, supra note 24, at 20-2. It has been argued that courts often refuse to acknowledge that free exercise rights are implicated by application of zoning laws, see Godshall, supra note 21, at 1556 nn.25-30, 1569 nn.39-44 and accompanying text, or that the application of the Free Exercise Clause is so restricted as to virtually remove zoning laws from First Amendment review. See id. at 1572 n.52. Courts often do not apply constitutional scrutiny to zoning issues at all, but rather an "arbitrary or unreasonable" standard for determining administrative zoning actions. Kenneth Young, Anderson's American Law of Zoning § 21.10, at 720 (4th ed. 1996). Due process claims are easily dismissed by municipalities meeting the low standard enunciated in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinance must be reasonable and substantially related to governmental public welfare concerns). See also Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 305 (6th Cir. 1983). Often, little short of a city council's finding that a particular religion exercise is "unwholesome and immoral" will sustain a due process challenge. See Marks v. City of Chesapeake, 883 F.2d 308, 309 (4th Cir. 1989) (denying permit for palmistry was arbitrary and capricious).

[FN38]. City of Lakewood, 699 F.2d at 304 n.2 (dictum). The First Amendment demands that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. The Sixth Circuit's theory has been explicitly rejected by other Circuits holding that statutory exemptions for religious institutions in land use laws do not violate the Establishment Clause. Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d

283 (4th Cir. 2000) (holding that exemption from special exception requirement for parochial schools located on land owned by churches); Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993) (holding that zoning ordinance exempting church daycare centers from the requirement of obtaining a special use permit). Another commentator has even argued that the majority New York rule violates the Free Exercise Clause. See Laurie Reynolds, Zoning the Church: The Police Power Versus the First Amendment, 64 B.U. L. Rev. 767, 777 (1984).

[FN39]. See Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354-56 (2d Cir. 1990); Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221 (9th Cir. 1990); Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983); City of Lakewood, 699 F.2d 303. For a discussion of church zoning cases prior to the Supreme Court's Employment Division v. Smith, 494 U.S. 872 (1989), see Godshall, supra note 21, at 1562.

[FN40]. City of Lakewood, 699 F.2d at 304. In fact, the court went so far as to hold that the rule "runs afoul of the Establishment Clause." See supra note 38. Lakewood was re-affirmed recently by the Sixth Circuit in Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398 (6th Cir. 1999). See also Milwaukie Co. of Jehovah's Witnesses v. Mullen, 330 P.2d 5, 21 (Or. 1958) (commenting critically on the tendency "to cloak petitioning churches with a species of judicial favoritism under the zoning laws").

[FN41]. Grosz, 721 F.2d at 741. The reasoning of Grosz was reaffirmed by the Eleventh Circuit subsequent to Smith and the Supreme Court's decision in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). See First Assembly Church of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 424 n.4 (11th Cir. 1994). However, subsequent to the passage of RFRA, the Groszes filed a second suit seeking declaratory and injunctive relief under RFRA from the enforcement of the city's zoning ordinance. Grosz v. City of Miami Beach, 82 F.3d 1005 (11th Cir. 1996). The appeals court vacated and remanded the district court's ruling that the plaintiffs were collaterally estopped from making the claim, holding that the "suit under RFRA presents an issue different from the constitutional issue litigated in Grosz I." Id. at 1007 n.2. "The issue 'actually litigated' in Grosz I was whether the burden . . . on Grosz's free exercise rights outweighed the burden on the City if its zoning ordinance was not enforced. Today, the issue which first must be litigated is whether, under RFRA, the government has 'substantially burdened' Grosz's exercise of religion." Id. at 1007.

[FN42]. 374 U.S. 398, 406 (1963).

[FN43]. 406 U.S. 205 (1972). See Williamson, supra note 21, at 118 n.77 (noting that "(c)ourts generally gave religious entities special deference when the government imposed regulations using their police powers"). While a detailed description of the history of Free Exercise analysis is outside the scope of this Article, a brief synopsis is appropriate. In its first modern Free Exercise Clause decision, the Court held that the "freedom to believe" was absolute while the "freedom to act" could not be. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). Twenty years later, the Court distinguished direct burdens from indirect burdens, holding that the latter could be justified if the conduct was regulated by a general law within the State's power. Braunfeld v. Brown, 366 U.S. 599, 606 (1961). The compelling interest test was subsequently developed by the Court in its Sherbert and Yoder decisions, and applied inconsistently until the Smith decision. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (rejecting compelling interest test for laws which incidentally burden religion); Bowen v. Roy, 476 U.S. 693, 708 (1986) (holding that social security number regulations, as "a reasonable means of promoting a legitimate public interest," were constitutional); United States v. Lee, 455 U.S. 252 (1982) (holding that an exemption from the social security program for two Amish employers was not constitutionally required). This has led one commentator to describe free exercise doctrine as "mired in slogans and

multipart tests that could be manipulated to reach almost any result." Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685, 685 (1992). See also Kenneth Pearlman & Stuart Meck, Land Use Controls and RFRA: Analysis and Predictions, 2 Nexus 127, 132 (1997) (arguing that "the failure of the Supreme Court to provide guidance (in City of Boerne) is all the more regrettable because the law of the Constitution relating to religious freedom is, unlike the law of the First Amendment pertaining to speech and public assembly, a crazy quilt").

[FN44]. 494 U.S. 872 (1990) (upholding denial of unemployment benefits based on criminal use of peyote). See Von G. Keetch & Matthew K. Richards, The Need for Legislation to Enshrine Free Exercise in the Land Use Context, 32 U.C. Davis L. Rev. 725 (1999) (arguing for statutory protections for churches in the zoning context).

[FN45]. See generally Colin L. Black, Comment, The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis, 72 Tul. L. Rev. 1767, 1778-82 (1988) (describing the opinions of Justices Scalia and O'Connor as "inconsistent" and "circular"); Stephen L. Carter, The Separation of Church and Self, 46 SMU L. Rev. 585, 597 (1992) (arguing that Smith is "justly criticized"); John Delaney, Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith, 25 Ind. L. Rev. 71 (1991); Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1 (1990); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109 (1990).

[FN46]. Hennessy v. City of Melrose, 194 F.3d 237, 244 n.1 (1st Cir. 1999) (applying Smith to education law); Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (motor vehicle regulation law); Thiry v. Carlson, 78 F.3d 1491, 1496 (10th Cir. 1996) (eminent domain law); Miller v. Drennon, No. 91-2166, 1992 U.S. App. LEXIS 14449, at *10-12 (4th Cir. June 19, 1992) (per curiam) (employee schedules); Ryan v. DOJ, 950 F.2d 458, 460-61 (7th Cir. 1991) (termination from government employment); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991) (zoning ordinance); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932-33 (6th Cir. 1991) (education law); Munn v. Algee, 924 F.2d 568, 574 (5th Cir. 1991) (tort law); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 194-96 (3d Cir. 1990) (housing regulation law); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354-56 (2d Cir. 1990) (landmarks law).

[FN47]. Smith, 494 U.S. at 878-79.

[FN48]. See generally James M. Oleske, Jr., Note, Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence of Doubt", 85 Geo. L.J. 751, 761-62 (1997).

[FN49]. Smith, 494 U.S. at 877 (citing Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

[FN50]. Id. (citing Torcaso v. Watkins, 367 U.S. 488 (1961)).

[FN51]. Id. (citing Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969)).

[FN52]. Id. (citing McDaniel v. Paty, 435 U.S. 618 (1978)). See 42 U.S.C.A. § 2000cc(b)(1) ("Equal Terms"). See also Smith, 494 U.S. at 877-78 (recognizing violation of Free Exercise Clause if the government banned certain physical acts "only when they are engaged in for religious reasons").

[FN53]. Smith, 494 U.S. at 877 (citing United States v. Ballard, 322 U.S. 78, 86-88 (1944)). See 42 U.S.C.A. §

2000cc(b)(2) (“Nondiscrimination”).

[FN54]. Smith, 494 U.S. at 879. Laws explicitly targeting or regulating the form of group worship are not neutral. See Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994) (holding unconstitutional borough's attempt to impede church's ability to hold tent revival meetings in baseball park). Cf. Small v. Lehman, 98 F.3d 762, 767-68 (3d Cir. 1996) (“The failure to provide otherwise available facilities may therefore be, depending on whether it is compelled, as substantial a burden on that right as would the removal of pertinent facilities from actual congregational worship. It may meaningfully bar their ability to express adherence to their faith.”).

[FN55]. Smith, 494 U.S. at 880, 884-85. The Court described Sunday closing laws, the Selective Service System, the Social Security program, and the income tax system as “generally applicable regulatory law(s).” Id. at 880, 896-97. See 42 U.S.C.A. § 2000cc(a)(2)(C) (“individualized assessments”); infra notes 134-55 and accompanying text.

[FN56]. Smith, 494 U.S. at 881. See also infra notes 65-68, 365 and accompanying text (discussing hybrid rights).

[FN57]. See infra notes 134-55, 262-326 and accompanying text.

[FN58]. 508 U.S. 520 (1993).

[FN59]. Id. at 532; see also id. at 533-40.

[FN60]. See infra notes 262-95 and accompanying text.

[FN61]. City of Hialeah, 508 U.S. at 542; see also id. at 542-46.

[FN62]. See infra notes 151-52 and accompanying text.

[FN63]. Analyzing federal court decisions, Professor Tuttle argues that “(f)aced with religious institutions' claims to relief from land use regulations, courts took one of two paths to avoid overturning administrators' decisions. Some courts simply found that the zoning restriction placed no burden on the religious community's free exercise right.” Tuttle, supra note 34, at 871. He further argues that “(e)ven where federal courts were willing to concede, if only for the sake of argument, that a zoning ordinance substantially burdened the religious interests of a congregation, the courts typically found that the zoning ordinance furthered a compelling governmental interest that could not be achieved through less restrictive means.” Id. at 874.

[FN64]. See Godshall, supra note 21, at 1568-69; Tuttle, supra note 34, at 876 (“Religious institutions have fared better in state court land use decisions . . . .”). At least one state's statutes do not give municipalities zoning power over churches, except for safety regulations. See Mo. Rev. Stat. § 89.020 (2000); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451, 454 (Mo. 1959).

[FN65]. 840 P.2d 174 (Wash. 1992) (landmark law violated church's free exercise rights because it was not a neutral law of general applicability, it involved a situation of “hybrid rights,” and the government asserted no compelling interests). See also Russell S. Bonds, Comment, First Covenant Church v. City of Seattle: The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions, 27 Ga. L. Rev. 589 (1993).

[FN66]. 499 U.S. 901 (1991). The Supreme Court of Washington had previously concluded that the ordinance violated the church's federal and state free exercise rights under the Sherbert v. Verner, 374 U.S. 398 (1963), analysis. First Covenant Church of Seattle v. City of Seattle, 787 P.2d 1352 (Wash. 1990).

[FN67]. First Covenant, 840 P.2d at 182 (citations omitted). For a detailed discussion about religious architecture and activity as religious expression, see Sarah J. Gralen Rous, Comment, Why Free Exercise Jurisprudence in Relation to Zoning Restrictions Remains Unsettled After Boerne v. Flores, 52 SMU L. Rev. 305, 322-28 (1999). See generally Thomas Pak, Free Exercise, Free Expression, and Landmarks Preservation, 91 Colum. L. Rev. 1813 (1991) (discussing religious architecture as expression deserving of First Amendment protection); Simon J. Santiago, Zoning and Religion: Will the Religious Freedom Restoration Act of 1993 Shift the Line Toward Religious Liberty?, 45 Am. U. L. Rev. 200, 233 (1995) (arguing that under the hybrid rights doctrine, "claimants who are able to assert other constitutional protections can still argue the applicability of the compelling interest test during the post-Smith era of free exercise jurisprudence").

[FN68]. The Court "eschew(ed) the 'uncertainty' of Smith," and rested its decision on state constitutional grounds as well. First Covenant Church v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992). Likewise, the Eighth Circuit has reversed summary judgment against a church on its free exercise claim based on the hybrid rights theory. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991).

[FN69]. First Covenant, 840 P.2d at 181-82. Similarly, two justices of the Supreme Court of Indiana argued that a church could prove a hybrid rights claim in its challenge to a condemnation proceeding based on related freedom of association grounds. City Chapel Evangelical Free Church v. City of S. Bend, 744 N.E.2d 443, 453 (Ind. 2001). Two others simply rejected the hybrid rights principle, at least when based on freedom of association claims. Id. at 454 (Shepard, J., concurring in part and dissenting in part); id. at 456 (Boehm, J., dissenting). The fifth did not opine on the matter. Id. at 455 (Sullivan, J., dissenting).

[FN70]. See, e.g., Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999) ("Certainly, the Association has not shown that its potential customers have a free exercise right to be buried in a Catholic cemetery close to their homes."); First Assembly Church of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 423 (11th Cir. 1994) ("Even if it is assumed for the sake of argument that sheltering the homeless is a central, essential element of the Christian religion, the fact still remains that the Naples ordinances are neutral and of general applicability."); Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 953 P.2d 1315, 1347 (Haw. 1998) ("It is simply insufficient that Abbot Ki felt that the property chosen would be convenient for parking, beautiful, or even 'holy.' The Temple cannot force the City to zone according to its religious conclusion that a particular plot of land is 'holy ground."' (emphasis added, citations omitted)).

[FN71]. See Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983); State v. Cameron, 498 A.2d 1217, 1226 (N.J. 1985) (Clifford, J., concurring) (minister using his home to hold a one-hour religious service each week because congregation "cannot afford to rent a location for its services").

[FN72]. See, e.g., Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 879 (N.D. Ill. 1996); City Chapel Evangelical Free Church, 744 N.E.2d at 456-57; Haven Shores Cmty. Church v. City of Grand Haven, No. 00-175 (W.D. Mich. filed Dec. 21, 2000) (consent judgment).

[FN73]. See, e.g., In re Robert Poulson, Decision and Order of the Maui Planning Comm'n, Case No. SUP 2 990016 (Haw. Aug. 20, 2001). Cf. Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824 (10th Cir. 1988) ("The Church makes only a vague reference to a preference for a pastoral setting, but such is of no con-

sequence to this analysis."); Cam v. Marion County, 987 F. Supp. 854 (D. Or. 1997) (church holding services in agricultural building).

