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Religious Land Use and Institutionalized Persons Act of 2000: The Land Use Provisions are Both Unconstitutional and Unnecessary

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RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000: UNCONSTITUTIONAL AND UNNECESSARY*

The Religious Land Use and Institutionalized Persons Act of 2000 was Congress' response to the Supreme Court's striking down of the Religious Freedom Restoration Act in City of Boerne v. Flores. *In promulgating the Religious Land Use and Institutionalized Persons Act, Congress, inter alia, sought to protect the free exercise of religion from excessive governmental meddling while remedying discrimination suffered by religious individuals and groups in the area of land use. In dealing solely with land use provisions of the RLUIPA, the author argues that the Religious Land Use and Institutionalized Person Act is unconstitutional because it violates the Establishment Clause of the First Amendment, the Commerce Clause, and also violates the principles of separation of powers as construed by the Tenth Amendment. Further, this Note suggests that the RLUIPA is wholly unnecessary to achieve Congress' stated goals because mechanisms exist to protect religious groups from discrimination in land use decisions including the Equal Protection Clause, Free Exercise of Religion Clause, and federal civil rights statutes.*

"*To be of no church is dangerous.*"
— Samuel Johnson, eighteenth century essayist[1]

Never was this maxim truer than when the Religious Land Use and Institutionalized Persons Act of 2000 (hereinafter RLUIPA) was signed into law on September 22, 2000.[2] The RLUIPA favors and protects those with a system of religious beliefs over those who do not hold an organized view of religion.

This Act was promulgated in response to a Supreme Court decision[3] striking down the RLUIPA's predecessor, the Religious Freedom Restoration Act of 1993 (hereinafter RFRA).[4] The RLUIPA imposes a strict scrutiny test on local governments faced with a land use decision affecting a religious organization or affiliated party.[5] Once a religious group has shown a substantial burden on the free

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* I would like to thank my father for bringing this incredibly interesting and provocative legislation to my attention and inspiring this note. Thank you to Michael Lacy, Sandy Hellums, Sarah Toraason, Christina James, and Dennis Schmieder for all of your hard work editing this note. Thank you to Matt Aman who motivates and encourages me everyday to be my best.

[1] JOHN BARTLETT, FAMILIAR QUOTATIONS (10th ed. 1919), *available at* http://www.bartleby.com/100/249.40.html (last visited Oct. 27, 2001).

[2] 42 U.S.C. § 2000cc (2001).

[3] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[4] 42 U.S.C. § 2000bb (2001).

[5] *See* 42 U.S.C. § 2000cc(a) (2001).

exercise of religion, the government must justify its decision by demonstrating that it is based on the protection of a compelling governmental interest and is the least restrictive means to further that interest.[6]

The language of the statute is very broad and its tenets have far-reaching implications. The statute not only applies to religious buildings, such as churches, synagogues, and mosques, but also to religious educational facilities, home religious study, religiously affiliated homeless shelters, and social services. Further, the RLUIPA could possibly be used to circumvent fire or health codes.

The language of the RLUIPA reflects a number of tensions prevalent in different areas of the law. First, it represents a tension between the Free Exercise Clause and the Establishment Clause. A tenuous balance exists between promoting the free exercise of religion and establishing a preference for religion over non-religion. Second, the RLUIPA symbolizes the ever-present conflict between federal and local regulation. Congress continually pushes the boundaries of its Commerce Clause authority while state and local governments constantly fight back under the Tenth Amendment to retain distinct control over their local communities.

The RLUIPA is unconstitutional because it violates the Establishment Clause of the First Amendment. In promulgating the RLUIPA, Congress exceeded its power under the Commerce Clause. The RLUIPA also violates the principles of separation of powers under the Tenth Amendment.

Land use discrimination against religious groups and individuals is undoubtedly a problem in municipalities across the nation. Religious groups point to documented accounts of capricious land use discrimination ostensibly based on ignorance, prejudice, and intolerance. However, remedies exist for these injustices.[7] Religious groups can seek a variance from or an amendment to existing land use laws. Furthermore, religious discrimination can be remedied under the Equal Protection Clause, Free Exercise of Religion Clause, and federal civil rights statutes. Not only is the RLUIPA unconstitutional, it is also unnecessary.

This Note deals exclusively with the land use provisions of the RLUIPA and does not address the constitutionality or history of the provisions regarding religious exercise of persons confined to governmental institutions.[8] Part I of this Note details the historical background of the RLUIPA. Part II examines the RLUIPA statute, its proponents, critics and possible applications. Part III analyzes why the RLUIPA is unconstitutional under the Establishment Clause, Commerce Clause, and Tenth Amendment of the U.S. Constitution.

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[6] *See* 42 U.S.C. § 2000cc(a)(1)(A-B) (2001).

[7] *See infra* notes 171-72 and accompanying text.

[8] 42 U.S.C. § 2000cc-1 (2001).

I. HISTORICAL BACKGROUND OF THE RLUIPA

In the 1960s and 1970s, the Supreme Court limited the government's authority to pass legislation restricting religious groups' ability to build places of worship by subjecting this type of legislation to a strict scrutiny analysis, which requires that a land use decision be grounded in a compelling governmental interest and implemented in the least restrictive way to further that compelling interest.[9]

In 1990, the Supreme Court changed direction with its decision of *Employment Division v. Smith*.[10] In this decision, the Court held that the Native American use of the hallucinogenic drug peyote was not a constitutionally protected right, despite its deep-roots in Native American religious practice.[11] The Oregon law banning the use of peyote was reasonable because restricting religion was not its principal purpose.[12] Thus, as long as the restrictions applied with equal force to all religious groups (and non-religious groups) and restricting religion was not the main purpose of the law, the law did not violate the Free Exercise Clause of the First Amendment.[13] Religion-neutral laws that have the effect of burdening certain religions did not need to be justified by a compelling governmental interest.[14]

In 1993, the Religious Freedom Restoration Act was signed into law.[15] Virtually all religious groups, with the exception of the Atheists,[16] supported the passage of the RFRA. The RFRA attempted to reinstate the strict scrutiny test employed by courts before the decision of *Employment Division v. Smith*.[17] The RFRA demanded "compelling justification" for a substantial burden of religious exercise and imposed a very high standard for the government to meet: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering

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[9] *See generally* Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (holding that the government did not meet the onerous burden of showing with "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exception to the Amish."); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that there was no compelling state interest to refuse unemployment benefits to those who have lost their job because they refuse to work on the Sabbath).

[10] 494 U.S. 872 (1990).

[11] *Id.* at 890.

[12] *Id.*

[13] *Id.* at 882.

[14] *Id.* at 882-89.

[15] 42 U.S.C. § 2000bb (2001).

[16] *See* American Atheists, *Scaled-Down Religious Protection Act Is Done Deal—For Now*, *at* http://www.atheists.org/flash.line/rlpa38.htm (last visited Nov. 26, 2001) [hereinafter American Atheists].

