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A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet

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I. Introduction

IMAGINE A LARGE CHURCH LOCATED IN A multi-family residential zoning district, where commercial uses are not permitted and religious uses are permitted by special use permit. The church applies for a special use permit to open a coffee shop, which would operate throughout the week during normal business hours and would supplement and support the church's other ministries. At the hearing on the permit application, many neighbors object. They fear increased traffic, visual blight, and safety hazards for their children. The city denies the permit. The church files an action against the city, alleging that the city has substantially burdened its religious exercise in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[1]

This type of conflict presents a real problem to religious institutions and to the communities in which they worship and minister. Neither the church nor the community is being unreasonable in this hypothetical. The church does not consider itself a business; it does not operate for profit and the coffee shop serves the church's mission of ministry. On the other hand, the coffee shop might cause some of the disruptions that the neighbors fear. The prohibition against commercial uses in the district was designed to avoid just those disruptions. The fracas appears intractable. RLUIPA mandates a particular resolution to this conflict, but not everyone finds that resolution satisfactory.

Despite enjoying bipartisan support in Congress and passing by an overwhelming majority, RLUIPA, and particularly the "substantial burden" provision of section 2(a),[2] has generated significant controversy

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1. 42 U.S.C. §§ 2000cc–2000cc-5 (2009).
2. 42 U.S.C. § 2000cc(a) (2009).

since its passage nine years ago. Section 2(a) subjects to strict scrutiny any land use regulation that substantially burdens religious exercise.[3] It is a prophylactic measure. It creates a new category of prohibited state action—substantially burdening religious land use without a compelling reason for doing so—in order to prevent discrimination against religious groups. Of course, before RLUIPA, the Free Exercise Clause of the First Amendment prohibited religious discrimination; though the Supreme Court's decision in *Employment Division v. Smith*[4] made it more difficult for claimants to obtain exemptions from neutral laws on grounds of religious conviction. The protection that RLUIPA section 2(a) provides to religious institutions goes beyond that afforded by the First Amendment, in that it extends to religious land users a right that is not generally afforded to non-religious land users.

This national advantage for religious land users is the primary source of controversy among RLUIPA scholars. Skeptics of section 2(a) fear expansive construction of its key terms—"land use regulation," "religious exercise," and "substantial burden." They tend to doubt that privileging religious land uses over non-religious uses is either just or constitutionally permissible. Those who favor an expansive scope for RLUIPA point to a history of discrimination against religious land users, which tends to hide behind facially neutral justifications in individualized land use decisions.

Despite this controversy, courts charged with enforcing RLUIPA have taken a modest view of the statute. This article will argue that, despite the vigorous disagreement among scholars, courts have been fairly consistent in their constructions, and have settled upon interpretations that avoid, by and large, confronting any constitutional or jurisprudential infirmities in the statute.[5]

This article will further challenge the common belief that strict scrutiny is necessarily fatal in fact when used to review land use regulations. It attempts to identify compelling state interests on the basis of which local governing authorities may burden religious land uses: interests in direct protection of basic (underived, ultimate) human goods.

3. *Id.*

4. Employment Div. v. Smith, 494 U.S. 872 (1990).

5. Consistent with well-established principles, courts charged with enforcing RLUIPA have tended to avoid constitutional questions surrounding the statute whenever exercises in statutory construction are sufficient to resolve the disputes. *See, e.g.*, Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 697 (E.D. Mich. 2004) (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936)).

The debate over the construction of Section 2(a) can thus be narrowed to address what this article calls the RLUIPA interest gap, the space between discriminatory state action hidden behind pretext, on one hand, and regulations that are narrowly tailored to compelling state interests, on the other.

II. The Key Terms of RLUIPA Section 2(a)

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[6]

By mandating strict scrutiny review of land use regulations and decisions that substantially burden religious exercise, RLUIPA section 2(a) in part diminishes the deference that federal courts have shown to local land use regulators since *Village of Euclid v. Ambler Realty Co.*[7] And it adds to the prohibition against religious discrimination articulated in *Employment Division v. Smith.*[8]

The debate over the proper interpretation of this controversial provision of RLUIPA is possible because the scope of section 2(a) rests on a handful of key terms, the meaning of which is open to debate. The contested terms will make themselves obvious to a careful reader.

A. *Land Use Regulation*

A court considering a RLUIPA claim must first resolve the question what constitutes imposition or implementation of a "land use regulation" within the meaning of RLUIPA section 2(a); if the governmental action is something other than a land use regulation, then RLUIPA does not apply. It is reasonably clear that a municipal ordinance prohibiting the sale of alcohol on Sundays, for example, would not come within RLUIPA, even though that ordinance might impose a hardship on a procrastinating rector who neglected to purchase enough communion wine for Sunday's service.