[FN74]. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (explaining that "one of the principal forms of devotion (of the Santeria faith) is an animal sacrifice"); Town v. State ex rel. Reno, 377 So. 2d 648, 650 (Fla. 1979) (noting that "the church was a religion within the first amendment, that the petitioner sincerely subscribed to the beliefs of the church, and that the use of cannabis was an integral part of the religion"); State ex rel. Swann v. Pack, 527 S.W.2d 99, 106 (Tenn. 1975) (explaining that snake handling is meant to "confirm the Word" in "the interest of an accurate and comprehensive statement of the beliefs of this religious group and its admittedly unusual ritual"). See Shelley Ross Saxer, Zoning Away First Amendment Rights, 53 Wash. U. J. Urb. & Contemp. L. 1, 8 n.34 (1998) (noting that "(c)lashes between zoning authorities and religious groups commonly have involved Jehovah's Witnesses, Orthodox Jews, and Hari Krishnas").

[FN75]. An argument frequently heard against religious land uses is that their mission has grown in modern times to include uses not traditionally found at places of worship such as homeless shelters and soup kitchens. A Michigan court, citing the United States Supreme Court, addressed this concern:
Societal needs change over time and the ways in which churches respond to those needs are "a means by which a religious community defines itself." . . . It is substantially burdensome to limit a church to activities and programs that are commonly practiced by other churches rather than allowing it to follow its faith even in unique and novel ways.Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals, 544 N.W.2d 698, 704-05 (Mich. Ct. App. 1996) (citing Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)).
[FN76]. City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (striking down RFRA as unconstitutional).

[FN77]. Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 Fordham L. Rev. 883, 896 (1994).

[FN78]. 42 U.S.C.A. § 2000bb-1(b) (West Supp. 2001); Williamson, supra note 21, at 123-28 nn.118-51 (discussing RFRA in the context of historic preservation laws).

[FN79]. 42 U.S.C.A. § 2000bb(b). At least two church zoning cases were determined under RFRA: Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996), and W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994).

[FN80]. City of Boerne, 521 U.S. at 520-27.

[FN81]. Id. at 532-35.

[FN82]. Id. at 532.

[FN83]. Id. at 536-37 (Stevens, J., concurring). Stevens' argument has failed to convince at least three courts of appeals that have examined the issue of exemptions for religious institutions in the land use context. See infra notes 461-500 and accompanying text.

[FN84]. City of Boerne, 521 U.S. at 545 (O'Connor, J., dissenting).

[FN85]. Id. at 546-47 (O'Connor, J., dissenting).

[FN86]. See, e.g., Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. (July 14, 1997); Protecting Religious Freedom after Boerne v. Flores (II): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (Feb. 26, 1998); Protecting Religious Freedom after Boerne v. Flores (III): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (Mar. 26, 1998).

[FN87]. S. 2148, 105th Cong. (1997); H.R. 4019, 105th Cong. (1997).

[FN88]. H.R. 1691, 106th Cong. (1999).

[FN89]. See, e.g., House Comm. on the Judiciary, Religious Liberty Protection Act of 1999, H.R. Rep. No. 106-219, at 40-42 (1999) (additional dissenting views); Religious Liberty: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 41-51 (June 23, 1999) (statement of Christopher Anders, Legislative Counsel, ACLU).

[FN90]. See infra notes 381-93 and accompanying text.

[FN91]. 146 Cong. Rec. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch).

[FN92]. 146 Cong. Rec. S6688 (daily ed. July 13, 2000) (statement of Sen. Kennedy). Opponents of the Act included the National Trust for Historic Preservation, the National League of Cities, the National Association of Towns and Townships, and the National Association of Counties. L. Cheryl Runyon et al., Religious Land Use--State and Federal Legislation, NCSL State Legis. Rep., Dec. 2000, at 6.

[FN93]. See supra notes 86-90 and accompanying text.

[FN94]. 146 Cong. Rec. E1564 (2000).

[FN95]. Id.

[FN96]. 146 Cong. Rec. S7779 (2000); 146 Cong. Rec. H7190 (2000).

[FN97]. See Statement by the President, Office of the Press Secretary (Sept. 22, 2000) (“Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society.”).

[FN98]. See generally Rous, supra note 67, at 329-31.

[FN99]. First Covenant Church v. City of Seattle, 840 P.2d 174, 186-88 (Wash. 1992).

[FN100]. City Chapel Evangelical Free Church v. City of S. Bend, 744 N.E.2d 443, 454 (Ind. 2001) (holding protections under Indiana Constitution broader than federal Free Exercise Clause). See also Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (holding that landmark designation of portions of a church--including the altar--violated Article 2 of the Declaration of Rights of the Massachusetts Constitution).

[FN101]. See, e.g., Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 864 (Minn. 1992) ; Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000); State v. Miller, 549 N.W.2d 235, 239 (Wis. 1996). See Tuttle, supra note 34, at 876 n.127.

[FN102]. See Ariz. Rev. Stat. §§ 41-1493 to 41-1493.02 (2000); Conn. Gen. Stat. § 52-571b (2001); Fla. Stat. §§ 761.01 to 761.05 (2000); Idaho Code §§ 73-401 to 73-404 (2000); 775 Ill. Comp. Stat. 35/1 to 35/99 (West 1998); N.M. Stat. Ann. §§ 28-2-1 to 28-2-5 (2000); Okla. Stat. 51 §§ 251-58 (2000); R.I. Gen. Laws §§ 42-80.1-1 to 42-80.1-4 (2001); S.C. Code §§ 1-32-10 to 1-32-60 (2000); Tex. Civ. Prac. & Rem. §§ 110.001 to 110.012 (1999). Alabama has incorporated RFRA into its constitution. Ala. Const. amend. 622.

[FN103]. Of course, when assemblies are discriminated against because of their religious nature, Equal Protection interests also come into play. See 42 U.S.C.A. § 2000cc(2)(b)(1) (West Supp. 2001) ("Equal terms"); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471 (8th Cir. 1991) ("Under the equal protection clause we must consider whether the City has a rational basis to differentiate between the Church and the entities it permits in the C-3 zone.").

[FN104]. However, reducing such standards to statutory text is no guarantee of consistent application. See Marc-Olivier Langlois, Note, The Substantial Burden of Municipal Zoning: The Religious Freedom Restoration Act as a Means to Consistent Protection for Church-Sponsored Homeless Shelters and Soup Kitchens, 4 Wm. & Mary Bill Rts. J. 1259, 1272-78 (1996) (comparing W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 546 (D.D.C. 1994), with Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995); both cases analyzing similar actions under RFRA)). Inconsistent application of the "substantial burden" requirement seems a certainty in the RLUIPA context as well. Compare Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 188 (D. Conn. 2001) ("'Substantial burden' has been defined or explained in various ways by the courts."), with Elsinore Christian Ctr. v. City of Lake Elsinore, No. 01-4842, slip op. at 23 (C.D. Cal. July 12, 2001) ("The Church claims that zoning restrictions have prevented it from moving to the one suitable, available building in downtown Lake Elsinore, and it suffers severe parking problems at its present location. The parking problems are particularly acute to elderly Church members, and those with disabilities. These 'sound' like substantial burdens.").

[FN105]. Mike Lewis, Sims Lifts Rural Building Ban, Seattle Post-Intelligencer, July 21, 2001, at B1. See generally Laycock, supra note 36, at 756 ("These constituencies start from the premise that the community should have a strong voice--many of them clearly believe the community should have a veto--in the development of every parcel of land, and that any claims of liberty from the land owner involve only property rights, which are entitled to little protection.").

[FN106]. Reid Forgrave, Sims Vetoes Rural Limits, Lifts Growth Moratorium, Seattle Times, July 21, 2001, at B1 (quoting King County Councilman Rob McKenna).

[FN107]. Complaint, No. 00-175 (W.D. Mich. filed Mar. 10, 2000).

[FN108]. Id. (consent judgment entered Dec. 20, 2000).

[FN109]. RLUIPA's opponents often criticize it as giving religious institutions a "blank check" when it comes to land use, without acknowledging that it allows governments to regulate such use in furtherance of a compelling interest. See, e.g., Veronique Pluviose-Fenton, NLC Compiles Criteria for a Successful RLUIPA Challenge, Nation's Cities Wkly., Apr. 2, 2001, at 13 ("Under RLUIPA, religious facilities would be effectively immune from local zoning restrictions . . . ."); Stuart Meck, Religious Land Use and Institutionalized Persons Act, Zoning News, Jan. 2001 ("While the legislative intent of the law was not to exempt religious land uses from local zoning and historic landmarking regulations, says Autumn Rierson, assistant general counsel for the National Trust for Historic Preservation in Washington, D.C., 'we think that this is what is going to happen in practice."'). In

reality, the legislation does not provide a religious assembly with immunity from zoning regulation. If the religious claimant cannot demonstrate that the regulation places a substantial burden on sincere religious exercise, then the claim fails without further consideration. If the claimant is successful in demonstrating a substantial burden, the government will still prevail if it can show that the burden is an unavoidable result of its pursuit of a compelling governmental objective. 146 Cong. Rec. S6688 (daily ed. July 13, 2000) (statement of Sen. Hatch).

[FN110]. See Langlois, supra note 104, at 1283-87 (discussing applicability of building and safety regulations and common law nuisance actions under RFRA); Saxer, supra note 74, at 88-108; Saxer, supra note 29, at 509-10 (arguing for nuisance law as a remedy and alternative to zoning regulation).

[FN111]. See generally Tuttle, supra note 34 (arguing that free speech and equal protection analyses represent better approaches to protecting religious land uses than exemptions based on the Free Exercise Clause or RLUIPA).

[FN112]. 42 U.S.C.A. § 2000cc-5(7)(B) (West Supp. 2001). See also Godshall, supra note 21, at 1567 (discussing the difficulty of distinguishing between secular and religious activity).

[FN113]. For a critical analysis of City of Lakewood, see Thomas S. Counts, Comment, Justice Douglas' Sanctuary: May Churches be Excluded from Suburban Residential Areas?, 45 Ohio St. L.J. 1017 (1984).

[FN114]. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983) (“There is no evidence that the construction of Kingdom Hall is a ritual, a ‘fundamental tenet,’ or a ‘cardinal principle’ of its faith.”).

[FN115]. 42 U.S.C.A. § 2000cc-5(7)(B).

[FN116]. See generally Laycock, supra note 36, at 756 (“In every major religious tradition--Christian, Jewish, Muslim, Buddhist, Hindu, whatever-- communities of believers assemble together, at least for shared rituals and usually for other activities as well. Churches cannot function without a physical space; creation of a church building is a core First Amendment right.”).

[FN117]. 42 U.S.C.A. § 2000cc-5(7)(A) (“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”).

[FN118]. See Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1237-38 (E.D. Va. 1996) (applying RFRA).

[FN119]. See Mack v. O'Leary, 80 F.3d 1175, 1178 (7th Cir. 1996) (collecting cases).

[FN120]. See, e.g., Articles of Religion ¶ XIV, Book of Discipline: Doctrines, Character, and Ritual of the Free Methodist Church (1993), available at http://www.freemethodistchurch. org/PDF%Files/Resources/Book% of20Discipline/Chapter%20/520Pages%207_22.pdf (“The church is created by God. It is the people of God. Christ Jesus is its Lord and Head. The Holy Spirit is its life and power. It is both divine and human, heavenly and earthly, ideal and imperfect. It is an organism, not an unchanging institution. It exists to fulfill the purposes of God in Christ.”); Report of the Baptist Faith and Message Study Committee to the Southern Baptist Convention ¶ VI (2000), available at http://sbc.net/default.asp?url=bfam_2000.html (“A New Testament church of the Lord Jesus Christ is an autonomous local congregation of baptized believers, associated by covenant in the faith and fellowship of the gospel; observing the two ordinances of Christ, governed by His laws, exercising the gifts,

rights, and privileges invested in them by His Word, and seeking to extend the gospel to the ends of the earth."); Mission Statement of the Reformed Church in America, at http://www.rca.org/welcome/vision.html ("The Reformed Church in America is a fellowship of congregations called by God and empowered by the Holy Spirit to be the very presence of Jesus Christ in the world. Our shared task is to equip congregations for ministry--a thousand churches in a million ways doing one thing--following Christ in mission, in a lost and broken world so loved by God."). Not all commentators agree. See Steven P. Eakman, Note, Fire and Brownstone: Historic Preservation of Religious Properties and the First Amendment, 33 B.C. L. Rev. 93, 149 (1991) (arguing that "some church actions are of a secular nature").

[FN121]. For a discussion of the "Church Autonomy" doctrine, see Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts over Religious Property, 98 Colum. L. Rev. 1843 (1998).

[FN122]. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) ("This form of religious activity (hand distribution of religious tracts) occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion.").

[FN123]. Thomas v. Rev. Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981).

[FN124]. 42 U.S.C.A. § 2000cc-5(5) (West Supp. 2001) ("The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.").

[FN125]. Id. § 2000cc(a).

[FN126]. Id. § 2000cc(a)(2).

[FN127]. Id. § 2000cc-5(4) ("The term 'government'--(A) means--(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law; and (B) for the purposes of sections 4(b) and 5, . . . includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.").

[FN128]. Id. § 2000cc(a)(1). See Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (arguing that strict scrutiny "is strict in theory, but fatal in fact"); Laurence H. Tribe, American Constitutional Law § 16-6 at 1451-54 (2d ed. 1988) (discussing strict scrutiny analysis in the Equal Protection context).

[FN129]. 42 U.S.C.A. § 2000cc-2(b). See infra notes 164-221 and accompanying text.

[FN130]. 42 U.S.C.A. § 2000cc-2(b). See infra notes 222-61 and accompanying text.

[FN131]. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[FN132]. See infra notes 349-460 and accompanying text.

[FN133]. 42 U.S.C.A. § 2000cc(a)(2)(C).

[FN134]. Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[FN135]. Id. at 882.

[FN136]. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 381 (1990).

[FN137]. None of the examples used by the Court in Smith, 494 U.S. at 879-80, are similar to the individualized nature of variance, special use, and rezoning procedures inherent in zoning codes. Rather, land use regulations are more analogous to the Court's description of the unemployment compensation procedures at issue in Sherbert v. Verner, 374 U.S. 398 (1963), Thomas v. Review Bd., 450 U.S. 707 (1981), and Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987): "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." Smith, 494 U.S. at 884. See McQuillin, supra note 24, at 489 ("Where the use of property for church purposes requires a special use permit and all conditions for its issuance are met, denial of the permit is an infringement upon the right to freedom of religion"); Laycock, supra note 36, at 767-69 (arguing that "(l)and use regulation is among the most individualized and least generally applicable bodies of law in our legal system"); Santiago, supra note 67, at 232 (arguing that "laws containing a system of exemptions are still subject to the compelling interest test when such laws substantially burden religion"); John M. Smith, Note & Comment, "Zoned for Residential Uses"--Like Prayer? Home Worship and Municipal Opposition in LeBlanc-Sternberg v. Fletcher, 2000 BYU L. Rev. 1153, 1158 (2000) (arguing that "(b)ecause (Smith) only applies to neutral rules of general applicability, it may not even reach land use laws. . . . (S)trong evidence suggests that zoning decisions are particularized determinations").