[17] *See* 42 U.S.C. § 2000bb(a)(4) (2001).

that compelling governmental interest."[18]

The Supreme Court declared the RFRA unconstitutional in *City of Boerne v. Flores*.[19] The Court determined that Congress' promulgation of the RFRA exceeded its enforcement power under the Fourteenth Amendment because it "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance."[20] In his concurrence, Justice Stevens concluded that the RFRA violated the Establishment Clause of the First Amendment by preferring organized religious groups over non-religious groups.[21]

On June 15, 2000, a new bill, the Religious Liberty Protection Act of 2000 (hereinafter RLPA), passed through the House of Representatives and was sent to the Senate for approval.[22] Similar to the RFRA, it called for a "strict scrutiny test" to be applied to "state and local laws that infringe on the free exercise of religion."[23] The bill stalled in the Senate because of concern about its broad nature and its potential undermining effect on certain civil rights laws in areas such as employment and housing.[24] Notable opponents of the RLPA included the American Atheists, civil rights groups, and environmental and preservationist groups.[25] The American Atheists were enraged at the reintroduction of a bill that favored organized religious groups over any other group in America and fought bitterly against the RLPA.[26] Civil rights groups were concerned that the RLPA may be used to trump the civil rights laws and give religious groups the power to discriminate on racial and other grounds.[27] Environmental and preservationist groups feared that the RLPA would "result in demolition of [religious buildings] protected by landmark laws."[28]

Thus, at the dawning of the millennium, the 1990 Supreme Court decision *Employment Division v. Smith*, which called for rational basis review of governmental legislation that interferes with religious exercise, prevailed.[29]

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[18] 42 U.S.C. § 2000bb-1(b)(1-2) (2001).

[19] 521 U.S. 507 (1997) (holding that it would be unconstitutional to allow a Roman Catholic Church to expand into the historic district of Boerne, Texas solely because it was a religious group when other groups would not have this justification).

[20] *Id.* at 536.

[21] 521 U.S. at 537 (Stevens, J., concurring).

[22] *See* B.A. Robinson, *Religious Freedom Restoration Acts and Religious Liberty Protection Act and Religious Land Use and Institutionalized Persons Act, at* http://www.religioustolerance.org/rfra.htm (last visited Oct. 27, 2001) [hereinafter Robinson].

[23] *Id.*

[24] 146 CONG. REC. S7774, S7778 (2000).

[25] *See* Robinson, *supra* note 22, *at* http://www.religioustolerance.org/rfra.htm.

[26] *See* American Atheists, *supra* note 16, *at* http://www.atheists.org/flash.line/rlpa38.htm.

[27] *See* Robinson, *supra* note 22, *at* http://www.religioustolerance.org/rfra.htm.

[28] Jane Lampman, *Religion in America — A Test of Faith*, THE DESERET NEWS (Salt Lake City, UT), Sept. 23, 2000, at A1.

[29] 494 U.S. 872, 887-90 (1990).

II. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

After passing through the House and the Senate with ease, the RLUIPA[30] was signed into law by President Clinton on September 22, 2000.[31] The RLUIPA attempts, once again, to restore a strict scrutiny test when analyzing land use legislation and its effect on religious exercise:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.[32]

The authors and supporters of the RLUIPA contend that strict constitutional scrutiny is absolutely necessary to protect Americans' right to free religious exercise.[33]

Under the RLUIPA, after the "plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [of RLUIPA]," the burden of persuasion shifts to the government "on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law . . . or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."[34]

Religious exercise, as broadly defined in the RLUIPA, includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and the RLUIPA encompasses properties used for such purposes.[35] With this incredibly expansive definition, a local government's land use laws may be "hampering a personal ideology that it could not have known existed."[36]

In an attempt to avoid the same problems that caused the RFRA to be declared unconstitutional in *City of Boerne v. Flores*,[37] Congress derived the power to

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[30] 42 U.S.C. § 2000cc (2001).

[31] Press Release, Office of the Press Secretary, Statement of President William J. Clinton, *M2 Presswire* (Sept. 25, 2000).

[32] 42 U.S.C. § 2000cc(a)(1) (2001).

[33] 146 CONG. REC. S7774, S7778 (2000).

[34] S. 2869 106th Cong. § 4(b) (2d Sess. 2000).

[35] 42 U.S.C. § 2000cc-5 (7)(A-B) (2001).

[36] Stuart Meck, *Religious Land Use and Institutionalized Persons Act*, ZONING NEWS, AMERICAN PLANNING ASSOCIATION, Jan. 2001, at 1.

[37] 521 U.S. 507 (1997) (declaring the RFRA unconstitutional because its promulgation

promulgate the RLUIPA from the Commerce Clause of the U.S. Constitution.[38] The RLUIPA states that the strict scrutiny test "applies in any case in which . . . the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes . . . ."[39]

The RLUIPA explicitly states that the Establishment Clause is unaffected by the promulgation of this Act: "Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion . . . ."[40] Although this proclamation sounds like a Congressional disclaimer, the RFRA had the exact same language.[41] In his concurrence striking down the RFRA in *City of Boerne*, Justice Stevens still found the Act violated the Establishment Clause.[42]

A. *Proponents of the RLUIPA*

The RLUIPA was "designed to protect the free exercise of religion from unnecessary governmental interference" and "to protect one of the most fundamental aspects of religious freedom, the right to gather and worship."[43] The RLUIPA is intended "to remedy the well-documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context."[44]

Advocates of the RLUIPA contend that places of worship are frequently discriminated against under the guise of discretionary land use purposes, such as "traffic, aesthetics, or uses not consistent with the city's land use plan."[45] Supporters of the Act blame shrewdly devised zoning plans that frequently exclude churches (in the same locales where large groups of people assemble for secular purposes).[46] Proponents believe this Act is essential because cities often do not approve churches in downtown areas where they would rather have taxpaying entities fill empty plots of land.[47]

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exceeded the power given to Congress under the Fourteenth Amendment and because it violated the Establishment Clause).

[38] U.S. CONST. art. I, § 8 (stating that Congress has power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[39] 42 U.S.C. § 2000cc-1(b)(2) (2001).

[40] 42 U.S.C. § 2000cc-4 (2001).

[41] *See* 42 U.S.C. § 2000bb-2 (2001).

[42] 521 U.S. at 537 (Stevens, J., concurring).

[43] 146 CONG. REC. H7190, 7190-91 (2000).

[44] 146 CONG. REC. E1234, 1235 (2000).

[45] 146 CONG. REC. S7774, 7774 (2000).

[46] *See id.*

[47] *See* Lampman, *supra* note 28, at A1.

A study conducted by an attorney of the law firm of Mayer, Brown & Platt and law professors at Brigham Young University found that "small religious groups and nondenominational churches are greatly overrepresented in reported church zoning cases."[48] The study found that more than forty-nine percent of zoning cases concerning the location of places of worship involved minority religions representing a mere nine percent of the population.[49] More than seventy religious and civil rights groups support the RLUIPA.[50] Groups backing the RLUIPA include the American Civil Liberties Union, Americans United for Separation of Church and State, Family Research Council, and the National Association for Evangelicals.[51]

Supporters of the RLUIPA have already won a small victory. In December 2000, a church won the first case under the Act.[52] A Michigan federal court held the "refusal of city officials . . . to allow a church to move into a small shopping center" violated the RLUIPA, despite a zoning ordinance forbidding religious worship in retail zones.[53] Although promising to advocates of the RLUIPA, this is the only case that has reviewed the RLUIPA and the Act's fate remains to be seen.

B. *Opponents of the RLUIPA*

Critics of the RLUIPA worry that religious groups will abuse the Act and that federal courts will be inundated with "church-backed litigation against local zoning boards."[54] Every local zoning dispute now has the potential to become a federal case under the RLUIPA.[55] Adversaries of the RLUIPA believe that the Act takes land use decisions out of the hands of local zoning boards and places them into the hands of the federal courts.[56] They argue that local zoning boards have the expertise and connection with the community to determine the zoning plan that is best for the municipality.[57]

The University of Arizona conducted an independent study and found that of all the land use permits filed by religious groups in 1998, local zoning boards only

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[48] 146 CONG. REC. S7774, 7777 (2000).

[49] *See* Lampman, *supra* note 28, at A1.

[50] *See* 146 CONG. REC. E1234, 1235 (2000).

[51] *See* 146 CONG. REC. S7774, 7777 (2000).

[52] *See* Charles C. Haynes, *Finding Common Ground: Religious Land-Use Law Bares Its Teeth*, GANNETT NEWS SERV., Jan. 2001, at ARC.