Because religious exercise is always done in particular places, and nearly always done on land owned or possessed by a particular religious institution, almost any ordinance, when applied to a religious land user,

6. 42 U.S.C. § 2000cc(a)(1) (2009).
7. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
8. *Employment Div.*, 494 U.S. 872 (1990).

can be said to regulate the religious group's use of its land. For this reason, a plain-language construction of the term "land use regulation" arguably brings within RLUIPA's reach disputes that RLUIPA clearly was not intended to cover. Does a noise ordinance regulate land use if employed to prevent a church congregation from singing hymns too loudly on Sunday morning? An ordinance prohibiting the slaughtering of animals, when enforced against a gathering of Santerias, prohibits a use of land that is central to Santeria religious exercise. Does that make the ordinance a land use regulation? (The answer, it turns out, is no.)[9] Does RLUIPA protect Rastafarians from the reach of anti-marijuana laws? (Again, no.)[10]

However, the category of land use regulations is anything but definite, and there is ample room for disagreement. Does an exercise of eminent domain power come under RLUIPA?[11] Should it?[12] Does RLUIPA apply to building codes and aesthetics regulations?[13] The statute leaves room for reasonable disagreement on these questions.

Congress tried to provide some guidance. RLUIPA explains that the term "land use regulation" encompasses "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land."[14] It is clear from this definition that imposition or implementation of a land use regulation includes a decision to enforce or not to amend a zoning ordinance.[15] However, this statutory definition has generated some confusion because it introduces two additional concepts into the equation. Does the statute apply only to zoning and landmarking actions or does it encompass impositions and imple-

9. Merced v. City of Euless, No. 4:06-CV-891-A, 2008 WL 182220, at *2 (N.D. Tex. Jan. 17, 2008).

10. Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007).

11. *See* Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653 (2004) [hereinafter *Eminent Domain and the First Amendment*]; *see also* G. David Mathues, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653 (2006) (arguing the affirmative); Daniel N. Lerman, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057 (2008) (arguing the negative).

12. *See* Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 N.D.L. Rev. (forthcoming 2009).

13. Shelley Ross Saxer, *Assessing RLUIPA's Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALB. GOV'T L. REV. 623, 630 (2009) [hereinafter *Building Codes*].

14. 42 U.S.C. § 2000cc-5(5) (2006).

15. Layman Lessons, Inc. v. City of Millersville, No. 3:06-cv-0588, 2008 WL 686399, at *23 (M.D. Tenn. Mar. 7, 2008); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 990-91 (N.D. Ill. 2003).

mentations of all land use regulations, of which zoning ordinances and landmarking decisions are the two most common instances? Courts are split on which of these interpretations is best. Despite the split, however, a glance at the case law reveals a discernable tendency to give the term "land use regulation" a narrow construction.

1. THE *PRATER* APPROACH

Reasoning from the plain language of the statute, a mandatory sewer tap ordinance would seem to be a regulation of the use of land. However, in the Third Circuit, an ordinance requiring landowners to tap into a newly-extended sewer line is not a land use regulation.[16] The Third Circuit in *Second Baptist Church v. Gilpin Township* considered the dismissal of a RLUIPA claim brought by a Baptist church. The township in 1999 extended a sewer line to within 138 feet of the church's lot, where the church had exercised its religious faith since 1958.[17] The contested ordinance required any landowner within 150 feet of a sewer line to tap into the line, apparently without regard to cost.[18]

The Court of Appeals rejected the church's "broad" construction of RLUIPA, which would have rendered the ordinance a land use regulation.[19] Instead, it took the statutory definition of the term to be a restriction on the term's reach. A land use regulation, the court reasoned, must be either a zoning law or a landmarking law, or implementation of a zoning or landmarking law; not all regulations suffice. The court noted that the challenged ordinance was not enacted pursuant to a zoning or landmarking law, and for that reason concluded that the church's claim was properly dismissed.[20]

This reading of the term "land use regulation," in which the statutory definition of the term is employed as a restriction upon the plain language of the term, comes from the Sixth Circuit's decision in *Prater v. City of Burnside*.[21] Courts following the *Prater* approach have declined to extend RLUIPA to cover, *inter alia:* (1) a city's development of a public roadway that bisected a church's land;[22] (2) an eminent domain condemnation of a church-owned condominium complex;[23] (3) an eminent

16. Second Baptist Church v. Gilpin Twp., 118 F. App'x 615 (3d Cir. 2004).
17. *Id.* at 616.
18. *Id.*
19. *Id.* at 617.
20. *Id.*
21. Prater v. City of Burnside, 289 F.3d 417, 417 (6th Cir. 2002).
22. *Id.* at 422.
23. City & County of Honolulu v. Sherman, 129 P.3d 542, 547 (Haw. 2006).

domain taking of a lot that a church had contracted to purchase;[24] (4) an exercise of eminent domain to expand Chicago's O'Hare Airport;[25] (5) annexation of a church's land into a zoning authority's jurisdiction;[26] and (6) enforcement of anti-narcotics laws to seize marijuana from, and seek judicial forfeiture of the land of, a group of Rastafarians.[27]