[FN138]. "Not In My Back Yard." Professor Laycock reasons that churches, which generally have a small, stable customer "base" instead of a broad range of consumers that a grocery store or theater may have, are more susceptible to NIMBY reaction because "(t)he large majority of the neighboring population confidently expects never to attend the proposed new church." Laycock, supra note 36, at 759-60. See also Saxer, supra note 29, at 509 ("When religious uses serve people from outside the local community, one of the reasons for favoring religious land use--accessible and convenient service to the religious organization's members--disappears.").

[FN139]. Smith, 494 U.S. at 884. See generally Reynolds, supra note 38, at 784-809 (arguing that unchecked discretion in special use permit procedures is a "particularly pernicious problem" in the context of religious uses); Rous, supra note 67, at 326-28 (arguing that "zoning ordinances are very similar to unemployment compensation . . . because they are usually replete with provisions that allow for individual exceptions, typically in the form of non-conforming uses, special use permits, and variances").

[FN140]. Am. Friends of the Soc'y of St. Pius v. Schwab, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979).

[FN141]. Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 887 (D. Md. 1996) (applying compelling interest standard to church seeking an exemption from a historic preservation ordinance where other exemptions existed); Alpine Christian Fellowship v. County Comm'rs, 870 F. Supp. 991, 994 (D. Colo. 1994); First Covenant Church v. City of Seattle, 840 P.2d 174, 177 (Wash. 1992). Cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 363 (3d Cir. 1999) (applying strict scrutiny to police department's no-beards rule when exemptions were made for medical reasons); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 933 (6th Cir. 1991) (adopting the "individualized exemptions" exception to Smith); Rader v. Johnston, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (finding that state university's parietal rule was not a rule of general applicability where other exceptions existed). Although, as discussed herein, the better approach is to view such zoning determinations as involving individualized assessments, not all lower courts agree. See First Assembly of God

of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 423 (11th Cir. 1994); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990).

[FN142]. First Covenant Church v. City of Seattle, 840 P.2d 174, 181 (Wash. 1992). Although the First Covenant Church majority distinguished St. Bartholomew's Church on the basis of several factual differences, 840 P.2d at 181, the concurrence more accurately stated that the Second Circuit's reasoning was simply wrong. 840 P.2d at 190 (Utter, J., concurring).

[FN143]. First Covenant Church, 840 P.2d at 180-81. See Rous, supra note 67, at 328-29 (arguing that zoning ordinances are not neutral).

[FN144]. 42 U.S.C.A. § 2000cc(a)(2)(C) (West Supp. 2001) (emphasis added).

[FN145]. St. Bartholomew's Church, 914 F.2d at 354-55; Cornerstone Bible Church, 948 F.2d at 472 (requiring an "anti-religious purpose"). See also Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 403 (6th Cir. 1999) (holding that city's refusal to rezone property for use as a Catholic cemetery was a neutral law of general applicability); First Assembly of God, 20 F.3d at 423 (holding that regulations which apply to all group homes are neutral and generally applicable).

[FN146]. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (emphasis added).

[FN147]. Sherbert, 374 U.S. at 404 (quoting Braunfeld, 366 U.S. at 607 (emphasis added)).

[FN148]. See, e.g., Marks v. City Council, 883 F.2d 308, 309-10 (4th Cir. 1989) (city council decision based on community opposition to fortune telling including, inter alia, statement that resident was opposed "because God is opposed to it"); Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1523 (N.D. Ala. 1990) ("Commissioner Davis voted the 'will of the people' regardless of other evidence and was swayed primarily, if not solely, by the voiced opposition."); Church of Jesus Christ of Latter-Day Saints v. Planning Bd., 687 N.Y.S.2d 794, 795 (N.Y. App. Div. 1999) ("(G)eneralized community objection, without more, is an improper basis for denial of a special use permit."). Cf. Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (holding that statutory scheme for the granting of religious solicitation certificates that "involves appraisal of facts, the exercise of judgment, and the formation of an opinion . . . is a denial of liberty protected by the First Amendment . . .").

[FN149]. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[FN150]. Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

[FN151]. See, e.g., W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 541 (D.D.C. 1994) ("Special exceptions are another form of administrative relief that may be granted by the BZA. Special exceptions are granted only in situations specified by the zoning laws and only to the extent the BZA can make the necessary factual findings set forth in the zoning laws. Section 3108.1 authorizes the BZA to grant special exceptions where, 'in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the Zoning Regulation and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions

specified in this title . . .' 11 D.C.M.R. § 3108.1.").

[FN152]. See, e.g., W. Presbyterian Church, 862 F. Supp. at 541 n.2 ("A variance is a form of administrative relief granted in response to specific requests for changes in the zoning plan. . . . Variances are granted where 'the strict application of any regulation adopted under D.C. Code §§ 5-413 to 5-432 (1981) would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship on the owner of the property . . . provided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.' 11 D.C.M.R. § 3107.2.").

[FN153]. 42 U.S.C.A. § 2000cc(a)(2)(C) (West Supp. 2001).

[FN154]. Young, supra note 37, at § 21.13 (quoting Twin County Recycling Corp v. Yevoli, 688 N.E.2d 501, 502 (N.Y. 1997)). See also 83 Am. Jur. 2d Zoning & Planning § 974 (1992).

[FN155]. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537, 568 (1993) (quoting Smith, 494 U.S. at 884).

[FN156]. See infra notes 405-43 and accompanying text.

[FN157]. See infra note 441 and accompanying text (discussing M. Stern testimony). See also United States v. Grassie, 237 F.3d 1199, 1209-10 n.7 (10th Cir. 2001) (citing Stern testimony to show "the enormous impact that religion has on commerce and channels of commerce in this country, with houses of worship filling a central economic and animating role," and that this "proposition is self-evident to an informed observer of this nation").

[FN158]. See, e.g., Grassie, 237 F.3d at 1208-11 & 1209-10 n.7 ("Religion and, in particular religious buildings actively used as the site and dynamic for a full range of activities, easily falls within" the commerce power.).

[FN159]. United States v. Lopez, 514 U.S. 549, 556, 559 (1995).

[FN160]. See, e.g., Camps Newfound/Owatonna, Inc. v. City of Harrison, 520 U.S. 564, 586 (1997) ("(A)lthough the (Christian Scientist) summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.").

[FN161]. 42 U.S.C.A. § 2000cc(a)(2)(B) (West Supp. 2001). See Memorandum of Law of Intervenor United States of America In Support of the Constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 at 7-13, Unitarian Universalist Church v. City of Fairlawn, No. 00-3021 (N.D. Ohio filed Apr. 30, 2001) (on file with authors).

[FN162]. 42 U.S.C.A. § 2000cc(a)(2)(A).

[FN163]. See Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981).

[FN164]. 42 U.S.C.A. § 2000cc(a)(1).

[FN165]. Id. § 2000cc-5(4) ("The term 'government' (A) means (i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or

official of an entity listed in clause (i); and (iii) any other person acting under color of State law; and (B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.").

[FN166]. Id. § 2000cc-5(7).

[FN167]. See generally Godshall, supra note 21, at 1568-71 (arguing that courts have both ignored and narrowly construed the Free Exercise Clause in the zoning context: "The question remains, however, whether this reading of the free exercise clause is consistent with the Supreme Court's free exercise doctrine."); Langlois, supra note 104, at 1266-67 (noting that courts "avoid () Sherbert's compelling interest test by finding that the regulations did not substantially burden the free exercise of religion"); id. at 1269-72 (examining substantial burden cases).

[FN168]. Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (emphasis added) (citations omitted).

[FN169]. See Grosz v. City of Miami Beach, 721 F.2d 729, 736 (11th Cir. 1983) ("(I)t is clear that when the government totally precludes religious conduct by imposing criminal sanctions, the burden weighs at its heaviest."); Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 181 (D. Conn. 2001) ("(P)laintiffs presented testimony that some participants in the prayer group meetings stopped attending the sessions out of fear that they would be arrested by town officials. This testimony was not refuted by defendants and is sufficient to provide evidence of a chilling effect on plaintiffs' right to associate, as well as their constitutional right to freedom of religion.").

[FN170]. See, e.g., Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 880 (N.D. Ill. 1996) ("The impact is not upon the content of religious practices but only upon where that religion may be practiced."). But see Murphy, 148 F. Supp. 2d at 188-89 ("The Court finds that the allegation that people are afraid to attend a prayer group meeting because they fear being arrested is a substantial burden (under RLUIPA) that the defendants have imposed on the prayer group participants.").

[FN171]. Grosz, 721 F.2d at 739. The court decided Grosz under a "three-part test"--that (1) The government regulation must regulate religious conduct, not belief, (2) the law must have a secular purpose and a secular effect, and (3) once those two threshold tests are met, the court balances the competing governmental and religious interests. Id. at 733-34. This has presumably been superseded by Smith and City of Hialeah, but applied again by a district court in Daytona Rescue Mission, Inc. v. City of Daytona Beach. 885 F. Supp. 1554 (M.D. Fla. 1995). See Saxer, supra note 29, at 539 n.239 (noting that "the balancing portion of the Grosz test appears to convert the Sherbert compelling interest test into a balancing exercise using religious burden and state interests"). In addition to the uncertainty of the appropriate constitutional analysis, and when combined with Florida's RFRA, and the passage of RLUIPA, one cannot envy the position of a court in Florida facing a church-zoning challenge.

[FN172]. 896 F.2d 1221, 1224-25 (9th Cir. 1990).

[FN173]. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306 (6th Cir. 1983).

[FN174]. Id. at 306-07.

[FN175]. Id. at 307.

[FN176]. Id. at 306-07. Cf. Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1525 n.6 (N.D. Ala. 1990) (deciding not to attach any significance to the fact that the church has no fundamental

tenets or principle beliefs that require them to construct a place of worship on the particular site). RLUIPA does not require burdened religious practices to be "central." 42 U.S.C.A. § 2000cc-5(7)(b) (West Supp. 2001).

[FN177]. City of Lakewood, 699 F.2d at 306. See Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 82 So. 2d 880, 882 (Fla. 1955) ("(W)e do not agree that because of the merits of these activities it can be said that an infringement of the constitutional rights of the owner results if it is not allowed use of the property for such purposes in the midst of a section of the city which has been restricted . . . ."); Counts, supra note 113, at 1030 ("Although a church building merely may be the structure in which the congregation worships, the regulation of land use for a church building does affect where a congregation can worship, and depending on the extent of the regulation, whether the congregation can worship at all."); Tuttle, supra note 34, at 872 ("As an inquiry into the religious significance of the Kingdom Hall for the congregation, the court's analysis surely must be found wanting.").

[FN178]. See also Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990) (rejecting Boston Landmarks Commission's argument that "the design and placement of . . . the altar of the church is merely a secular question of interior decoration").

[FN179]. Compare Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1239 (E.D. Va. 1996), and Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995), with W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 546 (D.D.C. 1994), and Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals, 544 N.W.2d 698, 704 (Mich. Ct. App. 1996).

[FN180]. Keetch & Richards, supra note 44, at 729 (citing study finding that minority religions representing less than nine percent of the general population "were involved in over forty-nine percent of the cases regarding the right to locate a religious building at a particular site . . ."); Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 936 (1989) ("The law that has emerged thus far creates an intolerable risk of discrimination against unconventional religious practices and beliefs, and threatens to narrow the protection of religious liberty overall."); Saxer, supra note 74, at 8 ("Clashes between zoning authorities and religious uses have also become more prevalent as our society has moved from a relatively homogeneous Christian society to a community that encompasses diverse religious beliefs.").

[FN181]. Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283, 290-91 (4th Cir. 2000).

[FN182]. Boyajian v. Gatzunis, 212 F.3d 1, 8 (1st Cir. 2000) ("Certainly in the face of such evidence, the state's decision to give religion an assist in the local land-use planning process is consistent with the Supreme Court's holding in Amos that legislation isolating religious groups for special treatment is permissible when done for the "proper purpose" of alleviating a burden on the exercise of religion.").

[FN183]. LeBlanc-Sternberg v. Fletcher, 1996 U.S. App. LEXIS 31800, at *10-11 (2d Cir. Dec. 6, 1996) ("The amendments to the zoning regulations require the Village to allow such worship--an effective way of ensuring that the village permits the use of residential dwellings for worship.").

[FN184]. Cohen v. City of Des Plaines, 8 F.3d 484, 492 (7th Cir. 1993) ("By exempting churches (which themselves do not require a special use permit to operate) from the special use requirement in the operation of nursery schools and day care centers, the city has removed a burden to the free exercise of religion.").

[FN185]. See also 42 U.S.C.A. § 2000cc-3(g) (West Supp. 2001) ("Broad Construction--This Act shall be con-

strued in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.").

[FN186]. Id. § 2000cc-5(7)(B).

[FN187]. Id. § 2000cc-5(7)(A) (emphasis added).

[FN188]. See Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1524 (N.D. Ala. 1990) ("LDS has as an integral part of its faith the need to gather under one roof to express its strength in unity and to gain strength to express its individual faith."); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1239 (E.D. Va. 1996) ("(I)t is the gathering together as a community to share in the meal that constitutes the essence of their faith.").

[FN189]. See Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 879 (N.D. Ill. 1996) ("The site (sought by the church) is also at a very visible location, a matter of some interest to the Church."). See also City Chapel Evangelical Free Church v. City of S. Bend, 744 N.E.2d 443, 456-57 (Ind. 2001) (Boehm, J., dissenting) (congregation specifically desired to be "in the center of downtown"). See Laycock, supra note 36, at 761 ("To exclude new churches from commercial zones goes far to exclude them from the city, while allowing them to locate as of right in residential neighborhoods goes far to fool uninformed judges into believing that a complaining church has ample opportunity to locate.").

[FN190]. Locating in residential districts may be of such critical importance that the inability to do so may constitute a complete bar to religious exercise for Orthodox Jewish congregations. See Boyajian v. Gatzunis, 212 F.3d 1, 10 (1st Cir. 2000) ("(P)roximity to their houses of worship is for some groups a significant component of their religious practice. Orthodox Jews, for example, believe they are prohibited by the Torah, the Jewish Bible, from using automobiles on their Sabbath. They therefore must live within walking distance of a synagogue."); Young Israel Org. v. Dworkin, 133 N.E.2d 174, 176 (Ohio Ct. App. 1956) (stating that places of worship must be within walking distance of their homes); Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd., 552 A.2d 772, 773 (Pa. Commw. Ct. 1989) ("It is ironic that the Board denied a special exception to convert a property to religious use on the grounds of increased traffic flow to a group whose religion prohibits them from driving automobiles during their day of worship.").