[53] *Id.*

[54] Matthew Leo Pordum, *Michigan Lawsuit Tests Federal Religious Act*, THE LEGAL INTELLIGENCER, Oct. 2, 2000, at 4.

[55] *Id.*

[56] *See* The Municipal Art Society, *Religious Land Use Act Passes Congress* (Oct. 10, 2000), *at* http://www.mas.org/new/current2.htm. [hereinafter Municipal Art Society].

[57] *Id.*

rejected one percent.[58] Marci Hamilton, a professor at Benjamin N. Cardozo School of Law, finds that actual discrimination is extremely rare and believes most zoning disputes "involve houses of worship demanding preferential treatment."[59] Other critics of the RLUIPA charge that the Act creates a dual standard that gives preferential treatment to religious persons or groups over secular persons or groups in violation of the separation of church and state.[60]

Another troubling aspect of the passage of the RLUIPA was that in both houses of Congress, the rules were suspended and no public hearings occurred before the RLUIPA's quick passage.[61] Thus, it seems there was very little debate about the RLUIPA's constitutionality, its advantages and disadvantages, and no examination of the far-reaching consequences of this important legislation. Some observers believe that the RLUIPA was not closely scrutinized because of public indifference to this Act and the mistaken perception that it only affects minority religions.[62] A political science professor at Rutgers University commented that "[n]o politician ever lost by standing too tall for religion" and believes that members of Congress recognized the Act's constitutional failings, but voted for the RLUIPA anyway "in the expectation that the Supreme Court will clean up their mess." [63] Opponents of the RLUIPA include local governments and zoning boards,[64] the American Planning Association,[65] the American Atheists,[66] and preservation land-use organizations.[67]

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[58] *Id.*

[59] Robert Worth, *Communities; Not Loving Thy Neighbor*, N.Y. TIMES, Apr. 8, 2001, at 4 (stating "[i]f churches insist on having a leg up in the zoning process, we're going to have a lot more discrimination claims and more diviseness").

[60] *See* American Atheists, *supra* note 16, *at* http://www.atheists.org/flash.line/rlpa38.htm.

[61] *Id.*; *see also* Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93 (2001) ("[The RLUIPA] was passed by unanimous consent in the Senate and by voice vote in the House within half an hour of each other . . . to the shock of municipalities, cities, and states coast to coast." (internal citations omitted)).

[62] *See* Charles C. Haynes, *Finding Common Ground: Public Indifference is Enemy of Religious Freedoms*, GANNETT NEWS SERV., Oct. 3, 2000, at ARC (contrasting the public concern and debate over public school vouchers and school prayer with the arguably further reaching implications of the RLUIPA and the lack of public opinion).

[63] Ross K. Baker, *Commentary; Religious-Political Mix Makes a Bad Brew*, L.A. TIMES, Sept. 11, 2000, at B7 (remarking that the RLUIPA is "a bill that would cause James Madison and other authors of the Constitution who abominated government meddling in religion to gyrate in their crypts").

[64] *See* Benjamin Pimental, *Putting Their Faith in New Religious Act*, S.F. CHRONICLE, Mar. 11, 2001, at A17 (quoting Morgan Hill Mayor Dennis Kennedy as stating, "this law, as written, gives too much favoritism to the religious institutions over the rights of the public government to serve the public good").

[65] *See* Meck, *supra* note 36, at 3 (quoting the policy director for the American Planning Association: "[L]and use by religious institutions should not be held to a separate and preferred standard that is different than the standard for any other land use. RLUIPA is poorly conceived and, under the guise of religious liberty, creates a special, privileged land-

C. *Possible Applications of the RLUIPA*

The RLUIPA is a broad statute with many possible applications. Not only does the RLUIPA affect religious buildings, such as churches, synagogues, temples, and mosques, but its scope also includes house churches, religious meeting places, religious social services, and schools run by religious groups.[68] Under the RLUIPA, religious groups may even be able to challenge the imposition of fire, safety, and health regulations.

The RLUIPA may affect religious buildings in many different contexts. A Mormon temple in Belmont, Massachusetts recently opened without its characteristic center 159-foot spire because of intense community opposition.[69] Neighbors of the church opposed the building of the Mormon temple because of concerns regarding its colossal size (70,000 square feet), increased traffic, incompatible neighborhood aesthetics (six tall spires, one 159-foot spire in a residential neighborhood), and glaring light from the temple's nightly

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use status for religious groups.").

[66] *See* American Atheists, *supra* note 16, *at* http://www.atheists.org/flash.line/rlpa38.htm.

[67] *See* Keith Clines, *Temple Suit Could Become Test Case for Religious Groups' Use of Land*, NEWHOUSE NEWS SERV., Aug. 22, 2001, at Lifestyle (reporting that a synagogue is attempting to use the RLUIPA to by-pass historic preservation restrictions and demolish a small house in Huntsville, Alabama's historic downtown); *see generally* Hamilton, *supra* note 61, at 100 ("Entites with strong ties to local government and politicians, especially the landmark and historical preservation organizations, also heavily criticized the [RLUIPA] to every member of Congress who would listen."); Janie Bryant, *Neighbors Try to Keep Church From Razing Site,* THE VIRGINIAN-PILOT (Norfolk, Va.), Jan. 23, 2001, at B1 (reporting on a Methodist church that wanted to expand and demolish a historic Catholic school; the civic league president believed they were trying to bypass the law because they were a church and stated, "[the church] knew it was in a historic district and they knew anyone buying here falls under the auspices of the Commission of Architectural Review and the city code with the regulations for the historic district"); Municipal Art Society, *supra* note 56, *at* http://www.mas.org/new/current2.htm (expressing concern that the RLUIPA could undermine historic preservation, landmarking, safety, and environmental laws across the country).

[68] *See* 42 U.S.C. § 2000cc(a)(1) ("No government shall impose . . . 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* . . . .") (emphasis added).

[69] Peggy Stack, *Mormon Milestone: 100th Temple Dedicated in Boston, but Rancor Remains; Milestone Reached with 100th Temple*, THE SALT LAKE TRIB., Sept. 30, 2000, at B1; *see generally* Lampman, *supra* note 28, at A1 (describing a proposed Mormon temple that was rejected due to the residential character of the neighborhood, although proposed location was near other churches); *Postings: Zoning Vote on Church in Harrison, N.Y.; Mormon Plan Is Rejected*, N.Y. TIMES, Oct. 8, 2000, at 1 (stating that a local zoning board of appeals rejected a Mormon temple's request for a variance to exceed a thirty-foot height limit by fourteen feet).

illumination.[70]

Mormons, in return, alleged religious intolerance based on unique features of Mormonism such as the aggressive proselytizing and the secretive nature of the religion.[71] In this case, if the congregation shows a substantial burden on their religious exercise, the government must show that the zoning decision was in furtherance of a compelling governmental interest and is the least restrictive means to further that interest.

Although traffic, aesthetics, and increased artificial light are very important factors in land use decisions, the government will have an uphill battle to show they are compelling governmental interests. If the government fails to meet this high standard, the Mormons will be allowed to build their illuminated spire with no restriction under the RLUIPA, despite the local regulations that would apply to a non-religious group.

Other religious groups around the country face similar opposition concerning the location of their customary, but unconventional, places of worship. An Islamic congregation was denied use of water and sewer services for a mosque in Frederick, Maryland, where those services had earlier been approved for a baseball complex.[72] In July 2000, residents of Irvine, California protested the conversion of an ice skating rink into a large Jewish temple, asking the city council to change the zoning plan to prohibit religious buildings on the property.[73] In Jacksonville, Oregon, a congregation was granted a building permit with the stipulation that the group would not hold weddings or funerals, serve alcohol, or hold functions on Saturdays.[74]

The United Methodist Church in Cheyenne, Wyoming is attempting to expand its facility to include an extended-hours daycare facility in the basement of its church.[75] Although neighbors do not oppose the expansion of the church, they are against the addition of an extended-hour daycare facility.[76] The city is in a

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[70] Lampman, *supra* note 28, at A1.