2. THE *TAYLOR* APPROACH

Prater's definition of "land use regulation" has arguably proven the most influential, but it is not the only extant definition. The Seventh Circuit, in *Taylor v. City of Gary, Indiana*,[28] employed a broader, plain-meaning construction of "land use regulation," but it nevertheless ruled against the religious claimant. The court held that a city's decision to demolish an old church, to which it owned the fee interest, rather than conveying the church to a Protestant minister, was not a land use regulation.[29] A land use regulation, stated the court, is "a regulation that restricts a claimant's ability to use land in which he holds a property interest."[30] The claimant had no property interest in the church, and the court disposed of the case on this ground.[31]

The *Taylor* plain-meaning construction arguably leaves more room for RLUIPA claimants than the *Prater* approach, because it takes zoning regulations and landmarking decisions as examples of land use regulations, rather than an exclusive list. One might thus expect the definition of "land use regulation" used in *Taylor* to prove more favorable to religious claimants than the *Prater* definition. However, things have not turned out that way. Instead, as in *Taylor*, many courts tend to use plain meaning when a claim so clearly does not implicate a land use regulation that it fails no matter what construction is employed.

For example, a leader in the Santeria religion, against whom a city enforced an ordinance prohibiting animal slaughter, failed to convince a court to apply RLUIPA to his claim.[32] The Santeria clergyman thought

24. Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 251 (W.D.N.Y. 2005).
25. St. John's United Church of Christ v. City of Chi., 401 F. Supp. 2d 887, 899 (N.D. Ill. 2005).
26. Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997-98 (7th Cir. 2006).
27. Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007).
28. Taylor v. City of Gary, 233 F. App'x 561, 561 (7th Cir. 2007).
29. *Id.* at 562.
30. *Id.* (citing 42 U.S.C. § 2000cc-5(5) (2006) and *Vision Church*, 468 F.3d at 998).
31. *Taylor*, 233 F. App'x at 562.
32. *See* Merced v. City of Euless, No. 4:06-CV-891-A, 2008 WL 182220 (N.D. Tex. Jan. 17, 2008).

it quite clear that the ordinance was regulating his use of land. The district court disagreed, without going into the distinction between zoning and landmarking laws and other regulations. The court reasoned that the ordinance did not regulate the use of particular land but rather prohibited one activity throughout the city.[33]

> The fact that plaintiff wants to participate in these activities on his property located within those city limits does not turn the ordinances into land use regulations. If defendant's ordinance regulating the activity of slaughtering animals were construed as a land use regulation under RLUIPA, then any ordinance that regulates a person's activities, as all activities are in some way conducted on land, would potentially be subject to RLUIPA. While plaintiff argues that Congress intended RLUIPA to be broadly construed, the court is convinced that whatever type of laws Congress may have intended RLUIPA to govern, these ordinances are not of that type.[34]

This plain-meaning construction, in which a land use regulation regulates the use of particular land, was sufficient to dispose of the case. The court did not need to consider *Prater*'s more exacting standard. Indeed, the court evidently did not feel obliged to resolve the question what "type of laws Congress may have intended RLUIPA to govern."[35] Regardless what types of land use regulations RLUIPA reaches, this ordinance was not a land use regulation of any type, and therefore did not come within the reach of the statute.

The court in that case set an outer boundary on the reach of RLUIPA—a land use regulation is more than merely a regulation of conduct that might be performed on one's own land—without distinguishing between various types of government action that affect landowners. So, an ordinance prohibiting the slaughter of animals is never a land use regulation, but what about an ordinance requiring owners of developed land to install septic systems? Both ordinances might rest upon the community's interest in health and sanitation, but the latter more directly and purposefully regulates the use of particular lots of land.

The question appears to be unresolved. A United States District Court assumed without deciding, and without discussion, that an ordinance prescribing the capacity of a septic tank was a land use regulation when enforced against members of the Old Order Amish faith.[36] The Amish claimants alleged that the minimum capacity established in the ordinance far exceeded their sanitation needs, which were determined

33. *Id.* at *2.
34. *Id.*
35. *Id.*
36. Beechy v. Central Mich. Dist. Health Dep't, 475 F. Supp. 2d 671, 680-81 (E.D. Mich. 2007), *aff'd*, 274 F. App'x 481 (6th Cir. 2008).

by their simple lifestyle, mandated by their religious convictions.[37] The court ultimately concluded that the Amish claimants' resistance to enforcement of the ordinance was grounded in convenience rather than religious conviction and entered summary judgment for the state health officials against whom the action was filed.[38] The court did not question the applicability of RLUIPA, choosing instead to resolve the question whether the ordinance substantially burdened the claimants' religious exercise, a query that led to the disposal of both the claimants' RLUIPA claim and their Free Exercise claim.[39]

From these cases, one discerns a trend. Where it is possible to dispose of a RLUIPA dispute without determining what constitutes a land use regulation, courts do so. Where it is not possible, courts employ the narrow *Prater* construction of the term "land use regulation."