[FN191]. Grosz v. City of Miami Beach, 721 F.2d 729, 731 (11th Cir. 1983). See generally Ann L. Wehener, Comment, When a House is Not a Home But a Church: A Proposal For Protection of Home Worship From Zoning Ordinances, 22 Cap. U. L. Rev. 491 (1993).

[FN192]. See supra note 73.

[FN193]. First Covenant Church v. City of Seattle, 840 P.2d 174, 182 (Wash. 1992) ("First Covenant claims, and no one disputes, that its church building itself 'is an expression of Christian belief and message' and that conveying religious beliefs is part of the building's function"); Angela C. Carmella, Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation Act and Architectural Review, 36 Vill. L. Rev. 401, 449 (1991); Robert L. Crewdson, Ministry and Mortar: Historic Preservation and the First Amendment after Barwick, 33 Wash. U. J. Urb. & Contemp. L. 137, 157 (1988); Pak, supra note 67, at 1817.

[FN194]. See Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1524 (N.D. Ala. 1990); Village Lutheran Church v. City of Ladue, 997 S.W.2d 506, 507 (Mo. Ct. App. 1999). Expansion

was also the motivating force behind the City of Boerne lawsuit. For a detailed description of the need for Saint Peter the Apostle's Catholic Church (the church at issue in Boerne) to accommodate a larger congregation, see Colin L. Black, Comment, The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis, 72 Tul. L. Rev. 1767, 1769-73 (1998).

[FN195]. First Assembly of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 422 (11th Cir. 1994) ("sheltering the homeless is an essential aspect of the Christian religion"); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1236 (E.D. Va. 1996) ("(F)eeding the poor constitutes a central tenet of the religion practiced at the six churches involved in the Meal Ministry."); Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1558 (M.D. Fla. 1995) ("housing the homeless and feeding the poor are central to their religion"); W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 544 (D.D.C. 1994) ("The plaintiffs maintain that ministering to the needy is a religious function rooted in the Bible, the constitution of the Presbyterian Church (USA), and the Church's bylaws."); Young Israel Org., 133 N.E.2d at 176 (meeting rooms, club rooms, and class rooms). Cf. Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 401 (6th Cir. 1999) (Catholic cemetery). See generally Langlois, supra note 104, at 1259.

[FN196]. Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 572 (Mass. 1990). The plaintiffs filed suit after being denied an application to remove the church's altar and construct a new altar and rooms for pastoral counseling. Id.

[FN197]. See City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (archbishop applied for a building permit to enlarge the existing church building); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 353 (2d Cir. 1990) (church claimed that existing community house was inadequate for its purposes and impaired its "ability to carry on and expand the ministerial and charitable activities that are central to its religious mission"); Ramona Convent of Holy Names v. City of Alhambra, 21 Cal. App. 4th 10, 15 (Cal. Ct. App. 1993) (noting that the convent decided to sell part of its land in order to pay for repairs to the school's main building that was extensively damaged in an earthquake).

[FN198]. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983).

[FN199]. Mount Elliott, 171 F.3d at 404.

[FN200]. Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990) ("The burden on religious practice is not great when the government action, in this case the denial of a use permit, does not restrict current religious practice but rather prevents a change in religious practice.").

[FN201]. 480 U.S. 136 (1987).

[FN202]. Id. at 144.

[FN203]. Id.

[FN204]. First Assembly of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 420 (11th Cir. 1994) (homeless shelter was not a customary accessory use); Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983) (reasoning that although solicitation of neighbors to attend the religious services is "not integral to Appellee's faith", those "nonessential practices (do) further the religious conduct"); Lakewood, Ohio Congrega-

tion of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983) ("(B)uilding and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs."); Sexton v. Bates, 85 A.2d 833, 837-38 (N.J. Super. Ct. Law Div. 1951) ("The fact that a mikvah is devoted to the performance of certain religious rites by females does not constitute it a building set apart for public worship, as a church, in the common understanding of the meaning of that word."), aff'd sub nom. Sexton v. Essex County Ritualarium, 91 A.2d 162 (N.J. Sup. Ct. App. Div. 1952); Archdiocese of Portland v. County of Washington, 458 P.2d 682, 683 (Or. 1969); Coe v. City of Dallas, 266 S.W.2d 181, 182 (Tex. Civ. App. 1953).

[FN205]. Garbaty v. Norwalk Jewish Ctr., Inc., 171 A.2d 197, 200-01 (Conn. 1961) ("The chief activities taking place in the social and recreational portions of the premises are not services carried on as a business."); Synod of the Chesapeake, Inc. v. City of Newark, 254 A.2d 611, 613-14 (Del. Ch. 1969) ("(P)resent-day courts recognize that any contemporary church group, to be worth its salt, must necessarily perform non-religious functions such as using business machines for getting out letters and periodicals in order to reach its members. Accordingly, such activities may not be banned as unrelated to church ritual."); Corp. of the Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton, 448 P.2d 185, 189 (Idaho 1968) ("(T)he activities conducted on this field are an integral part of the Church program and are sufficiently connected with the church itself that the use of this property for recreation purposes is permissible."); Bd. of Zoning Appeals v. New Testament Bible Church, Inc., 411 N.E.2d 681, 685 (Ind. Ct. App. 1980) (recognizing that in Indiana "if one is entitled to build a church, he may not be denied the opportunity to build accessories as well"). See generally Saxer, supra note 29, at 519-25.

[FN206]. For the effect of RLUIPA on such discriminatory treatment, see infra notes 296-317 and accompanying text.

[FN207]. See Reynolds, supra note 38, at 811-14 (arguing that the Establishment Clause prevents municipalities from determining what uses are customary to a church).

[FN208]. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981). For a particularly sensitive application of this doctrine, see St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935, 938 (N.J. Super. Ct. Law Div. 1983) (acknowledging the importance of sanctuaries in Christian doctrine). That same New Jersey court later held that prohibiting a radio transmitter tower (used to broadcast religious messages) constituted a substantial burden. Burlington Assembly of God Church v. Zoning Bd. of Adjustment, 570 A.2d 495, 499 (N.J. Super. Ct. Law. Div. 1989). Cf. W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 547 (D.D.C. 1994) ("To regulate religious conduct (feeding the needy) through zoning laws, as done in this case, is a substantial burden on the free exercise of religion.").

[FN209]. Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1254 (Colo. 1973).

[FN210]. Badoni v. Higginson, 638 F.2d 172, 175 (10th Cir. 1980); Manybeads v. United States, 730 F. Supp. 1515, 1516 (D. Ariz. 1989). See Smith, supra note 137, at 1172 (recognizing the importance of "particular sacred locations").

[FN211]. Rathkopf & Rathkopf, supra note 24 at 20-4. See O'Brien v. City of Chicago, 105 N.E.2d 917, 921 (Ill. Ct. App. 1952) ("The City Council could not arbitrarily refuse to accept the dedication in a situation where such refusal was not reasonably required for the protection of the public health, safety, welfare and morals."); Cmty. Synagogue v. Bates, 136 N.E.2d 488, 496 (N.Y. 1956) ("(I)f the municipality has the unfettered power to say that the 'precise spot' selected is not the right one, the municipality has the power to say eventually which is the

proper ‘precise spot.”’); State ex rel. Synod of Ohio of United Lutheran Church v. Joseph, 39 N.E.2d 515, 525 (Ohio 1942) (“It was rather in pursuance of a general policy that no churches should be admitted to the residential district while sites in the business district were still available, and this we hold to be in violation of realtor's property rights . . . .”).

[FN212]. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983); Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983).

[FN213]. Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 189 (N.Y. 1983); First Covenant Church v. City of Seattle, 840 P.2d 174, 183 (Wash. 1992) (“The ordinances burden free exercise ‘administratively’ because they require that First Covenant seek the approval of a government body before it alters the exterior of its house of worship, whether or not the alteration is for a religious reason.”). But see Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 348 (2d Cir. 1990) (“It is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs.”).

[FN214]. Westchester Reform Temple v. Brown, 239 N.E.2d 891, 896 (N.Y. 1968) (“While the grounds offered by the commission to sustain its determination might justify the imposition of conditions requiring a modest increase in expenditures, these reasons cannot sustain the heavy financial burden placed upon the Temple.”); First Covenant Church, 840 P.2d at 183 (“(A) financial burden on religious activity, if too gross, may unconstitutionally infringe on free exercise.”); City of Sumner v. First Baptist Church, 639 P.2d 1358, 1362 (Wash. 1982) (“(A)lthough there is no fundamental tenet against compliance with building codes or zoning ordinances, the practical effect of their uncompromising enforcement would be to close down the church-operated school.”). See also Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990) (warning that an “onerous” financial burden “even if generally applicable, might effectively choke off an adherent's religious practices . . .”); Williamson, supra note 21, at 107 nn.278-85 (discussing the interest of churches to be free from the financial pressures of government regulation).

[FN215]. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (“(W)e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.”).

[FN216]. City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994) (“Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.”).

[FN217]. See Laycock, supra note 77, at 895; Saxer, supra note 74, at 76.

[FN218]. Sherbert v. Verner, 374 U.S. 398, 400 (1963).

[FN219]. Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1533 (N.D. Ala. 1990) (citing Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983)). See also Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 880 (N.D. Ill. 1996) (“Additional expense, at least so long as it is not an inflated expense not imposed upon most landowners, is not a substantial burden within the meaning of the RFRA or in the context of the First Amendment.”); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355-56 (2d Cir. 1990) (holding that depriving church of the ability to put property to lucrative commercial use is not a burden on reli-

gious exercise).

[FN220]. For example, the actions of the Seattle Landmarks Preservation Board reduced the First Covenant Church's property value from $700,000 to $400,000. First Covenant Church v. City of Seattle, 787 P.2d 1352, 1355 (Wash. 1990).

[FN221]. See Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals, 544 N.W.2d 698, 704 (Mich. Ct. App. 1996) ("The relocation of the shelter program would certainly create an economic burden for The Jesus Center, requiring the lease or purchase of another facility. . . . The Zoning Board's decision to require The Jesus Center to move its entire operation or relocate its shelter program apart from its worship facility constitutes a substantial burden under the RFRA.").

[FN222]. The potential threat to the compelling interest standard observed by Professor Laycock in the context of the Religious Freedom Restoration Act-- that RFRA may water down the test--may exist equally for RLUIPA. Laycock, supra note 77, at 901. However, since RFRA's application to the States was held unconstitutional in 1996, it is unclear whether this fear was justified.

[FN223]. 42 U.S.C.A. § 2000cc(b) (West Supp. 2001).

[FN224]. Id.

[FN225]. Id. § 2000cc(a)(1)(A).

[FN226]. Id. § 2000cc(a)(1)(B).

[FN227]. Sherbert v. Verner, 374 U.S. 398, 406 (1963). Black's Law Dictionary defines "compelling state interest" as "(o)ne which the state is forced or obliged to protect. . . . Term used to uphold state action in the face of attack grounded on Equal Protection or First Amendment rights because of serious need for such state action." Black's Law Dictionary 282 (6th ed.).

[FN228]. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[FN229]. First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992) (quotations, citations omitted). See also First Assembly Church of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 420 (11th Cir. 1994) ("great community distress over both health and safety concerns"); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1240 (E.D. Va. 1996) (opining that preventing "acts or threats of violence against neighbors" may constitute a compelling interest); Trinity Res., Inc. v. Township of Delanco, 842 F. Supp. 782, 788 (D.N.J. 1994) (discussing "a serious electric problem involving high voltage (that) created a safety hazard with in the building and for a large area beyond the building"); Langlois, supra note 104, at 1282 ("prevention of crime, noise, and litter are compelling municipal interests").

[FN230]. Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655, 663 (S.D.N.Y. 1984) ("Having determined that certain fire and safety-related regulations are, contrary to plaintiff's view, at issue here, I must conclude that public safety, health and welfare is at least one objective underlying the Town's interest in enforcing the challenged ordinance. Such an interest is of a magnitude to justify even substantial inroads on the free exercise of religion and clearly outweighs the indirect and seemingly remediable burden on plaintiff's religious liberty."); Mkt. St. Mission v. Bureau of Rooming & Boarding House Standards, 541 A.2d 668, 670 (N.J. 1988) ("The State's only interest in the Mission . . . is that the Mission's structures meet the gen-

eral requirements of public safety laws."); Antrim Faith Baptist Church v. Commonwealth, 460 A.2d 1228, 1231 (Pa. Commw. Ct. 1983) ("Even if the financial cost of these precautions ((e.g., fire safety)) be treated as the burden--albeit upon the church's budget rather than its conscience--the compelling state interest, protection of human life, is apparent."). Cf. Portage Township v. Full Salvation Union, 29 N.W.2d 297, 301 (Mich. 1947) (holding that "water, light and sanitation" requirements "cannot be said to be unrelated to the public health and welfare").

[FN231]. St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935, 939 (N.J. Super. Ct. Law Div. 1983) ("Plaintiffs agree that the shelter must comply with appropriate health and safety laws and regulations, including reasonable occupancy requirements.").

[FN232]. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) ("Renton has not used "the power to zone as a pretext for suppressing expression," but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning.").

[FN233]. See, e.g., City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc., 707 N.E.2d 53, 59 (Ill. Ct. App. 1998) ("Zoning ordinances and special uses are presumptively valid."); Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals, 544 N.W.2d 698, 704-05 (Mich. Ct. App. 1996) ("(W)e recognize that zoning regulations are a legitimate means to protect important property interests and accommodate competing uses of property within a community."); Holy Spirit Ass'n for the Unification of World Christianity v. Town of New Castle, 480 F. Supp. 1212, 1216 (S.D.N.Y. 1979) (finding simply that a zoning board's power to regulate land use is of "extreme significance").

[FN234]. 42 U.S.C.A. § 2000cc(a)(1)(A) (West Supp. 2001).

[FN235]. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 469 (8th Cir. 1991); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 305-08 (6th Cir. 1983); Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 82 So. 2d 880, 882 (Fla. 1955); Galfas v. Ailor, 57 S.E.2d 834 (Ga. App. 1950); Milwaukie Co. of Jehovah's Witnesses v. Mullen, 330 P.2d 5, 18 (Or. 1958).

[FN236]. Cornerstone Bible Church, 948 F.2d at 469; Congregation Cmty. v. City Council, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956) ("Furthermore, there is no evidence that the size of the lot has any substantial relation to the health, morals, safety, or general welfare of the community.").