[71] Elizabeth Mehern, *Mormon Temple Without a Steeple is Testament to Bitter Dispute*, MILWAUKEE J. SENTINEL, Sept. 24, 2000, at 5F.

[72] Lampman, *supra* note 28, at A1.

[73] Margaret Ramirez, *Religion/Exploring Issues, Answers and Beliefs; Removing Obstacles to Religious Buildings; Some Neighborhoods Resist Constructions, but a New Law Would Make it Harder to Use Zoning Laws to Keep Worshippers from Residential Areas*, L.A. TIMES, Aug. 5, 2000, at B2.

[74] *New Federal Law Reinforces Religious Freedom*, KNIGHT RIDDER/TRIB., Sept. 14, 2000, at commentary.

[75] *Day Care Controversy Grace United Methodist Sees Need, But Has Wrong Answer*, WYOMING TRIB.-EAGLE, Apr. 8, 2001, at A12 [hereinafter *Daycare*]; Paula Glover, *Proposed Day Care Could Test Federal Law*, WYOMING TRIB.-EAGLE, Mar. 30, 2001, at A1 ("... the case could end up in court as a test case for the new Religious Land Use and Institutionalized Persons Act").

[76] *Day Care*, *supra* note 75, at A12.

quandary because daycare services fall under commercial zoning, while the church is located in a residentially zoned neighborhood.[77] Spot-zoning or the granting of a variance is against the city's policy and would "interrupt the land-use plan of the neighborhood."[78] The congregation alleges religious discrimination and a substantial burden of religious exercise under the RLUIPA because the daycare center will include religious instruction.[79] The city maintains its position against the daycare center is based on existing law grounded in business and zoning matters.[80]

Another recent case demonstrated the inevitable tension between the RLUIPA and other land-use obligations. A local government was torn between allowing the building of an Orthodox Synagogue and its obligation to provide fair housing.[81] The court did not have the opportunity to interpret the RLUIPA because the case settled.[82] This type of situation forces courts to determine whether a religious organization's right to be free of zoning constraints that substantially burden its free exercise of religion under the RLUIPA trumps a municipality's responsibility to provide fair housing to its residents.[83]

Not only does the RLUIPA apply to traditional buildings of worship, but it also applies to religious meeting places, such as homes, schools, and rooms and buildings rented for religious gathering.[84] In 1997, a small Orthodox Jewish congregation was instructed to discontinue religious services in a Hancock Park, California home, despite the fact that Orthodox Jews do not use "mechanical conveyances" on the Sabbath and this location was a convenient place to worship.[85] The City of Hancock Park argued that churches should not be located in residential areas that contain schools and recreational facilities.[86] Although a valid assertion of its zoning power, the local government will have difficulty proving that this land use plan furthers a compelling government interest. If the government does not demonstrate a compelling interest, religious groups are permitted to circumvent the current zoning laws under the RLUIPA.

In the first lawsuit filed under the RLUIPA (three minutes after President

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[77] *Id.*

[78] *Id.*

[79] Glover, *supra* note 75, at A1 (quoting the congregation's pastor: "Zoning cannot be used to manipulate and control religious practices.").

[80] *Id.*

[81] *See* Mary P. Gallagher, *Litigation Over the Sitting of an Orthodox Synagogue in a Bergen County Town Becomes a Conflict Between Free Exercise of Religion and the Obligation to Provide Fair Housing*, N.J. L.J., Feb. 12, 2001.

[82] *Id.*

[83] *Id.*

[84] *See* 42 U.S.C. § 2000cc(b)(3)(B) (2001).

[85] Lampman, *supra* note 28, at A1.

[86] *Id.*

Clinton signed the Act), a Catholic-based Montessori school alleged that an undue burden was placed on the school when it was denied permission to expand its religious education center in Ann Arbor, Michigan.[87] Although the school officials believed that the permit denial was an act of discrimination, the city maintained that it was simply upholding the laws of Michigan.[88] The Montessori school, located in an office park district, was expanding from a daycare center to a primary school.[89] Under Michigan law, daycare centers are allowed in office park districts, but primary schools are not.[90] The city believed that the appropriate avenue for redress would be for the Montessori school to seek an amendment to the existing zoning code, rather than bring a lawsuit against the city.[91]

In Castro Valley, California, a Christian school group is alleging religious discrimination for being denied approval to build a Christian middle school in a rural area.[92] The local planning board denies any religious discrimination and points to its precedent of protecting this rural canyon and cites an environmental impact report showing that the project would increase noise standards beyond current county limits.[93] The government argues that these grounds reveal "compelling governmental interests" under the RLUIPA and as such they are not required to give approval to the building of the school.[94]

The application of the RLUIPA does not end there. The RLUIPA may have wide and far-reaching consequences unforeseen by Congress or President Clinton. Under the RLUIPA, religious groups can challenge *any* land use law that "imposes a substantial burden on the religious exercise of a person."[95] Religious exercise is broadly defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[96] Under this definition, a person could allege a substantial burden on religious exercise based on a system of beliefs no one may

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[87] Pordum, *supra* note 54, at 4.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] David Holbrook, *Redwood Christian Schools Put Faith in New Law*, CONTRA COSTA TIMES, Mar. 15, 2001, at State and Regional News.

[93] *Id.*

[94] *Id.*

[95] 42 U.S.C. § 2000cc(a)(1) (2001). *See* Annysa Johnson, *Wisconsin Lutheran May Sue Over Stadium Plan; Rejection of Complex Could Violate Land-Use Law, School Attorney Says*, MILWAUKEE J. SENTINEL, Sept. 19, 2001, at 7B (reporting that a religious college may assert that the denial of a sports complex imposes a substantial burden on religious exercise in violation of the RLUIPA); *Synagogue Denied Intervention in Challenge to Monopole*, TELECOMM. INDUSTRY LITIG. REP., Oct. 10, 2001, at 7 (reporting that a synagogue relied on the RLUIPA to intervene in a dispute over the erection of a monopole on the grounds that it restricted their exercise of religion by ruining the view from the synagogue's sanctuary).

[96] 42 U.S.C. § 2000cc-5(7)(A) (2001).

have known about or could have foreseen. RLUIPA's definition of religious exercise opens the door for people to abuse the Act by fabricating religious beliefs to gain protection under the RLUIPA.

Claiming a "substantial burden on religious exercise," a religious organization could challenge a city's fire safety or health regulations, and a religious landlord could refuse to rent an apartment or sell a piece of property to gay or single couples living together.[97] Under the RLUIPA, religious groups also may be able to provide social services, such as substance abuse programs, food distribution, or child and elder care, without obtaining a license from or being subject to state regulation.[98] Because the language of the RLUIPA is so broad and has so few restrictions and limitations, the potential exists for dangerous and unintended applications of the statute that could inhibit the government's ability to protect public safety.[99]

III. UNCONSTITUTIONALITY OF THE RLUIPA

The RLUIPA is unconstitutional for three reasons. First, it violates the Establishment Clause of the First Amendment because the RLUIPA advances religion and excessively entangles the government with religion. Second, its connection to the Commerce Clause is too tenuous because the RLUIPA does not regulate the use of channels of interstate commerce, the instrumentalities of interstate commerce, or an activity that has a substantial relation to interstate commerce. Finally, the RLUIPA violates the separation of powers under the Tenth Amendment because zoning and land use regulation are not powers given to Congress by the Constitution. Further, the RLUIPA commandeers state and local governments to enforce federal legislation; land use regulation is a power traditionally assumed solely by state and local governments. Additionally, the RLUIPA has not corrected the provisions of the RFRA that contributed to the Supreme Court's finding that it was unconstitutional.