3. THE *COTTONWOOD CHRISTIAN* DECISION

A notable exception to this trend is a district court's decision in *Cottonwood Christian Center v. Cypress Redevelopment Agency*.[40] The dispute involved a charter city and a church. In 2000, the church, which had grown in less than twenty years from fifty adult members to more than 4,000 adults and 1,200 youths,[41] applied for permits to construct a 4,700 seat auditorium and attendant facilities for worship and ministry.[42] The charter city denied the application and imposed moratoria on the issuance of new land permits.[43] The church filed suit and the city then commenced eminent domain proceedings to condemn the church's land.[44] The church sought an injunction against those proceedings and the charter city moved to dismiss the church's claim.[45]

The court denied the charter city's motion to dismiss and granted the religious organization's motion for a preliminary injunction.[46] In support of its finding that Cottonwood Christian Center had established a likelihood of success on the merits, the court determined that the charter city's exercise of eminent domain was a land use regulation within the

37. *Id.* at 672.
38. *Id.* at 672-73, 684-85.
39. *Id.* at 681.
40. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).
41. *Id.* at 1211.
42. *Id.* at 1213.
43. *Id.* at 1209, 1213.
44. *Id.* at 1209, 1215.
45. *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1209.
46. *Id.*

meaning of RLUIPA.[47] Essential to that determination was the fact that the eminent domain proceeding was conducted pursuant to a redevelopment plan, which constituted a zoning scheme.[48]

The *Cottonwood Christian* court did not indicate, because it did not need to decide, whether an eminent domain proceeding not predicated on re-zoning and redevelopment might be a land use regulation. A finding that a church is likely to succeed on its claim does not amount to a definitive ruling on the meaning of the statute. And a ruling about an eminent domain proceeding that is predicated on re-zoning does not indicate inclusion of eminent domain proceedings generally. Thus, *Cottonwood Christian* does not break dramatically with the tendency of courts to construe the term "land use regulation" narrowly.

B. *Religious Exercise*

In RLUIPA, the term " 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[49] It includes the "use, building, or conversion of real property for the purpose of religious exercise."[50] This definition of religious exercise employs religious belief as its reference point, and religious motivation as its criteria. It largely ignores the tangible aspects of religious exercise: the actions in which a religious actor might hope to engage. What activities constitute *exercises* of religion? Presumably worship services count, but what about accessory uses of land by religious institutions, such as social services to the poor, primary and secondary education, or child care?[51]

The statute is silent on these contested questions. Thus commentators have taken to drawing inferences from the statute's omissions. RLUIPA does not distinguish between worship and non-worship activities, so one infers that it covers both.[52] Because RLUIPA disclaims any requirement that a religious exercise must be compelled by a system of religious belief, religious exercise should include feeding and housing

47. *Id.* at 1222 n.9.
48. *Id.*
49. 42 U.S.C. § 2000cc-5(7)(A) (2009).
50. 42 U.S.C. § 2000cc-5(7)(B) (2009).
51. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 340 (2003); Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 207 (2006); Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593, 593 [hereinafter *Faith in Action*].
52. Galvan, *supra* note 51, at 209.

the poor and counseling the downtrodden, unless the function of the facility in which those actions are performed is purely secular.[53] Unlike the tax code, RLUIPA contains no requirement that a covered auxiliary activity be substantially related to the church's religious, educational, or charitable mission.[54] This omission leads commentators to speculate that RLUIPA might insulate from land use regulations all sorts of otherwise secular activities that increasingly are attaching themselves to Protestant mega-churches: schools, movie theaters, gymnasiums, even private homes.[55]

Indeed, the mega-church appears to be the great source of contention among those who take an interest in RLUIPA. This is not without reason. Large churches affect their communities—for better and worse—to a much greater extent than small churches do. Large churches are able to engage in ministries that small churches cannot perform, and they create problems for their neighbors that small churches do not create. In Demsetzian terms, they create both positive and negative externalities on a large scale.

One study asserts that mega-churches operate restaurants, fitness centers and rock-climbing walls, shops and bookstores, schools, conference centers and retreat centers.[56] Many of these churches are engaged

53. *Faith in Action, supra* note 51, at 618.