[FN237]. City of Lakewood, 699 F.2d at 305; Bd. of Zoning Appeals v. Schulte, 172 N.E.2d 39, 43 (Ind. 1961); In re Application of Garden City Jewish Ctr., 155 N.Y.S.2d 523, 528 (N.Y. Sup. Ct. 1956) ("Noise and other inconveniences have been held to be insufficient grounds upon which to deny a permit to a church or a parochial school.") (citations and internal quotations omitted) (quoting Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 861 (N.Y. 1956)).

[FN238]. City of Lakewood, 699 F.2d at 305; Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1523 n.2 (N.D. Ala. 1990); Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 82 So. 2d 880, 882 (Fla. 1955) ("From testimony the chancellor was privileged to believe, the value of the surrounding property would 'definitely depreciate' . . . .").

[FN239]. Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990); Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 835 (N.Y. 1956) ("We know of no rule of law which requires that churches may only be established in sparsely settled areas."); 146 Cong. Rec. S6678, 6688 (daily ed. July 13, 2000) ("An example of this was seen recently when a city refused to allow the LDS Church to construct a temple simply because it was not in the 'aesthetic' interests of the community as set forth in a 'generally applicable' statute.").

[FN240]. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests. . . . The compelling interest standard that we apply once a law fails to meet the Smith requirements is not 'water(ed) . . . down' but 'really means what it says.' . . . Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

[FN241]. See Love Church v. City of Evanston, 671 F. Supp. 515, 519 (N.D. Ill. 1987) ("While traffic concerns are legitimate, we could hardly call them compelling. In any event, Evanston does not indicate how a church poses a greater traffic problem than, say, a funeral parlor."), vacated based on standing, 896 F.2d 1082 (7th Cir. 1990); State ex rel. Tampa, Fla., Co. of Jehovah's Witnesses, N. Unit, Inc. v. City of Tampa, 48 So. 2d 78, 79 (Fla. 1950) ("The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is lightest."); Young Israel Org. v. Dworkin, 133 N.E.2d 174, 181 (Ohio Ct. App. 1956) ("Many churches are like this one, in residential areas, where traffic is not heavy and where there are side streets and other facilities for parking.") (quoting City of Tampa, 46 So. 2d at 78).

[FN242]. Bd. of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 120 (Ind. 1954) ("The services of appellee are held on Friday evenings and Sunday afternoons at times when traffic is at its lowest ebb."); State ex rel. Synod of Ohio of United Lutheran Church v. Joseph, 39 N.E.2d 515, 524 ("Any perceptible increase in the traffic which might result from attendance at a church seating only 250 persons would occur mostly on Sunday mornings, a time when ordinary traffic would be greatly diminished, and any danger to children going to and from school entirely eliminated.").

[FN243]. Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990) ("The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance."); Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 201-02 (N.Y. 1986) (Meyer, J., dissenting) ("There is . . . an exception for summary administrative action when protection of public health or safety so requires . . . but landmark designations involve cultural and aesthetic considerations, not health or safety."); First Covenant Church v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992) ("Preservation ordinances further cultural and aesthetic interests, but they do not protect public health or safety."). Contra Grace Cmty. Church v. Town of Bethel, 622 A.2d 591, 596 (Conn. App. Ct. 1993) ("A city has undeniably important interests in protecting the character of its residential neighborhoods and in promoting the health, safety, and welfare of its citizens.") (quoting Husti v. Zuckerman Prop. Enters., Ltd., 508 A.2d 735, 738 (Conn. 1986)). In a non-religious context, the Supreme Court has described a city's interest in banning billboards for aesthetic reasons as only "sufficiently substantial" to justify a "time, place or manner" restriction on expression. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 807-08 (1984).

[FN244]. See, e.g., Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 468 (8th Cir. 1991) ("(T)he City's stated objective is to allow uses that generate economic activity . . . ."); Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (holding that "stimulat(ing) commercial activity" is a compelling interest); City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc., 749 N.E.2d 916, 928 (Ill. 2001) ("(A)ny noncommercial use of property located in the . . . corridor would have a negative effect on the commercial development of that corridor . . . ."); Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Bd. of Appeals, 182 N.E.2d 722, 726 (Ill. 1962). ("The second basis for denial of this special use is the detrimental effect of a church in a solid business block."). But see Love Church, 671 F. Supp. at 519 ("Evanston has not offered any reason why a church's noncommercial nature requires it to obtain special approval.").

[FN245]. See, e.g., City of Chicago Heights, 749 N.E.2d at 921; Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 2-5 (1998) (statement of John Mauck), available at http://www.house.gov/ judiciary/mauck.pdf.

[FN246]. Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 836 (N.Y. 1956) ("(I)t cannot seriously be argued that the decision of respondents denying this permit because of a loss of tax revenue is in furtherance of the general welfare."); Anshe Chesed Congregation v. Bruggemeier, 115 N.E.2d 65, 69 (Ohio App. 1953) ("No municipal corporation can justly refuse a permit to build a church only because the property will no longer be subject to taxation."); Jacobi v. Zoning Bd. of Adjustment, 196 A.2d 742, 745 (Pa. 1964) ("So universal is the belief that religious . . . institutions should be exempt from taxation that it would be odd indeed if we were to disapprove an action of the zoning authorities consistent with such belief and label it adverse to the general welfare.").

[FN247]. See supra note 229.

[FN248]. Jacobi, 196 A.2d at 745.

[FN249]. Columbus Park Congregation, 182 N.E.2d at 726 ("We are unable to see how the use as a church is more harmful to adjacent stores than a (dance hall, crematory, mausoleum or trade school).").

[FN250]. United States District Judge Robert B. Propst dismissed such a claim succinctly: "There are a number of exceptionally fine, well above average residential areas in municipalities in Jefferson County which have churches near them. The court cannot find from a preponderance of the evidence that the values of these residences are adversely affected by the proximity of churches." Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1526 n.7 (N.D. Ala. 1990). See Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981, 989 (N.Y. Sup. Ct. 1989) (holding that speculative fears of diminution of property values do not qualify as injury, let alone irreparable harm); Englewood v. Apostolic Christian Church, 362 P.2d 172, 177 (Colo. 1961) (McWilliams, J., concurring) ("The possible depressive effect on property values by the erection of a church in a residential zone is not in itself sufficient ground for denying a permit for construction of a church."); Diocese of Rochester, 136 N.E.2d at 835 ("Moreover, in view of the high purposes, and the moral value, of these institutions, mere pecuniary loss to a few persons should not bar their erection and use."); Rathkopf & Rathkopf, supra note 24, at 20-13 n.22 (collecting cases); 2 Robert M. Anderson, American Law of Zoning § 12.24 (1986).

[FN251]. State ex rel. Lake Drive Baptist Church v. Village of Bayside Bd. of Trs., 108 N.W.2d 288, 301 (Wis. 1961).

[FN252]. See Love Church v. City of Evanston, 671 F. Supp. 515, 519 (N.D. Ill. 1987) (“If pedestrians do not threaten the city's interest while walking to attend a show or a meeting, why should it be different when they are walking to attend a religious service?”).

[FN253]. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986) (requiring city to produce evidence relevant to the problem that the city addresses through its zoning ordinance); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 469 (8th Cir. 1991) (“Significantly, the City conceded that it had never conducted any studies of the effects of churches on commercial activity . . .”).

[FN254]. See, e.g., Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 469 (8th Cir. 1991) (“(T)he Church met the City's evidence with affidavits from owners of businesses in the C-3 zone who stated that Cornerstone Bible Church had no negative effects on the central business district.”).

[FN255]. Fed. R. Civ. P. 56.

[FN256]. Fed. R. Civ. P. 12(b)(6).

[FN257]. See Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1533 (N.D. Ala. 1990) (“State concerns can be addressed by restrictive covenants or court orders containing restrictions.”). See, e.g., State ex rel. Lake Drive Baptist Church v. Village of Bayside Bd. of Trs., 108 N.W.2d 288, 299 (Wis. 1961) (“The village chief of police testified that it would be a hazard, but it could be eliminated by a stop-and-go light, or stationing an officer.”).

[FN258]. W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 545 (D.D.C. 1994).

[FN259]. Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 190 (D. Conn. 2001).

[FN260]. Prince v. Massachusetts, 321 U.S. 158 (1944).

[FN261]. United States v. Lee, 455 U.S. 252 (1982).

[FN262]. 42 U.S.C.A. § 2(b)(1) (West Supp. 2001).

[FN263]. See generally Saxer, supra note 74. (“As Professor William Marshall points out, much of our modern Free Speech analysis was developed during the 1930s and 1940s in cases involving Jehovah's Witnesses' religious expression.”); Tuttle, supra note 34, at 892 (citing William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 Minn. L. Rev. 545, 562-64 (1983)). Religious speech is still speech entitled to equal protection under the Free Speech Clause. See Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981); Gedicks, supra note 36, at 931 (arguing that “the Speech Clause is the best template to use for the development of a newer free exercise doctrine”). Municipal ordinances that regulate church activity may also be unconstitutionally vague in defining prohibited activity. See Grayned v. City of Rockford, 408 U.S. 104 (1972); Michael W. Macloed-Ball, The Future of Zoning Limitations Upon Religious Uses of Land: Due Process or Equal Protection?, 22 Suffolk U. L. Rev. 1087, 1106-08 (1988).

[FN264]. In Smith, the Court held that when acts are prohibited only if engaged in for religious reasons, such prohibition violates the Free Exercise Clause. It uses the example of a law banning the “casting of statues that are to be used for worship purposes.” Employment Div. v. Smith, 494 U.S. 872, 877-78 (1990). This clearly prohibits the state from permitting the building of places of assembly such as lodges, clubs or theaters while deny-

ing a church the ability to do the same.

[FN265]. Roberts v. U.S. Jaycees, 468 U.S. 609, 617-29 (1984). See Gedicks, supra note 36, at 941-44 (“An analogous freedom of religious association under the Free Exercise Clause . . . could protect group religious exercise directly.”); Wehener, supra note 191, at 519-21 (arguing that the Court's freedom of association doctrine protects home worship).

[FN266]. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Love Church v. City of Evanston, 671 F. Supp. 515, 517 (N.D. Ill. 1987).

[FN267]. The following examples are ordinances that have been used to burden the religious exercise of the authors' clients.

[FN268]. See supra notes 107-08 and accompanying text.

[FN269]. Grand Haven, Mich., Grand Haven Zoning Ordinance § 40-144 (1991). The City agreed to a consent judgment acknowledging that the Ordinance “would not survive review under the Religious Land Use and Institutionalized Persons Act of 2000.” Haven Shores Cmty. Church v. City of Grand Haven, No. 00-175 (W.D. Mich. filed Dec. 21, 2000) (consent judgment).

[FN270]. Indianola, Iowa, Code of Ordinances, Zoning Regulations, ch. 165 (2001). See Tom Suk, Indianola Debates Church Move, Des Moines Reg., Feb. 27, 2001, at 5B (“The federal government coming in and telling a local government what to do is anathema to me, (Indianola Mayor Jerry) Kelley said.”).

[FN271]. Reidsville, Ga., Zoning Ordinance § 801 (Apr. 1976). After the threat of a lawsuit, the Reidsville City Council voted to grant Come As You Are Ministries an exemption from the zoning ordinance. See Come As You Are Fellowship, available at http://www.rluipa.com/cases/ ComeAsYouAre.html.

[FN272]. Congregation Kol Ami v. Abington Township, No. 01-1919, 2001 U.S. Dist. LEXIS 9690, at *14 (E.D. Pa. July 11, 2001) (holding that ordinance that does not allow places of worship to apply for special exception in a residential district violated plaintiffs' rights under the Equal Protection Clause, the Due Process Clause, and the First Amendment).

[FN273]. Id. at 13-14.

[FN274]. Id. at 11-13.

[FN275]. Employment Div. v. Smith, 494 U.S. 872, 878-80 (1990).

[FN276]. McDaniel v. Paty, 435 U.S. 618, 627-29 (1978).

[FN277]. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[FN278]. Id. at 534-35. See id. at 542 (“(T)he texts of the ordinance were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings.”).

[FN279]. W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 546 (D.D.C. 1994).

[FN280]. See, e.g., Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471 (8th Cir. 1991); Int'l

Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (holding that permitting "meeting halls" while prohibiting churches creates no constitutional infirmity); Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1525 (N.D. Ala. 1990); Love Church v. City of Evanston, 671 F. Supp. 515, 517-19 (N.D. Ill. 1987); Ellsworth v. Gercke, 156 P.2d 242, 242-43 (Ariz. 1942); Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Bd. of Appeals, 182 N.E.2d 722, 723 (Ill. 1962).

[FN281]. See supra notes 54, 58-62 and accompanying text.

[FN282]. See Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist, 508 U.S. 384 (1993).

[FN283]. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Love Church v. City of Evanston, 671 F. Supp. 515, 518-19 (N.D. Ill. 1987).

[FN284]. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (striking down ordinance prohibiting nudity at drive-in theaters based on desire to avoid traffic accidents as underinclusive, since other movie scenes may distract drivers as well). See also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986) (discussing underinclusiveness doctrine in the content of adult businesses); Cornerstone Bible Church, 948 F.2d at 470-71 ("(T)he factfinder should make such findings as will enable it to determine whether exclusion of churches from the C-3 zone is justifiable on the ground that a church displaces economic activity to a greater extent than the non-commercial uses the City has allowed in the zone.").

[FN285]. See, e.g., N. Shore Unitarian Soc'y, Inc. v. Village of Plandome, 109 N.Y.S.2d 803, 804 (N.Y. Sup. Ct. 1951).

[FN286]. See, e.g., Grosz v. City of Miami Beach, 721 F.2d 729, 740 (11th Cir. 1983) ("Government may regulate place and manner of religious expression as long as there is no content classification . . . ."). One commentator has argued that landmark laws are not content-neutral because they advance certain aesthetic interests over others. Angela C. Carmella, Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, 36 Vill. L. Rev. 401, 491 n.338 (1991).

[FN287]. 948 F.2d 464, 471 (8th Cir. 1991).

[FN288]. Id. at 468. Even under the "time, place, and manner" analysis, a municipality "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). Thus, prohibiting churches while permitting equivalent, nonreligious assembly uses may not pass constitutional muster.

[FN289]. Cornerstone Bible Church, 948 F.2d at 468.

[FN290]. See generally Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828-29 (1995). The Eighth Circuit seemed to lack confidence in its holding, however, stating that it has "lingering doubt as to whether the time, place and manner doctrine applies." Cornerstone Bible Church, 948 F.2d at 469.