A. *Establishment Clause*

The Establishment Clause of the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion . . . ."[100] The Supreme Court set forth a three-prong test to determine if there has been a violation of the Establishment

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[97] *See Municipal Art Society, supra* note 56, *at* http://www.mas.org/new/current2.htm.

[98] *See id.* ("Social service programs belong in licensed, regulated, and professionally operated facilities in properly zoned and managed lands. They do not belong in churches where often inexperienced volunteers operate programs, profit takes precedent over truth and neighborhoods are forced to live with the resulting chaos and destruction.").

[99] *See id.*

[100] U.S. CONST. amend. I.

Clause in *Lemon v. Kurtzman*.[101] The first prong asks whether the challenged law or action has a *secular purpose*.[102] The second prong explores whether the challenged law or action's *principal effect is to advance or inhibit religion*.[103] The third prong of the *Lemon* test examines whether the challenged law *excessively entangles government with religion*.[104] A statute or government action violates the Establishment Clause if it fails one of these prongs.

In determining compliance with the first prong of the *Lemon* test, whether the challenged law has a secular purpose, it is appropriate to examine the legislative intent behind the statute.[105] In *Lemon*, the Court gave deference to the purpose of the statute as stated by the legislators.[106] Not all analyses under the first prong of *Lemon* are so deferential to the legislators' stated purpose. The less deferential standard requires a demonstration of "clear secular purpose."[107]

The RLUIPA meets the first prong of the *Lemon* test. The Act's stated purpose is the prevention of religious discrimination.[108] Deterrence of religious discrimination is "unquestionably an appropriate, secular legislative purpose."[109] Under the "clear secular purpose" standard, an argument could be advanced that the RLUIPA's purpose is not clearly secular because it unmistakably advances religious groups over non-religious groups by making it easier for the former to circumvent zoning regulations. Additionally, if it was the legislature's intent to formulate an

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[101] 403 U.S. 602 (1971) (holding that a Pennsylvania statute that provides reimbursement to nonpublic sectarian schools for various secular educational programs violated the Establishment Clause); *see also* Mitchell v. Helms, 530 U.S. 793, 807-10 (2000) (applying the *Lemon* test to determine if a law providing government aid to public and private schools in the form of materials and equipment was a violation of the Establishment Clause); Agostini v. Felton, 521 U.S. 203, 232 (1997) (applying the *Lemon* test to determine if a federally funded program that provides additional, remedial instruction to disadvantaged children violated the Establishment Clause).

[102] *Lemon*, 403 U.S. at 612 (emphasis added).

[103] *Id.* (emphasis added).

[104] *Id.* at 613 (emphasis added).

[105] *Id.*

[106] *Id.* (stating "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else").

[107] Estate of Thornton v. Caldor, 472 U.S. 703, 707 (1985) (affirming the Connecticut Supreme Court's holding that a statute mandating an employer to allow an employee to refrain from work on his practiced Sabbath had the "unmistakable purpose . . . [of] allow[ing] those persons who wish to worship on a particular day the freedom to do so") (citing Caldor, Inc. v. Thornton, 191 Conn. 336, 349 (1983)).

[108] 42 U.S.C. § 2000cc(b)(2) (2001) (stating "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination").

[109] Boyajian v. Gatzunis, 212 F.3d 1, 5 (1st Cir. 2000) (citing Church of the Lukumi Babalu Ave., Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993)).

anti-discrimination statute, the RLUIPA could have read: "No municipality may discriminate against a proposed use of land on the basis of the religious nature of the use, the religious beliefs, or the religious affiliation of the user."[110] Because the prohibition of religious discrimination is a compelling reason to pass legislation, courts would most likely be deferential to the stated legislative purpose of the RLUIPA and it would pass the first prong of *Lemon*.

The second prong of the *Lemon* test asks whether the primary effect of the challenged law is to advance or inhibit religion. Although *Lemon*[111] does not specifically address this issue, a challenged statute fails this prong if its primary effect is to advance religion by conferring a "'benefit' on an explicitly religious basis."[112] The Court has made it "abundantly clear" that some advancement of religion will undoubtedly occur from government action.[113] Thus, determination of the advancement of religion is a question of degree.

The RLUIPA fails the second prong of the *Lemon* test because it provides a benefit on an overtly religious basis. The primary effect of the RLUIPA is to make it easier for *religious organizations* to obtain land use remedies (e.g. building permits, variances, permits to gather in certain areas, etc.). Because the RLUIPA is only applicable to religious organizations and cannot be utilized by atheists or secular groups, its effect is to advance religion to the detriment of non-religious parties.

A counterargument to this conclusion is that this statute does not rise to the level of advancement of religion. The Court has held that statutes exempting religious organizations from property taxes[114] and permitting tax deductions for religious education expenses are not a violation of the Establishment Clause.[115] However, those cases are distinguishable from the RLUIPA because the statutes in

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[110] *Id.* at 11 (Torruella, C.J., dissenting) (referring to a Massachusetts statute similar to the RLUIPA, the dissent states further that "[t]he effect of this [Act's] broader language goes far beyond prohibiting religious intolerance, by exempting religious users from the ordinary zoning process by granting them a 'free pass' with regard to perhaps the most important issue in zoning regulation — location").

[111] 403 U.S. at 613-14:

> We need not decide whether these legislative precautions restrict the . . . primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

Id.

[112] *Caldor*, 472 U.S. at 708 (citing Caldor, Inc. v. Thornton, 191 Conn. 336, 349 (1983)).

[113] Lynch v. Donnelly, 465 U.S. 668, 683 (1984).

[114] *See* Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970).

[115] *See* Mueller v. Allen, 463 U.S. 388 (1983).

question conferred a benefit on a variety of groups (e.g. non-profit organizations), and not *only* religious organizations.[116] The RLUIPA fails the second prong of the *Lemon* test by impermissibly advancing religion.

The third prong of the *Lemon* test asks whether the challenged law excessively entangles government with religion. In analyzing this prong, one must examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[117] The Court, in prior cases, has found excessive entanglement of government and religion under a statute that gave money to private, sectarian schools to support non-sectarian activities[118] and under a statute that mandated employers to accommodate employees' wishes to refrain from work on their Sabbath.[119]

The RLUIPA fails the third prong of the *Lemon* test because it only benefits religious organizations. The RLUIPA does not apply to any group or association without religious affiliation and it requires the state to apply a different standard to religious groups. This standard makes it easier for religious organizations to receive land use approval because the government's decision will be analyzed under strict scrutiny review, the most exacting and stringent standard of review for governmental decision-making. Non-religious groups will not have the benefit of having their land use rulings subject to strict scrutiny review, and thus will not share the benefit provided to religious groups. As demonstrated by the divergence in these two standards, by passage of the RLUIPA, Congress has tremendously aided religious groups over non-religious groups in the area of land use regulation.

The resulting relationship between the government and religious organizations under the RLUIPA is a troubling one. Under the RLUIPA, after a religious group has demonstrated a substantial burden on religious exercise,[120] the government must demonstrate that the imposition of the burden is in furtherance of a compelling governmental interest *and* is the least restrictive means of furthering that interest.[121] These high standards are extremely difficult for the government to meet. In effect, every time a religious group is denied almost anything in the land use field, it can call that decision a substantial burden on its free exercise of religion. At that point,

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[116] *Accord* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding that a Texas statute that exempted religious periodicals, and no other publications, from sales tax violated the Establishment Clause).

[117] Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

[118] *Id.*

[119] Estate of Thornton v. Caldor, 472 U.S. 703, 708 (1985).