54. Commentators here reason by analogy from the tax code, which insulates certain religious institutions, particularly churches, from tax liability. The Internal Revenue Service defines a church to include some of its "integrated auxiliaries." *Id.* at 600. A covered auxiliary use is substantially related to the church's religious, educational, or charitable mission. Galvan, *supra* note 51, at 208. Unlike the tax code, RLUIPA contains no comparable substantial relationship requirement. *Id.*

55. Galvan, *supra* note 51, at 209; Hamilton, *supra* note 51, at 340; Jennifer S. Evans-Cowley & Kenneth Pearlman, *Six Flags Over Jesus: RLUIPA, Megachurches, and Zoning*, 4 TUL. ENVTL. L.J. 203, 209 (2008). One author frets:

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

Galvan, *supra* note 51, at 209-10.

56. Evans-Cowley & Pearlman, *supra* note 55, at 223-24.

in activities throughout the week, even daily.[57] The authors observe, "Neighbors complain that these churches are architectural eyesores, create traffic nightmares, and cause a burden on their neighborhoods."[58] On the other hand, at least some local officials "see churches as providing a valuable service to the community (usually providing services that taxpayers might otherwise be called on to provide)."[59]

A construction of the term "religious exercise" that is deferential to churches, which scholars tend to infer on the basis of RLUIPA's omissions, might tip the scales in favor of mega-churches and other religious institutions and against local regulatory authorities. This would potentially exempt from land use regulations many activities that affect, for better and worse, the local communities in which they are practiced, as courts would leave to religious claimants the determination of which of their various enterprises constitute religious exercises.[60] Thus, one does not need an active imagination to understand why the scope of the term "religious exercise" excites vigorous debate.

Despite the zeal that full-service churches inspire among scholars, the concerns and aspirations of scholarly commentators have gone largely unrealized in practice. Courts generally ignore the relationship between the proposed land use and the religious character of the institution making the use, and instead inquire whether each particular proposed land use is "for a religious purpose,"[61] meaning a purpose that objective observers generally take to be religious in nature.

57. *Id.*

58. *Id.* at 208. Evans-Cowley and Pearlman note that mega-churches have developed a bad reputation and that lawsuits and zoning disputes over mega-church activities are proliferating. *Id.*

59. *Id.* at 226.

60. A broad construction might assist courts to avoid answering the question which activities of a religious group are religious, or (what is fraught with even greater peril) motivated by a sincerely held religious belief. *See Faith in Action, supra* note 51, at 618. Saxer points out that minimizing the extent of governmental intrusion into the determination of which activities are religious in character is a salutary policy goal of RLUIPA. *Id.* at 614-15. If RLUIPA is to serve this goal, "then an accessory use should not be subject to a primary test of whether it is a religious use, but instead should be subject to a lesser inquiry into whether it is reasonably necessary to accomplish the religious organizations purpose." *Id.* at 615. At least one court has arguably employed this standard. Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 700-01 (E.D. Mich. 2004). However, as discussed in the next paragraph, most courts ignore the religious organization's actual purposes and ask whether a particular activity promotes what is generally understood, in an objective sense, to be religious purposes. This standard also minimizes government involvement with religious conviction, but results in a more restrictive construction of RLUIPA than Saxer has called for.

61. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007).

This standard leads to rather unremarkable holdings and dicta. A faith-based primary school constitutes a religious use.[62] Religious exercise protection does not cover a gymnasium constructed by a religious school for exclusive use as a sports venue,[63] or for a headmaster's residence,[64] though it does encompass educational facilities in every room of which at least some of the instruction is religious.[65] Nor does this standard extend RLUIPA protection to expansion of a church building, part of which would house church administrative offices.[66] However, RLUIPA does cover worship services, choir performances, preaching, Sunday school education, and counseling in the same facility that houses the offices.[67] Use for a religious purpose includes worship services, concerts, prayer meetings, and social events,[68] but does not include leasing a church facility to a catering company for the purpose of strengthening the lessor-church's financial condition.[69]

One can with some certainty draw three generalizations from these rulings. First, the nature of the activity, and not the character of the actor, makes an exercise religious. RLUIPA does not, as some scholars fear, require local governments to accommodate land use applicants simply because those applicants are religious.[70] By focusing on the activity rather than the actor in this way, courts constrain the reach of section 2(a). A religious landowner engaging in a land use in which secular landowners routinely engage will not necessarily qualify for section 2(a) protection. This is consistent with the statute's purpose: a religious landowner who is prevented from making a use of his land that is not manifestly religious is anything but an obvious victim of religious discrimination. His religious conviction is a mere happenstance in such a case.

62. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W.2d 271, 280-81 (Mich. Ct. App. 2003). Two scholars concerned about RLUIPA's reach find this "a conclusion with which it is difficult to argue." Evans-Cowley & Pearlman, *supra* note 55, at 215.

63. Evans-Cowley & Pearlman, *supra* note 55, at 347.

64. *Id.*

65. *Id.* at 348.

66. Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 390-91 (E.D.N.Y. 2005).

67. Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, No. CV-02-2989(TCP)(MO), 2006 WL 572855, at *8 (E.D.N.Y. Mar. 6, 2006).