[FN291]. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

[FN292]. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). Strict scrutiny is also implic-

ated under the Equal Protection Clause when a classification affects the exercise of fundamental rights. Zablocki v. Redhail, 434 U.S. 374, 383 (1978) ("Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required."). Clearly, the free exercise of religion is such a right.

[FN293]. City of Cleburne, 473 U.S. at 448.

[FN294]. Id.

[FN295]. Although the Court used rational basis review in City of Cleburne, the appropriate standard for reviewing discriminatory treatment in the church-zoning context is, again, strict scrutiny, since the discrimination is based on a suspect classification (religion), as well as on the exercise of fundamental rights (free exercise of religion). See Love Church v. City of Evanston, 671 F. Supp. 515, 517 (N.D. Ill. 1987) (holding that ordinance treated churches differently from community centers, schools, meeting halls, and theatres and therefore constituted discrimination based on religion, and thus subject to strict scrutiny); Macloed-Ball, supra note 263, at 1108-12. But see Cornerstone Bible Church, 948 F.2d at 471-72 (analyzing equal protection claim under rational basis review). Some state courts have explicitly adopted this view. Rathkopf & Rathkopf, supra note 24, at 20-5 n.7 (collecting cases); McQuillin, supra note 24, at 489 ("Likewise, a zoning ordinance requiring a special use permit to operate a church when it does not require such permits to operate community centers, meeting halls, and other establishment similarly situated is violative of the Equal Protection Clause of the Fourteenth Amendment.").

[FN296]. 42 U.S.C.A. § 2(b)(2) (West Supp. 2001) ("No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.").

[FN297]. Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views . . . .").

[FN298]. See supra notes 286-91 and accompanying text.

[FN299]. See supra notes 292-95 and accompanying text. See generally Frederick M. Gedicks, The Normalized Free Exercise Clause: Three Abnormalities, 75 Ind. L. J. 77, 105-13 (2000).

[FN300]. See Letter from Marci A. Hamilton, Thomas H. Lee Chair of Public Law, Benjamin N. Cardozo School of Law, Yeshiva University, to United States Senate (July 24, 2000), available at http://www.marcihamilton.com/rlpa/rluipa_ letter.htm (hereinafter Hamilton Letter) (stating that "there is little, if any, proof that churches have been the target of discrimination by local zoning boards"); Meck, supra note 109, at 4 ("RLUIPA 'doesn't address a specific form of discrimination,' (National Association of Counties assistant legislative director Stephanie) Osborn points out.").

[FN301]. Bruce Shoulson, Presentation to House Committee on the Judiciary, Subcommittee on the Constitution (July 14, 1998), available at http:// www.house.gov/judiciary/222494.htm.

[FN302]. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 419 (2d Cir. 1995). For a discussion on the history of the Village of Airmont's zoning ordinance at issue in the LeBlanc-Sternberg controversy, see Smith, supra note 137, at 1162-70.

[FN303]. Professor Laycock describes several other examples of such intolerance. Laycock, supra note 36, at 780-81.

[FN304]. Videotape: City of Grand Haven Councilman John Naser, City Council Meeting (Feb. 14, 2000) (on file with authors).

[FN305]. See supra note 5. Based on those neighbors' objections, the Maui Planning Commission denied Hale O Kaula church a special use permit to use an existing structure for religious worship purposes, explicitly ignoring RLUIPA's terms. Transcript of Hearing, In re Application of Robert Poulson, Case No. SUP 2 990016 (Haw. June 27, 2001) ("I also have a personal thing about this federal law (RLUIPA), because as an indigenous person of this island, the federal law has taken away all my rights, and I believe that in this decision the law should be made under the state land use codes and the county land use codes.") (statement of Commissioner Samuel Kalalau III)) (on file with authors).

[FN306]. Cf. LeBlanc-Sternberg, 67 F.3d at 429-31 (finding enough evidence to support jury verdict finding that village conspired to deny plaintiffs' civil rights and that the impetus of civic association to incorporate town and take control of zoning was anti-Hasidic animus).

[FN307]. 840 F.2d 293, 294 (5th Cir. 1988).

[FN308]. Id. at 302.

[FN309]. Marks v. City of Chesapeake, 883 F.2d 308, 309-10 (4th Cir. 1989).

[FN310]. Id. at 309.

[FN311]. Id. at 309-10.

[FN312]. Id. at 310.

[FN313]. Id. at 313. See supra note 285.

[FN314]. See Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1525-26 (N.D. Ala. 1990).

[FN315]. See Annysa Johnson, Worshippers Get Edge in Land Use, Milwaukee J. Sentinel, May 27, 2001, at 1A ("Residents in New Berlin oppose construction of a Buddhist temple in their 'Christian neighborhood,' and it is denied by the city for lack of a definitive plan."). Such discrimination also violates the due process clause. Marks v. City of Chesapeake, 883 F.2d 308, 311 (4th Cir. 1989) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985)).

[FN316]. See Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405-07 (6th Cir. 1999) (discussing the grandfathering of cemeteries belonging to other religious denominations in context of Equal Protection claim); Laycock, supra note 36, at 760.

[FN317]. Laycock, supra note 36, at 758 (quoting an anonymous Texas legislator as saying that "if the neighborhood associations came to believe that a Texas RFRA would let churches build in their neighborhoods--and especially if they came to believe that 'it means they can't keep black churches out of white neighborhoods'--the

bill would be dead").

[FN318]. 42 U.S.C.A. § 2000cc(b)(3)(A) (West Supp. 2001). The proximity of § 2000cc(b)(3)(A) and § 2000cc(b)(3)(B) (prohibiting unreasonable regulations on religious assemblies) implies the obvious: that an ordinance that completely excludes religious assemblies from a jurisdiction is unreasonable.

[FN319]. See supra notes 24-35 and accompanying text.

[FN320]. Ellsworth v. Gercke, 156 P.2d 242, 244 (Ariz. 1942) (holding unconstitutional an ordinance excluding the building of churches within a residential district); Roman Catholic Archbishop v. Village of Orchard Lake, 53 N.W.2d 308, 310 (Mich. 1952) (excluding churches from an entire village violated state constitutional provision setting forth that "(r)eligion, morality and knowledge (was) necessary to good government and the happiness of mankind") (citation omitted); N. Shore Unitarian Soc'y Inc. v. Village of Plandome, 109 N.Y.S.2d 803, 804 (N.Y. Sup. Ct. 1951) (ordinance which "wholly exclude(s) from within its borders churches . . . would not substantially promote the health, safety, morals or general welfare of the community"); State ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph, 39 N.E.2d 515, 524 (Ohio 1942) ("(T)he administrative act of respondents in refusing a permit to erect a church in the residential district, there being no adequate showing that this exclusion of the church was in furtherance of the public health, safety, morals or the public welfare, was arbitrary and unreasonable and in violation of realtor's rights under the state and federal Constitutions.");City of Sherman v. Simms, 183 S.W.2d 415, 417 (Tex. 1944) ("To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right. An ordinance fraught with that danger will not be enforced.").

[FN321]. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 67 (1981) ("The First Amendment requires that there be sufficient justification for the exclusion of a broad category of protected expression."). Ironically, this principle manifests itself most frequently in the adult entertainment arena. Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 99 (6th Cir. 1981). See also Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 837 (N.Y. 1956) (holding that churches may not be completely excluded on due process grounds).

[FN322]. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983).

[FN323]. Gedicks, supra note 36, at 948 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)). See generally Macloed-Ball, supra note 263, at 1098-06 (discussing the application of due process principles to church-zoning conflicts).

[FN324]. 42 U.S.C.A. § 2000cc(b)(3)(B) (West Supp. 2001).

[FN325]. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[FN326]. Id. ("It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.").

[FN327]. 42 U.S.C.A. § 2000cc-2(a).

[FN328]. Where a claimant has not had a "full and fair" adjudication of a RLUIPA section 2 claim, such adjudication "shall not be entitled to full faith and credit in a Federal court." Id.

[FN329]. Id.

[FN330]. See Elrod v. Burns, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[FN331]. See Bell v. Hood, 327 U.S. 678, 684 (1946) ("(I)t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); 42 U.S.C.A. § 1983 (1994) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

[FN332]. 28 U.S.C.A §§ 2201-02 (West 1994).

[FN333]. See Availability of Money Damages Under the Religious Freedom Restoration Act, Memorandum from Walter Dellinger, Office of Legal Counsel, Department of Justice, to John R. Schmidt, Associate Attorney General, Department of Justice (Oct. 7, 1994) (on file with author) (arguing that monetary damages are available under similar language in RFRA). See also Carey v. Piphus, 435 U.S. 247, 255 (1978) ("The Court implicitly has recognized the applicability of this principle to actions under (42 U.S.C.) § 1983 by stating that damages are available under that section for actions 'found . . . to have been violative of . . . constitutional rights and to have caused compensable injury. . . .'") (first two words of emphasis added) (quoting Wood v. Strickland, 420 U.S. 308, 319 (1978)). Monetary damages are subject to the relevant doctrines of qualified or sovereign immunity.

[FN334]. 42 U.S.C.A. § 1988 (West Supp. 2001).

[FN335]. See, e.g., Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 187 n.13 (D. Conn. 2001) (ruling on Plaintiffs' Motion for Preliminary Injunction); Letter from Marci Hamilton to the U.S. Senate (July 24, 2000), available at http://www.marcihamilton.com/rlpa/rluipa_letter.htm (arguing that RLUIPA will not withstand judicial scrutiny); American Atheists, Scaled-Down Religious Protection Act is Done Deal--For Now, at http://www.atheists.org/flash.line/rlpa38.htm ("All of this legislation empowered churches, mosques, temples and other sectarian organizations with a dangerous legal instrument."); Meck, supra note 109 ("(American Planning Association Policy Director Jeff) Soule says APA's board of directors has appropriated funds to potentially pursue a direct challenge of the law."). The National League of Cities has issued a list of "Criteria For a Successful RLUIPA Challenge," which includes encouraging municipalities to search for cases where "statements by a plaintiff church that 'God's law' is higher than 'man's law,"' have been made. See Pluviose-Fenton, supra note 109, at 13. To date, defendants in several cases have challenged the law as unconstitutional. Frank Murray, Judge Lifts Ban on Home Prayer Meetings, Wash. Times, July 20, 2001, at A1 ("(New Milford, Connecticut Town Lawyer Steven Byrne) told the New Milford Spectrum the town will appeal the constitutionality of the federal law.").

[FN336]. Section 5 of the Fourteenth Amendment provides that "(t)he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," which include the prohibition in section 1 against "any

State('s) depriv(ing) any person of life, liberty, or property, without due process of law," or "deny(ing) to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §§ 1, 5.

[FN337]. Section 8 of Article I provides in relevant part that "(t)he Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

[FN338]. Section 8 of Article I provides in relevant part that "(t)he Congress shall have power . . . to pay the debts and provide for the common defense and general welfare of the United States . . . ." U.S. Const. art. I, § 8, cl. 1.

[FN339]. The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion" U.S. Const. amend. I.

[FN340]. United States v. Morrison, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). See also Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985) ("Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform."') (quoting Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927))).

[FN341]. 521 U.S. 507 (1997).

[FN342]. See 146 Cong Rec. S7774-81 (July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (as well as related letters of support); House Comm. on the Judiciary, Religious Liberty Protection Act of 1999, H.R. Rep. No. 106-219 (1999) (discussing RLPA); 146 Cong. Rec. E1564-67 (daily ed. Sept. 22, 2000) (House legislative record, including state cases supporting the Act's adoption); 146 Cong. Rec. E1563-67 (daily ed. Sept. 22, 2000) (House legislative record, including a section-by-section analysis of RLUIPA that links RLUIPA sections to corresponding sections in RLPA).

[FN343]. City of Boerne, 521 U.S. at 520.

[FN344]. 514 U.S. 549 (1995).

[FN345]. 483 U.S. 203, 207-08 (1987).

[FN346]. 483 U.S. 327 (1987).

[FN347]. 42 U.S.C.A. § 2000cc-4 (West Supp. 2001).

[FN348]. Id. 2000cc-3.

[FN349]. 521 U.S. 507 (1997).

[FN350]. See, e.g., 42 U.S.C. §§ 1983, 1988 (West Supp. 2001).

[FN351]. City of Boerne v. Flores, 521 U.S. 507, 518, 524 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)); See Bd. of Trs. v. Garrett, 121 S. Ct. 955, 974 (2001) ("Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence," but may also prohibit "a somewhat broader swath of con-

duct.”).

[FN352]. See Douglas Laycock, Reflections on City of Boerne v. Flores: Conceptual Gulfs in City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 744 (1998) (noting that all six appellate courts addressing the question prior to City of Boerne concluded that RFRA was consistent with section 5, and concluding that City of Boerne “dramatically changed the law, but if it did not, then I am not the only one who was confused”).

[FN353]. See, e.g., Garrett, 121 S. Ct. 955; Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

[FN354]. City of Boerne, 521 U.S. at 518, 519.

[FN355]. Garrett, 121 S. Ct. at 963 (quoting City of Boerne, 521 U.S. at 520).

[FN356]. City of Boerne, 521 U.S. at 532.

[FN357]. See infra notes 361-80 and accompanying text.

[FN358]. See infra notes 381-93 and accompanying text.

[FN359]. See infra notes 394-404 and accompanying text; City of Boerne, 521 U.S. at 520.

[FN360]. City of Boerne, 521 U.S. at 532.

[FN361]. See supra notes 124-261 and accompanying text.

[FN362]. 42 U.S.C.A. § 2000cc (West Supp. 2001).

[FN363]. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) (“As we noted in Smith, in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”') (quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990)); City of Hialeah, 508 U.S. at 546 (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”).

[FN364]. See, e.g., Laycock, supra note 36, at 767 (“A law with exceptions is not generally applicable; a law that applies to some properties but not to others is not generally applicable; a law that permits individualized governmental assessment of the reasons for the relevant conduct is not generally applicable.”) (footnotes omitted).

[FN365]. Strict scrutiny also applies in cases presenting the “hybrid situation” of claims under “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children.” Smith, 494 U.S. at 881 (citations omitted). Courts have usually, though not uniformly, recognized and applied this confusing doctrine in religious land-use cases. See, e.g., Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991); City Chapel Evangelical Free Church v. City of S. Bend, 744 N.E.2d 443 (Ind. 2001); First Covenant Church v. City of Seattle, 840 P.2d 174, 181-82 (Wash. 1992).
Though the “hybrid rights” doctrine of Smith reinforces that RLUIPA section 2(b) restates current constitutional

standards (and so falls well within Congress' Enforcement Clause power), that doctrine has little if any role in supporting the application of RLUIPA section 2(a)(1). Although Congress could have included a second jurisdictional element based on the "hybrid rights" doctrine to assure that the substantial burden test is applied only where current Free Exercise jurisprudence would allow, it did not. Therefore, in a religious land-use case involving hybrid rights, but not "individualized assessments," the substantial burdens provision of RLUIPA simply does not apply pursuant to the Enforcement Clause. Therefore, the question whether the Enforcement Clause could support such an application would never be raised.