[120] This burden is not hard to establish in the land use context. The denial of anything, including a permit to expand or a height variance for a traditional steeple, may be considered a substantial burden on the group's exercise of religion under the Act because of the broad definition of "substantial burden." *See* 42 U.S.C. § 2000cc(a) (2001).

[121] 42 U.S.C. § 2000cc(a)(1)(A-B) (2001).

the government must demonstrate a compelling governmental interest justifying the decision and that the least restrictive means were used to further that interest.[122] Because the government will rarely meet these exacting standards, religious groups will have their land use decisions measured by a different and more lenient standard of review than non-religious groups.[123]

For example, suppose an atheist organization and a Christian congregation were before a zoning board seeking a building permit. The Christian congregation could state that the denial of this permit would substantially burden the free exercise of religion because they would like to build a house of worship. Before denying the congregation's building permit, the government would have to establish that the zoning law achieves a compelling purpose by the least restrictive means. This standard is almost impossible to meet because the government must first show a compelling interest and then must show that the zoning regulation is the least restrictive means of accomplishing this goal. Because the government will rarely meet this standard, religious groups and individuals will be permitted to circumvent local zoning ordinances, while non-religious groups must follow the land use codes without exception.[124]

Under the RLUIPA, the government does not have to meet this same burden when denying the atheist organization's building permit because it is not a religious organization. All the government must do is apply the law to the case and the atheist group has no grounds to force the government to justify its decision under strict scrutiny review. Thus, preferential treatment is given to religious organizations over non-religious organizations.[125] The RLUIPA endorses organized

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[122] *See* 42 U.S.C. § 2000cc-2(a-b) (2001).

[123] It is not argued here that religions should not be afforded free exercise, but merely that religious organizations and non-religious organizations should be held to the same standard.

[124] Interestingly, in the RLUIPA's brief existence, courts and governments have taken creative approaches to avoid having to meet the strict scrutiny standard. *Compare* Katherine Morales, *Council Oks Change in Religious Facility Zoning*, DALLAS MORNING NEWS, Sept. 14, 2001, at 35 (reporting that a local municipality proactively changed its zoning ordinance to comply with the RLUIPA and religious facilities now have their own less restrictive zoning ordinances that no longer require a special-use permit for land-use changes), *with* Tran v. Gwinn, No. 002810, 2001 Va. LEXIS 140 (Va. Nov. 2, 2001) (holding that the special use permit requirement imposed a "minimal and incidental burden" on a Buddhist monk's exercise of religion — the RLUIPA was not mentioned in the majority opinion, although the concurrence mentioned its *possible* applicability).

[125] *Accord* City of Boerne v. Flores, 521 U.S. 507, 537 (Stevens, J. concurring) (discussing the anomaly created by the RLUIPA's similar predecessor the RFRA):

> If the historic landmark . . . in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure . . . . [T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain.

religion to the detriment of those who are not members of an organized religion.[126] As a result, the Act has the effect of advancing religion in violation of the Establishment Clause.[127]

Because of the differing standards, the government is, in effect, promoting religious groups over non-religious groups. Such governmental advancement of religion is an excessive entanglement of government and religion, and therefore the RLUIPA fails the third prong of the *Lemon* test.

A recent Supreme Court case involving governmental aid to religious schools further explains the standards used to analyze a violation of the Establishment Clause. In *Mitchell v. Helms*,[128] the Court found that governmental aid to religious schools was not a violation of the Establishment Clause because it was a law of neutral application:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.[129]

Thus, the governmental aid was not found to be a violation of the Establishment Clause because the programs were of neutral application and benefitted all children, not just religious children. In *Agostini v. Felton*, the Court held that a remedial

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Id. See also Boyajian v. Gatzunis, 212 F.3d 1, 14 (1st Cir. 2000) (Torruella, C.J., dissenting) (referring to a Massachusetts statute very similar to the RLUIPA: "After all, what troubles me about the [statute] is largely the fact that it removes religious users from the ordinary land-use decision making process and thus places them in a position of considerable advantage over nonreligious uses and users.").

[126] *Accord* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring):

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community.

[127] *Accord* Estate of Thornton v. Caldor, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

[128] 530 U.S. 793 (2000).

[129] *Id.* at 809.

tutoring service for disadvantaged children staffed by government employees at religious schools did not violate the Establishment Clause because the governmental assistance was provided to disadvantaged children throughout the state regardless of their religious affiliation.[130] In both of these cases, the validity of the law under the Establishment Clause turned on its neutral applicability. If the law applies to religious and non-religious groups alike, the Establishment Clause is unaffected.

The RLUIPA could be seen as governmental aid to religious organizations because Congress passed a law that makes it easier for those groups to obtain land use approval than groups with no religious affiliation. In stark contrast to *Mitchell*, the RLUIPA is not a law of neutral application. The RLUIPA applies a different standard for religious groups than non-religious groups by requiring the government to show that its land use decision was to further a compelling governmental interest and was the least restrictive means of furthering that governmental interest. The government does not have to meet this formidable burden when non-religious groups challenge its land use decisions. If the Supreme Court consistently "turns to the principle of neutrality" in determining a violation of the Establishment Clause,[131] then the RLUIPA violates the Establishment Clause by its non-neutral purpose of preferring religion over non-religion.

Because the RLUIPA favors all religious groups over those groups without religious affiliation, the Act violates the Establishment Clause of the First Amendment under the three prong test set forth by the Supreme Court in the case of *Lemon v. Kurtzman*.

B. *Commerce Clause*

Congress bases its power to promulgate the RLUIPA on the authority of the Commerce Clause[132] of the U.S. Constitution.[133] The Commerce Clause gives Congress the power to "regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes . . . ."[134] Those powers that are not enumerated in the Constitution are reserved expressly and unmistakably for state regulation.[135] By promulgating the RLUIPA, Congress is regulating private actors (as opposed to state actors), and its actions under the Commerce Clause should be analyzed under the standards set forth in the Supreme Court's recent decisions of

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[130] 521 U.S. 203 (1997).

[131] *Id.*

[132] U.S. CONST. art I, § 8, cl. 3.

[133] *See* 42 U.S.C. § 2000cc-1(b)(2) (2001).

[134] U.S. CONST. art I, § 8, cl. 3.

[135] United States v. Lopez, 514 U.S. 549, 552 (1995) (citing THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

United States v. Lopez[136] and *United States v. Morrison*.[137]

In *Lopez*, the Supreme Court broke with its longstanding tradition of an expansive reading of the Commerce Clause and deference to laws passed by Congress.[138] The Court in *Lopez* held that Congress exceeded its power under the Commerce Clause of the U.S. Constitution with its promulgation of the Gun-Free School Zones Act of 1990.[139]

In doing so, the Court identified three categories of activity that Congress has the power to regulate under the Commerce Clause: "the use of the channels of interstate commerce[,] . . . the instrumentalities of interstate commerce or persons or things in interstate commerce, . . . [and] those activities having a substantial relation to interstate commerce."[140] The Court found that the Gun-Free School Zones Act of 1990 did not fall into any of these categories and thus did not have a relationship to the regulation of commerce.[141] Furthermore, the Court found that the Gun-Free School Zones Act of 1990 lacked a jurisdictional element "which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce."[142] Finally, the Court concluded that there was a lack of congressional findings that demonstrate a link between the Act and the Commerce Clause.[143]

Congress exceeded the authority granted by the Commerce Clause in its promulgation of the RLUIPA. The RLUIPA does not fall into any of the three categories of activity that Congress has been given the power to regulate under the Commerce Clause as identified in *Lopez*. Further, the RLUIPA does not include a jurisdictional element to aid courts in determining case-by-case violations of the Act, nor does it contain legislative findings that would enable a court to determine the Act's connection with the Commerce Clause.