68. *Episcopal Student Found.*, 341 F. Supp. 2d at 693, 700-01.

69. Third Church of Christ v. City of New York, 617 F. Supp. 2d 201 (S.D.N.Y. 2008).

70. *See* Marci Hamilton, *The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act is Unconstitutional*, 2 ALB. GOV'T L. REV. 366, 425 (2009).

Second, an activity that has intelligible value only as a religious activity is a religious exercise. Prayer, preaching, religious instruction, and proselytizing all qualify as religious exercises and qualify for protection from local land use regulations. This also is as one might expect. Local governments that target manifestly religious activities rightly raise suspicion of discriminatory animus.

Finally, an activity that has intelligible value in service to ends that are not exclusively religious, such as education (which serves the secular end of knowledge), can be a religious exercise only if performed for what is generally understood to be a religious purpose. This singular formulation accrues to the advantage of local communities (and, by correlation, is less than cheery news for mega-church administrators trying to open a coffee shop). This construction of "religious exercise" leaves ample room for local authorities to force prominent religious institutions, such as mega-churches and sectarian universities, to internalize many of the negative externalities that they generate.

On the other hand, it also leaves room for municipalities to discriminate on pretextual grounds against landowners known to have religious commitments. And it arguably authorizes courts to determine what counts as a religious purpose and what does not. One might reasonably wonder why courts should be in the business of telling churches which of their activities serve their religious missions. The merit of this construction thus turns on (1) the amount of authority that courts should, and can constitutionally, exercise in this area, and (2) the frequency with which municipalities do, in fact, discriminate against religious land users. It is not the purpose of this article to explore those issues. It is here sufficient to observe that RLUIPA has not, in fact, given mega-churches a free hand to spite the communities in which they worship and minister.

C. *Substantial Burden*

The term "substantial burden" is not defined in RLUIPA.[71] Here again, RLUIPA leaves unanswered various questions about the meaning of a

71. The statute identifies three ways in which a substantial burden may be imposed on religious exercise so as to bring a state action under the statute. Section 2(a) applies where a substantial burden (1) "is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability"; (2) affects interstate commerce; or (3) "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." 42 U.S.C. § 2000cc(a)(2) (2009). These jurisdictional prerequisites do not assist the reader to understand what constitutes a "substantial burden" in the first instance.

key term. What constitutes a substantial burden on religious exercise? How substantial must the burden be? Is any type of burden sufficient, or is the phrase "substantial burden" merely code for discrimination?[72] The statute provides little guidance. Courts have struggled to articulate a consistent standard for applying the term,[73] and there is at present no general consensus on the best construction, as there is with the terms "land use regulation" and "religious exercise."

Courts are not writing on a clean slate. Free Exercise jurisprudence has long taken cognizance of state action that places a substantial burden on the exercise of religion. Because substantial burden is a term of art in the Supreme Court's Free Exercise doctrine, lower courts interpreting RLUIPA infer that Congress, by using it, intended to employ the Supreme Court's construction of the term.[74] The legislative history supports this inference.[75] For this reason, Free Exercise precedent provides a starting point for interpreting the term.[76] Indeed, some courts simply fold their RLUIPA substantial burden analysis into their First Amendment substantial burden analysis.[77]

Supreme Court precedent teaches that a substantial burden requires a religious actor to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand."[78] This standard does not fit comfortably into the land use regulatory landscape; "in the context of land use, a religious institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits."[79] When a municipality denies to a religious actor permission to engage in some use of land, the municipality often brings direct coercion to bear.[80] Rather than merely presenting the land user with a Hobson's choice between adhering to its religious mission and obtaining some privilege or benefit, adverse land use decisions increase the cost of exercising religious beliefs. However, where a denial is not absolute

72. *See* Mark Spykerman, *When God and Costco Battle for a City's Soul: Can the Religious Land Use and Institutionalized Persons Act Fairly Adjudicate Both Sides in Land Use Disputes?*, 18 WASH. U. J.L. & POL'Y 291 (2005).

73. *See Building Codes, supra* note 13.

74. *Westchester Day Sch.*, 504 F.3d at 348.

75. *Id.* (citing 146 Cong. Rec. S7774, S7776 (2000)).

76. *Vision Church*, 468 F.3d at 996-97; Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006).

77. *Vineyard Christian Fellowship of Evanston, Inc.*, 250 F. Supp. 2d at 991-92.

78. *Westchester Day Sch.*, 504 F.3d at 348 (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

79. *Id.* at 348-49.

80. *Id.* at 349.

or final,[81] or where the religious land user has other options available,[82] it is difficult to quantify the amount of coercion that the municipality is using because the religious actor can often, with increased expense of time and money, satisfy the municipality's demands.