[FN366]. City of Hialeah, 508 U.S. at 537-38; see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) ("While the Supreme Court did speak in terms of 'individualized exemptions' in Smith and City of Hialeah, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.").

[FN367]. City of Hialeah, 508 U.S. at 537; see also Smith, 494 U.S. at 884 (distinguishing unemployment cases, where strict scrutiny appropriately applies, because "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment"). See also 146 Cong. Rec. S7775 (daily ed. July 27, 2000) ("The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.").

[FN368]. See, e.g., Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that landmark ordinance "has in place a system of individualized exemptions"); Alpine Christian Fellowship v. County Comm'rs, 870 F. Supp. 991, 994-95 (D. Colo. 1994) (holding that denial of special use permit triggered strict scrutiny because determination was made under discretionary "appropriate(ness)" standard); Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) ("The City's variance law clearly creates a 'system of individualized exceptions' from the general zoning law."); First Covenant Church v. City of Seattle, 840 P.2d 174, 181 (Wash. 1992) (holding that landmark ordinances "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions"). See also Laycock, supra note 36, at 767 ("Land use regulation is among the most individualized and least generally applicable bodies of law in our legal system. The whole point of requiring a special use permit is to provide for 'individualized governmental assessment' of the proposed use."); H.R. Rep. No. 106-219, at 17 ("Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.").

[FN369]. 42 U.S.C.A. § 2000cc(b)(1).

[FN370]. City of Hialeah, 508 U.S. at 532 ("(T)he First Amendment forbids an official purpose to disapprove . . . of religion in general."); Smith, 494 U.S. at 877 ("The government may not . . . impose special disabilities on the basis of religious views or religious status."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) ("(T)he State may not . . . affirmatively oppos(e) or show( ) hostility to religion, thus 'preferring those who believe in no religion over those who believe.'") (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

[FN371]. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (listing religion as suspect classification triggering strict scrutiny); see, e.g., Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991) (remanding for consideration of Equal Protection claim); Love Church v. City of Evanston, 671 F. Supp. 515, 519-21 (N.D. Ill. 1987) (finding Equal Protection violation where nonreligious assembly uses were permitted as of right, but churches were required to seek a special use permit), vacated on other grounds, 896 F.2d 1082 (7th Cir. 1990).

[FN372]. 42 U.S.C.A. § 2000cc(b)(2).

[FN373]. City of Hialeah, 508 U.S. at 532 ("(T)he First Amendment forbids an official purpose to disapprove of a particular religion . . . ."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

[FN374]. 42 U.S.C.A. § 2000cc(b)(3)(A)(B).

[FN375]. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 67 (1981). See also Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 570-71 (1987) (striking down ordinance prohibiting protected speech throughout entire airport). Although the category of expression excluded by zoning in Schad was "live entertainment," religious expression enjoys no less protection under the Free Speech Clause. See, e.g., Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[FN376]. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (striking down zoning ordinance under Equal Protection Clause because not "rationally related to a legitimate state interest"); Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928) (striking down zoning ordinance under Due Process Clause for failure to "bear a substantial relation to the public health, safety, morals, or general welfare").

[FN377]. See supra notes 318-26 and accompanying text; Rathkopf & Rathkopf, supra note 24, at 20-3 ("The majority view is that facilities for religious or educational uses are, by their very nature, 'clearly in furtherance of the public morals and general welfare' and may not be excluded from a residence district in which location of such use is sought.") (emphasis added); R.P. Davis, Zoning Regulation as Affecting Churches, 74 A.L.R.2d 377 § 2(a) (1960, Supp. 2000) ("(C)hurches may not, either as a matter of the express language of a zoning regulation or as a matter of administrative application or enforcement of a neutrally worded enactment, validly be excluded from residential areas as an absolute and invariable rule. . . .") (emphasis added); McQuillin, supra note 24, at 485-86 (3d ed. 2000) ("Although there is some conflict of opinion as to whether churches or other places of public worship may be excluded from residential zones, most of the judicial decisions have concluded that such an exclusion is both improper and illegal.") (emphasis added); Young, supra note 37, § 12.22, at 578 (4th ed. 1996) ("(A)n ordinance which excludes (religious) uses from residential zones does not further the public health, safety, morals, or general welfare" because "religious uses contribute to the general welfare of the community."); E.C. Yokley, Zoning Law and Practice § 35-14, at 35 (4th ed. 1980) ("Since the advent of zoning, churches have been held proper in residence districts."). See also Boyajian v. Gatzunis, 212 F.3d 1, 9 (1st Cir. 2000) (noting "(a)n impressive body of case law and scholarly texts and articles supports th(e) conclusion" that "religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood") (emphasis added).

[FN378]. See Rathkopf & Rathkopf, supra note 24, at 20-5 (zoning ordinances violate equal protection where "other nonresidential uses, equally or even more abrasive, such as schools, colleges, public libraries, museums, clubhouses, and the like existed therein or were permitted uses therein"). See also McQuillin, supra note 24, at 489 ("(A) zoning ordinance requiring a special use permit to operate a church when it does not require such permits to operate community centers, meeting halls, and other establishments similarly situated" violates equal protection.). See, e.g., Congregation Kol Ami v. Abington Twp., 2001 U.S. Dist. LEXIS 10224, at *6 (E.D. Pa. July 20, 2001) (No. 01-1919) (relying on City of Cleburne and concluding that the township "failed to offer any rational reason to preclude Kol Ami from requesting (a special exception under the 1996 Ordinance) . . . but the other uses, namely a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house and country club may request one").

[FN379]. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[FN380]. Id. at 519.

[FN381]. 146 Cong. Rec. S7774 (daily ed. July 27, 2000); see H.R. Rep. No. 106-219, at 18-24 (summarizing of hearing testimony regarding land-use).

[FN382]. City of Boerne, 521 U.S. at 531 (emphasis added).

[FN383]. Compare 146 Cong. Rec. S7774 ("Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes.") (emphasis added), and Laycock, supra note 36, at 773 (discussing examples from congressional record of "evidence of discrimination in the zoning codes themselves") (emphasis added), with 146 Cong. Rec. S7774 ("Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan."').

[FN384]. See supra notes 141-55 and accompanying text.

[FN385]. Compare Hamilton Letter, supra note 300 ("The legislative history cites to no reported cases involving intentional discrimination."), with Protecting Religious Freedom after Boerne v. Flores (III), Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 131-53 (Mar. 26, 1998) (statement of von Keetch, Counsel to Mormon Church), available at http:// commdocs.house.gov/committees/judiciary/hju57227.000/ hju57227_0f.htm (hereinafter Keetch Statement) (listing numerous state and federal zoning cases involving religious assemblies).

[FN386]. See, e.g., Keetch Statement, supra note 385 at 127-54 (summarizing and presenting findings of Brigham Young University study of religious land use conflicts); Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 364-75 (June 16 & July 14, 1998) (statement of Rev. Elenora Giddings Ivory, Presbyterian Church (USA), available at http:// commdocs.house.gov/committees/judiciary/hju 59929.000/hju59929_0f.htm) (discussing survey by Presbyterian Church (USA) of zoning problems within that denomination) (hereinafter June-July 1998 House Hearings); id. at 405, 415-16 (statement of Prof. Douglas Laycock, University of Texas Law School) (discussing Gallup poll data indicating hostile attitudes toward religious minorities); John W. Mauck, Tales from the Front: Municipal Control of Religious Expression Through Zoning Ordinances, at 7-8 (July 9, 1998) (statement submitted to Congress), available at http:// www.house.gov/judiciary/mauck.pdf, to

supplement live testimony of June 16, 1998 (compiling zoning provisions affecting churches in twenty-nine suburbs of northern Cook County) (hereinafter Mauck Statement).

[FN387]. Bd. of Trs. v. Garrett, 121 S. Ct. 955, 968 (2001) (Kennedy, J., concurring). See Keetch Statement, supra note 385, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

[FN388]. See, e.g., Mauck Statement, supra note 385, at 1-5 (describing twenty-two representative cases based on twenty-five years experience representing churches in land-use disputes); June-July 1998 House Hearings, supra note 386, at 360-64 (statement of Bruce D. Shoulson, attorney) (describing experiences representing Jewish congregations in land-use disputes, and concluding that "the implications of these examples, which I believe are by no means unique, are obvious, and the need for assurances to Americans of all faiths that they will be free to exercise their religions should be equally obvious"). See also 146 Cong. Rec. E1564-67 (Sept. 22, 2000) (listing nineteen additional instances of land-use burdens on religious exercise arising since conclusion of hearings). Cf. Garrett, 121 S. Ct. at 965 (finding "half a dozen relevant examples from the record" insufficient alone to establish pattern of constitutional violation).

[FN389]. See generally Laycock, supra note 36, at 769-83; Legislation to Protect Religious Liberty: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. (Sept. 9, 1999) (statement of Douglas Laycock), available at http://www. senate.gov/°judiciary/9999dlay.htm.

[FN390]. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) ("The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case."); see 42 U.S.C.A. §§ 2000cc(a)(1), 2(a)(2)(C) (West Supp. 2001).

[FN391]. 146 Cong. Rec. S7775 ("(T)he hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly . . . ."); see 42 U.S.C.A. § 2000cc(b)(1).

[FN392]. 146 Cong. Rec. S7775 ("(T)he hearing record reveals a widespread pattern . . . of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones."); see 42 U.S.C.A. § 2000cc(b)(2).

[FN393]. H.R. Rep. No. 106-219, at 19 (1999) ("Other testimony revealed that some land use regulations deliberately exclude all churches from an entire city. . . . The result of these zoning patterns is to foreclose or limit new religious groups from moving into a municipality."); see 42 U.S.C.A. § 2000cc (b)(3).

[FN394]. Lesage v. Texas, 158 F.3d 213, 217 (5th Cir. 1998) ("This law (42 U.S.C. § 2000d) prohibits precisely that which the Constitution prohibits in virtually all possible applications. It can therefore hardly be argued that the statute does not reflect 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."') (footnote omitted), rev'd on other grounds, 528 U.S. 18 (1999).

[FN395]. City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

[FN396]. 42 U.S.C.A. § 2000cc-2(a)-(d).

[FN397]. Id. § 2000cc-2(b).

[FN398]. City of Boerne, 521 U.S. at 519.

[FN399]. 42 U.S.C.A. § 2000cc-5(5).

[FN400]. See supra notes 381-93 and accompanying text.

[FN401]. City of Boerne, 521 U.S. at 532. One might also argue that RLUIPA, like RFRA, is disproportionate because it contains no termination provision. But the Court in City of Boerne specifically noted that termination provisions are not required for consistency with section 5. City of Boerne, 521 U.S. at 533.

[FN402]. City of Boerne, 521 U.S. at 534.

[FN403]. Compare 42 U.S.C.A. § 2000cc(a)(2)(C) (West Supp. 2001), with Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993). To the extent that RLUIPA applies the compelling interest standard to land-use laws that do not involve "individualized assessments," Congress did not rely on its Enforcement Clause authority. Instead, the compelling interest standard applies only if the facts of the case authorize congressional action under the Commerce or Spending Clauses of Article I. See 42 U.S.C.A. § 2000cc(a)(2)(A) (application based on spending power); 42 U.S.C.A. § 2000cc(a)(2)(B) (application based on commerce power).

[FN404]. See 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability."). See also Bd. of Trs. v. Garrett, 121 S. Ct. 955, 963 (2001) ("Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence.").

[FN405]. 42 U.S.C.A. § 2000cc(a)(2)(B). This subsection also includes those burdens which affects commerce with foreign nations or with Indian tribes. Id.

[FN406]. 514 U.S. 549 (1995).

[FN407]. The Gun-Free School Zones Act of 1990 made it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone. 18 U.S.C. 922(q)(2)(A) (1988).

[FN408]. See Lopez, 514 U.S. at 561-63; United States v. Morrison, 529 U.S. 598, 608-12 (2000).

[FN409]. Lopez, 514 U.S. at 559.

[FN410]. Id. at 561; Morrison, 529 U.S. at 610-12.

[FN411]. Lopez, 514 U.S. at 559; Morrison, 529 U.S. at 608-11.

[FN412]. Morrison, 529 U.S. at 612 (citing Lopez, 514 U.S. at 563-67).

[FN413]. Id. at 612 (quoting Lopez, 514 U.S. at 562).

[FN414]. Id. at 612; 42 U.S.C.A. § 2000cc(a)(2)(B) .

[FN415]. Compare 42 U.S.C.A. § 2000cc(a)(2)(B), with U.S. Const. art. I, § 8, cl. 3; see United States v. Grassie, 237 F.3d 1199, 1211 (10th Cir. 2001) ("(B)y making interstate commerce an element of the (Church Arson Prevention Act) . . . to be decided on a case-by-case basis, constitutional problems are avoided."); United States v. Harrington, 108 F.3d 1460, 1464-67 (D.C. Cir. 1997) (holding jurisdictional element in Hobbs Act as-

sures facial constitutionality of statute); United States v. Polanco, 93 F.3d 555, 563 (9th Cir. 1996) ("The jurisdictional element (of 18 U.S.C. § 922(g)(1)) . . . insures, on a case-by-case basis, that a defendant's actions implicate interstate commerce to a constitutionally adequate degree."); United States v. Chesney, 86 F.3d 564, 568-69 (6th Cir. 1996) (concluding "presence of the jurisdictional element defeats (defendant's) facial challenge"); United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995) ("(T)he jurisdictional element in (the federal carjacking statute) independently refutes appellants' arguments that the statute is constitutionally infirm."). A similar logic should apply with respect to RLUIPA section 2(a)(2)(C), the jurisdictional element then ensures compliance with the Enforcement Clause.

[FN416]. See Morrison, 529 U.S. at 610-12; Lopez, 514 U.S. at 561 (noting that jurisdictional element ensures "through case-by-case inquiry" that regulated activity falls within Commerce Clause authority).

[FN417]. See 42 U.S.C.A. § 2000cc (a)(2)(B).

[FN418]. Groome Res. Ltd. v. Parish of Jefferson, 234 F.3d 192, 205 (5th Cir. 2000) (upholding constitutionality of Fair Housing Amendments Act).

[FN419]. Id. at 205-06.

[FN420]. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy); H.R. Rep. No. 106-219, at 28 (1999).