The RLUIPA does not regulate the use of the channels of interstate commerce and thus does not fall into the first category *Lopez* identified as subject to regulation

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[136] 514 U.S. 549 (1995).

[137] 529 U.S. 598 (2000).

[138] *See generally* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (holding that Congress' authority to regulate interstate commerce included the prohibition of racial discrimination by motels serving travelers by Title II of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that Congress had the power under the Commerce Clause to pass Title II of the Civil Rights Act of 1964 because discrimination in restaurants burdened interstate trade); Gibbons v. Ogden 22 U.S. 1 (1824) (upholding congressional legislation that required a federal license to operate a ferry between New York and New Jersey).

[139] 514 U.S. at 551.

[140] *Id.* at 558-59.

[141] *Id.* at 559-62.

[142] *Id.* at 561.

[143] *Id.* at 562 (stating that this was not a requirement of an act promulgated by Congress, but may have aided the Court to evaluate the Act's relationship with the Commerce Clause).

by Congress under the Commerce Clause.[144] The RLUIPA does not regulate the instrumentalities or persons or things in interstate commerce and thus does not fall into the second category subject to congressional regulation under *Lopez*.[145]

The third category that is subject to congressional commerce regulation under *Lopez* — activities having a substantial relationship to interstate commerce — is not so easily dismissed. The determining factor in *Lopez* for finding that the Gun-Free School Zones Act exceeded congressional power under the Commerce Clause was that the Act was a *criminal statute* that had *no relation to commerce*, no matter how broadly defined.[146]

The RLUIPA does not have a substantial relationship to interstate commerce. The RLUIPA is not a criminal statute (as in *Lopez*), thus its relationship with commerce must be examined. On its face, one cannot imagine the exercise of religion as having a substantial relationship with interstate commerce or even as "an essential part of a larger regulation of economic activity."[147] Churches are considered non-profit organizations and are not a source of revenue for municipalities because they are exempt from most tax laws.

In *Lopez*, after finding that the challenged act had no substantial effect on interstate commerce "visible to the naked eye,"[148] the Court turned to congressional findings to search for evidence of the Act's substantial relation to interstate commerce.[149] Although not formally required to make factual findings about a particular law's relationship to interstate commerce, the Court strongly suggested that such a finding should be made when promulgating a law whose relation to interstate commerce is not obvious.[150] Aside from anecdotal narratives in the sparse legislative history of the RLUIPA,[151] there are no findings advancing the proposition that the exercise of religion has a substantial relationship to interstate commerce

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[144] *See generally* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (holding that Congress has the power to regulate racial discrimination in the context of a hotel on an interstate because racial discrimination burdens the channels of interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (stating "[w]hile manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce").

[145] *See generally* Southern Ry. Co. v. United States, 222 U.S. 20 (1911) (holding that Congress has the power under the Commerce Clause to pass legislation dealing with vehicle safety because it was an instrumentality of interstate commerce).

[146] *See Lopez*, 514 U.S. at 561; United States v. Morrison, 529 U.S. 598, 610-11 (2000) (following *Lopez* by striking down part of the Violence Against Women Act of 1994 because it was a criminal statute with no substantial effect on interstate commerce. Consequently, Congress had exceeded its Commerce Clause power by promulgating the law.).

[147] *Lopez*, 514 U.S. at 561.

[148] *Id.* at 563.

[149] *Id.* at 562-63.

[150] *Id.*

[151] *See generally* 146 CONG. REC. S7774, 7776-77 (2000).

and that Congress has the power to regulate it.[152]

A counter-argument to this perspective is that the building of churches (one area that the RLUIPA regulates) involves commercial activity and therefore has a relationship to commerce. This argument is flawed for two reasons.

First, the RLUIPA is not limited to the building of new churches or the physical expansion of existing churches. The RLUIPA applies to any land use function such as permits for increased occupancy or a variance to change the use of the property (e.g. from residential to educational).[153] These types of land use functions have no relation to interstate commerce and their constitutionality cannot be resurrected by one commercial application of the RLUIPA.

Second, although the building of new religious facilities and the expansion of existing religious facilities have some relationship to interstate commerce, this affiliation is not substantial. In this context, interstate commerce is only affected while the religious building is under construction. Compared to the life of the building, which can be a very long time, this relationship with interstate commerce does not rise to the level of substantial.

Another factor in *Lopez* that the Court found disturbing about the challenged act was the lack of a jurisdictional element. By this, the Court meant a limit "which would ensure, through case-by-case inquiry, that the [act] in question affects interstate commerce."[154] The RLUIPA uses language so broad that virtually every type of land use function could conceivably fall under the RLUIPA.

For example, the authors of the RLUIPA could have limited its jurisdiction to the construction of new religious facilities or the expansion of existing facilities. This provision would limit the reach of the RLUIPA while enabling it to be meaningfully reviewed on a case-by-case basis. Without the inclusion of this jurisdictional element, the statute is too broad and has the potential to regulate areas reserved for state regulation. Because of the broad language of the RLUIPA, the lack of substantial relationship with interstate commerce, and the failure to include

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[152] *Accord Lopez*, 514 U.S. at 557 n.2 ("Simply because Congress may conclude that a particular activity affects interstate commerce does not necessarily make it so." (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 311 (1981))).

[153] 42 U.S.C. § 2000cc-5 (2001) (defining land use regulation broadly):

> 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 the 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.

Id.

[154] *Lopez*, 514 U.S. at 561 (stating that a jurisdictional element may be a discrete set of firearms that have an explicit relation to interstate connection).

a jurisdictional element, the RLUIPA does not fit into the third category of economic activities that Congress has authority to regulate.

The RLUIPA is unconstitutional because its promulgation exceeds the congressional Commerce Clause authority under the U.S. Constitution. The RLUIPA does not regulate the use of channels of interstate commerce, the instrumentalities of interstate commerce, nor does it have a substantial relationship with interstate commerce. The RLUIPA does not contain a jurisdictional element that limits its reach and allows for a meaningful case-by-case review. That which is not explicitly enumerated as a congressional power, should be left to the individual states' regulation and control.[155] The RLUIPA promulgation exceeds the power granted to Congress under the Commerce Clause of the Constitution, and these land use matters should be controlled under state and local law.

C. *Separation of Powers and the Tenth Amendment*

The RLUIPA violates the Tenth Amendment to the U.S. Constitution for four reasons. First, zoning and land use regulation is not a power given to Congress by the U.S. Constitution. Second, the RLUIPA unconstitutionally commandeers local governments to enforce federal legislation. Third, zoning and land use planning has traditionally been recognized as a power reserved for state and local governments. Finally, the RLUIPA has not remedied the separation of powers problems that plagued its unconstitutional predecessor, the RFRA.

Under the Tenth Amendment to the United States Constitution, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."[156] The Tenth Amendment's purpose is to prevent Congress from exercising power in spheres left to the discretion of the states and the people.[157] The Supreme Court has commented on the significance and consequence of the Tenth Amendment: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[158] The Constitution, without a doubt,

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[155] *See* United States v. Morrison, 529 U.S. 598, 617-18 (2000) (stating "[t]he Constitution requires a distinction between what is truly national and what is local").

[156] U.S. CONST. amend. X.

[157] *See* Kansas v. Colorado, 206 U.S. 46, 90 (1907) ("This amendment . . . disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted.").

[158] New York v. United States, 505 U.S. 144, 156 (1992) (holding the Low-Level Radioactive Waste Policy Amendments Act unconstitutional under the Tenth Amendment because it compelled states to enact and enforce federal legislation).

establishes "a system of dual sovereignty."[159] Consequently, there is a limit to congressional power and a boundary preventing Congress from impeding a state's authority to promulgate its own set of rules.