The natural question then is at what point does the increased cost of the regulatory burden on religious exercise become "substantial" within the meaning of RLUIPA section 2(a). In order to show that it has borne a substantial burden, a religious organization attempting to invoke RLUIPA must demonstrate more than mere inconvenience.[83] On the other hand, a burden need not be insuperable to be substantial.[84] Courts have agreed on these outside parameters, but between the margins there emerges a continuum of standards. Because some generalizations will assist the analysis, this article groups these standards into three categories: the Seventh Circuit test, the Ninth Circuit test, and the standard used by courts in other circuits.

1. SEVENTH CIRCUIT

The Seventh Circuit has staked out a position favorable to local regulatory authorities by construing "substantial burden" narrowly. The court has expressed concern that, "if this provision is interpreted to place religious institutions in too favorable a position in relation to other land users, there is a danger that it will run afoul" of the Establishment Clause,[85] or will provide to religious land users an impermissible exemption from legitimate land use regulation.[86] For this reason, the Seventh Circuit conceives of section 2(a) as merely a backstop to the explicit prohibitions against religious discrimination contained later in the act.[87] On this conception, state action that implicates the substantial burden in section 2(a) is action so utterly groundless as to raise an inference of discrimination, which is prohibited by the less than equal terms

81. A United States district court determined that, "[n]otwithstanding the broad language in the legislative history of RLUIPA," the term "substantial burden" cannot encompass the allegedly coercive effects of hostile municipal action unless and until the municipality completely and finally denies a church's application. *Cathedral Church of the Intercessor*, 353 F. Supp. at 390.

82. *Westchester Day Sch.*, 504 F.3d at 349; *Vision Church*, 468 F.3d at 999.

83. *Westchester Day Sch.*, 504 F.3d at 349; *Guru Nanak*, 456 F.3d at 988; Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

84. *Westchester Day Sch.*, 504 F.3d at 349; Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).

85. *Sts. Constantine & Helen*, 396 F.3d at 900.

86. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762 (7th Cir. 2003).

87. *Sts. Constantine & Helen*, 396 F.3d at 900. On this view, RLUIPA requires neutral and equal treatment as between religious and non-religious landowners. *Id.*

provision of section 2(b), so that invocation of the substantial burden provision is nearly superfluous.[88]

This modest conception of the role of section 2(a) has led the Seventh Circuit to adopt an exacting standard for would-be RLUIPA claimants. The court has observed that a broad reading of the term "could be read to include the effect of any regulation that 'inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise.'"[89] The court concluded, "this cannot be the correct construction of 'substantial burden on religious exercise' under RLUIPA" because it "would render meaningless the word 'substantial'": a slight burden would trigger strict scrutiny.[90] Therefore: "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[91]

The Seventh Circuit's effective impracticability test considerably narrows the reach of RLUIPA section 2(a). The provision applies to a land use decision that effectively prevents a church from raising funds to construct a worship facility within the municipality.[92] However, the burden on religious exercise created by most land use decisions is not sufficiently substantial in the Seventh Circuit.

In one case, a church petitioned to be annexed into a municipality and to be granted a special use permit, which was required for any construction of churches within the municipality.[93] The municipality proposed several conditions on annexation, including a ban on the future construction of buildings and a limitation on the number of services that the church could hold on the premises.[94] The church rejected the most onerous of these conditions, and the municipality rejected the church's petition.[95]

At approximately the same time, the municipality approved a petition for annexation and re-zoning from a local real estate developer, who

88. Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007). The Eleventh Circuit has criticized the Seventh Circuit's standard because it renders section 2(b)(3)'s total exclusion prohibition meaningless. *See generally Midrash Sephardi*, 366 F.3d at 1227.

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

90. *Id.*

91. *Id.*

92. *Sts. Constantine & Helen*, 396 F.3d at 899, 901.

93. *Vision Church*, 468 F.3d at 981.

94. *Id.* at 982.

95. *Id.* at 982-83.

planned to build residences on land adjacent to the church's lot.[96] As a result of this approval, the church's lot was surrounded on all sides by land within the jurisdiction of the municipality.[97] This fact authorized the municipality by state law to annex the church's land involuntarily, which it did, and to prevent the church from obtaining authority to build from an adjacent jurisdiction.[98] The municipality then enacted an ordinance restricting the size and capacity of buildings used for public assemblies to levels below those sought by the church.[99] The municipality then rejected an application made by the church for a special use permit to construct its desired facilities.[100]

The Seventh Circuit ruled that the municipality did not substantially burden the church's religious exercise by its involuntary annexation of the church's land, by the conditions it imposed on construction, or by its passage of the public assembly ordinance.[101] The court in its section 2(a) analysis drew heavily from its analysis of RLUIPA's equal terms provision and, finding no evidence that the municipality's actions were motivated by bias against the church or its denominational affiliation,[102] held that any burden on the church was merely incidental.[103] The court noted that the limitation on the number of services was "troublesome,"[104] but concluded that none of the municipality's decisions rendered the church's religious exercise effectively impracticable.[105]