[FN421]. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("A zoning ordinance usually has an impact on the value of the property which it regulates."); Furey v. City of Sacramento, 592 F. Supp. 463, 471 (E.D. Cal. 1984) ("It has long been conclusively demonstrated that zoning has an impact on the price of land.").

[FN422]. See 146 Cong. Rec. S7775 (joint statement of Sen. Hatch and Sen. Kennedy).

[FN423]. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 585 (1997) ("Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce."); H.R. Rep. No. 106-219, at 28 (noting that bill "does not treat religious exercise itself as commerce," but "recognizes that the exercise of religion sometimes requires commercial transactions, such as the construction of churches").

[FN424]. See, e.g., Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (finding religious foundation to be an "(e)nterprise engaged in commerce or in the production of goods for commerce" under Fair Labor Standards Act); Volunteers of Am. v. NLRB, 777 F.2d 1386, 1389 (9th Cir. 1985) (noting that nonprofit charitable employers are subject to National Labor Relations Act when they affect commerce, and finding statute to cover church-operated alcohol rehabilitation center).

[FN425]. Cf. Camps Newfound/Owatonna, 520 U.S. at 583-87 (Dormant Commerce Clause invalidates state real estate tax imposing discriminatory burden on economic activity of small church camp).

[FN426]. United States v. Lopez, 514 U.S. 549, 556 (1995) (quoting Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)); see, e.g., Camps Newfound/Owatonna, 520 U.S. at 586 (relying on "interstate commercial activities of nonprofit entities as a class" in Commerce Clause determination, citing Lopez and Wickard).

[FN427]. Lopez, 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

[FN428]. See, e.g., Congregation Kol Ami, supra note 36 (involving purchase of existing chapel for use as synagogue); Second Amended Complaint at ¶ 26, Unitarian Universalist Church v. City of Fairlawn, No. 00-3021 (N.D. Ohio filed Mar. 22, 2001) (involving construction of Fellowship Hall and renovation of existing church) (on file with authors); Refuge Temple Ministries v. City of Forest Park, No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (on file with authors) (involving lease of existing building for worship space).

[FN429]. See United States v. Grassie, 237 F.3d 1199, 1210 (10th Cir. 2001) ("Religion and in particular religious buildings actively used as the site and dynamic for a full range of activities, easily falls within" the commerce power.); id. at 1209 (listing among common church activities that affect interstate commerce "social services, educational and religious activities, the purchase and distribution of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines").

[FN430]. Lopez, 514 U.S. at 556, 559.

[FN431]. See, e.g., Camps Newfound/Owatonna, 520 U.S. at 586 ("(A)lthough the (Christian Scientist) summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.").

[FN432]. Lopez, 514 U.S. at 567.

[FN433]. Id.

[FN434]. See Groome Res. Ltd. v. Parish of Jefferson, 234 F.3d 192, 213 (5th Cir. 2000) (noting that "the connection between racial discrimination and its affect (sic) on interstate commerce had been established (by Supreme Court) in Heart of Atlanta Motel and McClung").

[FN435]. Lopez, 514 U.S. at 557, 567.

[FN436]. See 42 U.S.C.A. §§ 2000(a)(1), (a)(2)(B); See also Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574-75 (1997) (rejecting argument that Dormant Commerce Clause cannot invalidate discriminatory state real estate tax because Congress cannot impose real estate tax itself); Groome Res., 234 F.3d at 215 (rejecting "incantation of 'local zoning' and 'traditional' authority," because "it does not serve the balance of federalism to allow local communities to discriminate against the disabled").

[FN437]. United States v. Morrison, 529 U.S. 598, 612 (2000) (quoting Lopez, 514 U.S. at 562).

[FN438]. Morrison, 529 U.S. at 612 (quoting Lopez, 514 U.S. at 563).

[FN439]. See supra notes 156-61 and accompanying text.

[FN440]. See 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[FN441]. See, e.g., June-July 1998 House Hearings, supra note 386, at 125, 134 (statement of Marc D. Stern, American Jewish Congress); 146 Cong. Rec. S7775 (joint statement of Sen. Hatch and Sen. Kennedy) (citing Stern statement in support of Commerce Clause authority).

[FN442]. See supra notes 361-80 and accompanying text.

[FN443]. Lopez, 514 U.S. at 557.

[FN444]. 42 U.S.C.A. § 2000cc(a)(2)(A).

[FN445]. U.S. Const. art. I, § 8, cl. 1.

[FN446]. South Dakota v. Dole, 483 U.S. 203, 206 (1987) (internal quotations omitted).

[FN447]. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[FN448]. See Fullilove v. Klutznick, 448 U.S. 448, 474 (1980). See also United States v. Butler, 297 U.S. 1, 66 (1936) ("(T)he power of the Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

[FN449]. Steward Mach. v. Davis, 301 U.S. 548 (1937).

[FN450]. See Kansas v. United States, 214 F.3d 1196, 1200 (5th Cir. 2000).

[FN451]. Dole, 483 U.S. 203, 207 (1987) (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937)).

[FN452]. Dole, 483 U.S. at 207 (quoting Pennhurst, 451 U.S. at 17); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) ("In interpreting language in spending legislation, we thus insis(t) that Congress speak with a clear voice, recognizing that (t)here can, of course, be no knowing acceptance (of the terms of the putative contract) if a State is unaware of the conditions (imposed by the legislation) or is unable to ascertain what is expected of it.") (internal quotations omitted, brackets in original).

[FN453]. Dole, 483 U.S. at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)); see New York v. United States, 505 U.S. 144, 167 (1992) (conditions must "bear some relationship to the purpose of the federal spending"); id. at 172 (conditions imposed are "reasonably related to the purpose of the expenditure"). See also Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("(T)he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").

[FN454]. Dole, 483 U.S. at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam); King v. Smith, 392 U.S. 309, 333 n.34 (1968)).

[FN455]. See 42 U.S.C.A. § 2000cc-1; see, e.g., Mayweathers v. Terhune, 136 F. Supp. 2d 1152 (E.D. Cal. 2001) (rejecting Spending Clause challenge in RLUIPA prisoner case); First Amended Complaint, Jenkins v. Martin, No. 00-75 (W.D. Mich. filed July 31, 2001) (asserting RLUIPA § 3(b)(1) as jurisdictional basis for religious freedom claim by institutionalized persons).

[FN456]. See Order, Mayweathers, 136 F. Supp. 2d 1152 (E.D. Cal. 2001) (No. Civ. S-96-1582 LKK/GGH P), available at http:// www.rluipa.com/cases/MayweathersDecision.pdf.

[FN457]. Id. at 6 ("It is clear from the Act that Congress was endeavoring to ensure religious liberty, a concern of constitutional dimension.").

[FN458]. Dole, 483 U.S. at 207 n.2 (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937) and Buckley v. Valeo, 424 U.S. at 90-91). Cf. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-81 (2000) ("It is for Congress in

the first instance to 'determin(e) whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."') (quoting City of Boerne v. Flores, 521 U.S. 507, 517 (1997)).

[FN459]. See, e.g., Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640-44 (upholding prohibitions against sexual harassment associated with receipt of federal funds under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994)); Lau v. Nichols, 414 U.S. 563, 568-69 (1974) (upholding condition that public schools receiving federal funds comply with Title VI of Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994)).

[FN460]. See Lau, 414 U.S. at 569.

[FN461]. Arlin Adams & Charles Emmerich, A Nation Dedicated to Religious Liberty 53 (1990) ("Strict separationists . . . warn that religion can become a disruptive and sometimes oppressive force in society.").

[FN462]. See Marci A. Hamilton, Power, The Establishment Clause, and Vouchers, 31 Conn. L. Rev. 807, 821 (1999) ("Religion is not a passive participant in the political process but rather a potent presence with the capacity to overreach. It continues to deserve the mantle of distrust Madison placed upon it when the courts approach establishment questions."). Macloed-Ball, supra note 263, at 1113 ("The Supreme Court, therefore, should strike down the majority rulings, which effectively grant a church special status in the community, due to the primarily sectarian purpose and effect of those rulings.").

[FN463]. Adams & Emmerich, supra note 461, at 65-73. "Benevolent neutrality derives specific meaning from the nation's historical commitment to the ideals of equality and voluntarism. . . . The religion clauses do not compel a neutrality that is blind to the spiritual needs of citizens." Id. at 73.

[FN464]. Id. at 58-65. "(The Framers) recognized that accommodation must occur if religious liberty was to flourish, particularly in a society characterized by pluralism and expansive government." Id. at 65. See City of Boerne v. Flores, 521 U.S. 507, 561 (1997) ("The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.") (O'Connor, J., concurring).

[FN465]. Until recently, the Court had also required that a law not foster an excessive entanglement with religion. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The entanglement prong has since been subsumed within the "effect" prong of Lemon. Agostini v. Felton, 521 U.S. 203, 232-33 (1997) ("Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect."').

[FN466]. City of Boerne, 521 U.S. at 536-37 (1997) (Stevens, J., concurring).

[FN467]. See Ehlers-Renzi v. Connelly Sch. of the Holy Child, 224 F.3d 283, 292 (4th Cir. 2000) (upholding county zoning ordinance exempting from special exception requirement parochial schools located on land owned by religious organization); Boyajian v. Gatzunis, 212 F.3d 1, 9 (1st Cir. 2000) (upholding state law and town by-law prohibiting municipal authorities from excluding religious uses of property from any zoning area); Cohen v. City of Des Plaines, 8 F.3d 484, 493 (7th Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits).

[FN468]. Boyajian, 212 F.3d at 8 (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day

Saints v. Amos, 483 U.S. 327 (1987)). See also id. at 3-10 (holding that such accommodation has a secular purpose and effect).

[FN469]. 224 F.3d 283 (4th Cir. 2000).

[FN470]. Id. at 292.

[FN471]. 8 F.3d 484 (1993).

[FN472]. Id. at 490 (quoting Amos, 483 U.S. at 335).

[FN473]. Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 863 (8th Cir.) ("RFRA fulfills each of the elements presented in the Lemon test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA."), cert. denied, 525 U.S. 811 (1998); EEOC v. Catholic Univ., 83 F.3d 455, 470 (D.C. Cir. 1996) ("We agree with the Fifth Circuit that RFRA represents nothing more sinister than a 'legislatively mandated accommodation of the exercise of religion.'"); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996) ("RFRA's lifting of 'substantial burdens' on the exercise of religion does not amount to the Government coercing religious activity through 'its own activities and influence.'"), rev'd on other grounds, 521 U.S. 507 (1997); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996) ("We defer to the Fifth Circuit's analysis of why (RFRA) also does not violate . . . the establishment clause of the First Amendment."), vacated on other grounds, 521 U.S. 1114 (1997). See also Adams v. C.I.R., 170 F.3d 173, 175 n.1 (3d Cir. 1999) ("In general, courts that have addressed the question of constitutionality have found that RFRA is constitutional as applied to the federal government."); Belgard v. Hawaii, 883 F. Supp. 510, 517 n.2 (D. Haw. 1995) ("(T)he Court does not believe that the RFRA fosters government entanglement in or promotion of religion and is thus susceptible to a challenge under the Establishment Clause.").

[FN474]. Such legislative reactions to the Supreme Court's retreat from enforcing fundamental religious liberty values through the courts are commonplace. While Smith rejected a Free Exercise Clause-mandated exemption to drug laws, religious peyote use accommodations have been made at both the federal and state levels. These are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption. See Lee v. Weisman, 505 U.S. 577, 628-29 (1992) (Souter, J., concurring) ("(I)n freeing the Native American Church from federal laws forbidding peyote use, see Drug Enforcement Administration Miscellaneous Exemptions, 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans."); Employment Div. v. Smith, 494 U.S. 872, 890 (1989) ("(A) number of States have made an exception to their drug laws for sacramental peyote use."). After the Court ruled that an Air Force psychotherapist had no right under the Free Exercise Clause to wear a yarmulke while on duty in Goldman v. Weinberger, 475 U.S. 503, 510 (1986), Congress responded by statutorily enacting such a right in the National Defense Authorization Act for Fiscal Years 1988 and 1989 (10 U.S.C. § 774), a permissible accommodation of the religious liberty of service members. See Texas Monthly v. Bullock, 489 U.S. 1, 18 n.8 (1989) (plurality opinion of Brennan, Marshall, & Stevens, JJ.) ("(I)f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, see Goldman v. Weinberger . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.") (citation omitted).

[FN475]. Zorach v. Clauson, 343 U.S. 306, 314 (1952) (accommodating students' ability to attend religious instruction classes off school grounds). See also Counts, supra note 113, at 1036-39 (arguing that judicial accom-

modation for places of worship does not violate the Establishment Clause).

[FN476]. 465 U.S. 668 (1984).

[FN477]. Id. at 673.

[FN478]. Zorach, 343 U.S. at 314.

[FN479]. 483 U.S. 327 (1987).

[FN480]. Id. at 338.

[FN481]. Id. at 334 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-145 (1987)).

[FN482]. Id. at 338.

[FN483]. Id. at 334 (quoting Walz v. Tax Comm'r, 397 U.S. 664, 673 (1970)).

[FN484]. Id. at 338.

[FN485]. Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[FN486]. Id. at 890.

[FN487]. Amos, 483 U.S. at 335; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (RLUIPA was "designed to protect the free exercise of religion from unnecessary government interference" (statement of Rep. Canady)). See Cohen v. City of Des Plaines,8 F.3d 484, 490 (7th Cir. 1993) ("(I)t is clear that the legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization can extend to seemingly secular activities of the organization. Amos makes precisely this point.").

[FN488]. Amos, 483 U.S. at 337 (quoting Walz, 397 U.S. at 668) (emphasis in original).

[FN489]. Congregation Kol Ami v. Abington Township, Civ. No. 01-1919, slip op. at 9 (E.D. Pa. 2001).

[FN490]. See supra notes 286-95 and accompanying text.

[FN491]. 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." (citing Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

[FN492]. See, e.g., Hamilton, supra note 462, at 828 (arguing, in the context of school choice, that "the concept of 'neutrality' has shifted the analysis away from the Framer's fundamental insight that religion is capable of acting against the public good").

[FN493]. 42 U.S.C.A. § 2000cc-2(b)(2) (West Supp. 2001).

[FN494]. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. at 532 ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

[FN495]. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

[FN496]. 42 U.S.C.A. § 2000cc-2(b)(3)(A).

[FN497]. Schad, 452 U.S. at 67.

[FN498]. 42 U.S.C.A. § 2000cc(b)(3)(B).

[FN499]. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, . . . some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.").

[FN500]. 42 U.S.C.A. § 2000cc-4.
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