The first step in analyzing a Tenth Amendment violation is to determine if the congressional power exercised is an enumerated power reserved to Congress by the Constitution. In a literal sense, as long as congressional authority does not come from any provision of the Constitution, this power is reserved for the states and the people of the United States. Zoning and land use regulation was not a power given to Congress by the Constitution. The RLUIPA was promulgated under the Commerce Clause power[160] and, as discussed above, it exceeds Congress' authority.

Next, when analyzing a violation of the Tenth Amendment, congressional "commandeering" must be examined. Under the parameters of the Tenth Amendment, Congress does not have the authority to commandeer state governments to act on behalf of the federal government.[161] Federal legislation that commandeers state governments to adopt federal law is "inconsistent with the Constitution's division of authority between federal and state governments."[162]

Under the provisions of the RLUIPA, the federal government is using the state governments to enforce its legislation. Although imposing an onerous burden on local governments to show that regional zoning and land use planning does not burden religion may further federal interests, it can hinder state and local government interests by thwarting a community's plan for the layout of their neighborhood. Possibly, through no actual or intentional restriction of the free exercise of religion, a local government may not be able to show, under the RLUIPA, that a land use regulation is the least restrictive means to further a compelling governmental interest. Under the RLUIPA, if those two prongs are not sufficiently demonstrated, the local zoning decision would be overturned as a violation of the Act. The RLUIPA frustrates local governmental decision-making and commandeers local governments to comply with the means of the RLUIPA, so that federal ends will be met. Federal commandeering of state governments is unconstitutional and thus, the RLUIPA violates the Tenth Amendment.

Zoning and land use regulation have long been recognized as a power given to local state officials.[163] State and local government power to promulgate zoning and

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[159] Printz v. United States, 521 U.S. 898, 918 (1997) (holding that provisions of the Brady Gun Act violated constitutional doctrines of dual sovereignty and separation of powers because Congress cannot require states to pass or enforce a federal regulatory program).

[160] 42 U.S.C. § 2000cc-1(b)(2) (2001).

[161] *See Printz*, 521 U.S. at 933; *New York*, 505 U.S. at 161 (stating that Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981))).

[162] *New York*, 505 U.S. at 175.

[163] *See generally* Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994)

land use regulations has consistently withstood constitutional challenges.[164] Specifically, the Supreme Court has recognized the right of local officials 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."[165] It would be difficult and extremely impractical for a federal power to control and police every particularized community's local concerns about the composition and layout of their neighborhood. The local zoning and land use boards are in the best position to evaluate the proper and appropriate function of a certain area of their community. Zoning and land use planning is a valid use of a state's power and under the Tenth Amendment, therefore congressional control of these responsibilities is unconstitutional.[166] As such, land use regulation should be left expressly and solely to state and local government control.

In *City of Boerne v. Flores*, the Supreme Court case that struck down the RFRA, the RLUIPA's predecessor, the Court found that the RFRA "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance."[167] Although *City of Boerne* was not formally decided on Tenth Amendment grounds,[168] the opinion repeatedly accentuates the importance of the balance of power between federal and state systems of government and concludes that Congress overstepped its bounds in the promulgation of the RFRA.

At the core, the RLUIPA and the RFRA are virtually identical pieces of legislation.[169] Once a person or group has alleged a substantial burden on the

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(stating that a local government entity's "prime function . . . was regulation of land use, a function traditionally performed by local governments"); Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975) (stating that "[z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities"); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 960 (4th ed. 1998) ("Generally speaking, the police power is held to reside in the state, but in the case of zoning all states have adopted enabling acts that delegate zoning authority to local governments.").

[164] *See generally* Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that it was not constitutionally impermissible for a local government to condition a zoning decision on whether the plaintiff dedicated some of her land to the city); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a local government's zoning power and denying that its building code violated the Fourteenth Amendment).

[165] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1973).

[166] *See generally* Pimentel, *supra* note 64, at A17 (stating that "local governments have the right to say no to religious groups that want to build in inappropriate or dangerous places, such as industrial areas").

[167] 521 U.S. 507, 536 (1997).

[168] *Id.* (holding that the RFRA to exceeds Congress' power under the Enforcement Clause of the Fourteenth Amendment).

[169] *Compare* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (1993) ("Government may substantially burden a person's exercise of religions only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling

exercise of religion, both impose a strict scrutiny standard of proof on local governments. Nothing in the RLUIPA has remedied the Supreme Court's concern in *City of Boerne* about the RFRA's provisions creating an unlawful balance of power. As a result, the RLUIPA, like the RFRA, violates the balance of power between federal and state governments and is unconstitutional under the Tenth Amendment. [170] The RLUIPA violates the Tenth Amendment because regulation of land use is not a power given to Congress by the U.S. Constitution, the RLUIPA commandeers state governments to implement federal legislation, zoning and land use regulation is traditionally recognized as a state power, and the RLUIPA does not correct the unconstitutional provisions that contributed to the RFRA's demise.

CONCLUSION

The RLUIPA is unconstitutional because it violates three provisions of the U.S. Constitution. The RLUIPA is unconstitutional under the Establishment Clause of the First Amendment, because it fails the three prong test of *Lemon v. Kurtzman* by advancing religion and excessively entangling government with religion. In promulgating the RLUIPA, Congress exceeded its power under the Commerce Clause because the Act does not regulate the use of channels of interstate commerce, the instrumentalities of interstate commerce, nor an activity that has a substantial relation to interstate commerce. The RLUIPA is unconstitutional under the Tenth Amendment because it violates the separation of powers under the Tenth Amendment as zoning and land use regulation are not powers given to Congress by the Constitution. Further, the RLUIPA commandeers state and local governments to enforce federal legislation. Land use regulation is a power traditionally assumed solely by state and local governments, and the RLUIPA has not corrected the provisions of the RFRA that contributed to its unconstitutionality.

The broad nature of the RLUIPA seemingly invites vague and unpredictable applications of the statute. Leaving religious exercise virtually undefined and without precise limits opens the door to potential abuses of the Act. The RLUIPA has the possibility to be used in many unforeseen ways, such as the circumvention of fire and safety codes and historical landmarking laws.

Unquestionably, local discrimination against places of worship is a problem in

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governmental interest."), *with* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(1)(A-B) (2001) ("No government shall impose . . . a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates . . . the burden . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that governmental interest.").

[170] *Accord* Hamilton, *supra* note 61, at 100 (stating "[i]t took the Supreme Court to invalidate RFRA on federalism grounds, and it will take the Court to strike RLUIPA's usurpation of state and local power as well").

the United States. There are numerous examples of arbitrary land use decisions seemingly based on nothing but ignorance and discrimination. However, there are already remedies for such problems. Religious groups can appeal to the local government for a variance from or a change to the existing land use codes. Additionally, lawsuits can be brought that demonstrate a violation of the church's or church member's Equal Protection rights,[171] free exercise of religious rights under the First Amendment, or civil rights under the federal civil rights statutes.[172] The words of Samuel Johnson in the eighteenth century, "[t]o be of no church is dangerous,"[173] unfortunately ring true about the RLUIPA passed in the year 2000. The answer to local religious land use discrimination is not to favor and protect religion over non-religion, but to use the remedies in place to seek redress and justice.

The land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 are both unconstitutional and unnecessary to protect the rights of religious organizations from land use discrimination.

Ada-Marie Walsh

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[171] *See generally* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (dealing with alleged discriminatory zoning under the Equal Protection Clause of the Fourteenth Amendment); ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 9.2(a) (2d ed. 1993) (stating that federal constitutional zoning challenges are generally based on the Due Process or Equal Protection Clause of the Fourteenth Amendment).

[172] *See* 42 U.S.C. § 1983 (2001).

[173] Bartlett, *supra* note 1.