In *Civil Liberties for Urban Believers v. City of Chicago*, the Seventh Circuit held that a zoning ordinance which placed equal burdens on religious and non-religious public assembly uses did not impose a substantial burden on religious exercise.[106] While the ordinance created difficulties for religious land users, it did "not render impracticable the use of real property in Chicago for religious exercise."[107] None of the members of the three-judge panel found a RLUIPA violation, despite

96. *Id.* at 983.
97. *Id.*
98. *Vision Church*, 468 F.3d at 983.
99. *Id.* at 983-84.
100. *Id.* at 984.
101. *Id.* at 997-1000.
102. *Id.* at 999 (The court stated that, even if the municipality targeted the church, "this does not mean that [the church] was targeted because of religion.").
103. *Vision Church*, 468 F.3d at 998-99.
104. *Id.* at 999.
105. *Id.* at 999-1000.
106. *Civil Liberties for Urban Believers*, 342 F.3d at 761-62. *See also Petra Presbyterian*, 489 F.3d at 850-51 (holding that an ordinance banning churches in industrial zones did not substantially burden religious exercise where other membership organizations were also banned).
107. *Civil Liberties for Urban Believers*, 342 F.3d at 761.

appreciable evidence that the city's zoning restrictions on churches were discriminatory; one judge concluded that the city had violated the Equal Protection clause[108] and that the burden on at least one church was "formidable."[109]

Thus, a formidable burden is not in the Seventh Circuit sufficiently substantial to implicate section 2(a). On this reading of the provision, few are the violations of section 2(a) that will not also violate the equal terms provision of section 2(b). Indeed, in its most recent pronouncement on the question, the Seventh Circuit discerned a substantial burden from a complaint that stated a claim for "malicious prosecution of a religious organization by City officials."[110] Significantly, the court held that the complaint also stated a violation of the Equal Protection Clause.[111] In a companion case, the court renewed its insistence that "the adjective 'substantial' must be taken seriously lest RLUIPA be interpreted to grant churches a blanket immunity from land-use regulation."[112] The court held that the burden of a landmark designation on a "substantial religious organization" was modest where the landmark designation did not render the building uninhabitable.[113]

2. NINTH CIRCUIT

A short distance along the continuum one finds the Ninth Circuit's standard. From a dictionary the court derived the following test: "a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."[114] Though courts in the Ninth Circuit do not require religious claimants to demonstrate effective impracticability,[115] they do require that the regulation be "oppressive" to a "significantly great" extent.[116] The cases teach that significant oppression does not result from the normal vagaries and challenges that inhere in the zoning and regulatory process.

The Ninth Circuit held in *San Jose Christian College v. City of Morgan Hill* that denial of a re-zoning application to allow a hospital grounds

108. *Id.* at 768-73 (Posner, J., dissenting).
109. *Id.* at 773.
110. World Outreach Conference Center v. Chicago, 591 F.3d 531, 537 (7th Cir. 2009).
111. *Id.* at 538.
112. *Id.* at 539.
113. *Id.*
114. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004); *Guru Nanak Sikh Soc'y*, 456 F.3d at 988; Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980, 989 (D. Ariz. 2009).
115. *Guru Nanak*, 456 F.3d at 988 n.12 (rejecting the Seventh Circuit's "narrower definition").
116. *San Jose Christian Coll.*, 360 F.3d at 1034.

to be converted into a Christian college campus did not substantially burden the college's religious exercise.[117] The college did not in its application provide information required by a state environmental statute.[118] The court observed that the city "merely requires [the] College to submit a complete application, as is required of all applicants."[119] The college appeared reluctant to comply with environmental regulations, which applied equally to all land users, regardless of religious or sectarian conviction.[120] But the college's aversion to the regulatory burden did not amount to significant oppression.

Similarly, where a city denied a church's application to relocate to the city's Main Street, because the proposed move was inconsistent with other development on Main Street, the denial did not substantially burden religious exercise.[121] The court noted that Main Street was unique, that permitting the church to locate there would impede further development because it would subject an entire block to restrictions on liquor licensing.[122] The court found nothing to suggest that the city would have denied the church's permit to locate anywhere else in the district.[123] The court noted that permitting a church to invoke section 2(a) any time it "has purchased a new facility to replace its current, inadequate facility" would amount to a "de facto exemption from the zoning laws" for growing religious organizations.[124]

On the other hand, where municipalities deny permit applications arbitrarily, as where their stated reasons for denial are ambiguous and inconsistent, courts in the Ninth Circuit will permit an inference that those municipalities are effectively preventing land use by the religious applicant.[125] Where the breadth or arbitrariness of a municipality's reasoning indicates that it would deny an application by the religious claimant for any location, the religious claimant has established a significantly great restriction, which amounts to a substantial burden.[126] On this reasoning, a city's repeated denial of applications for a conditional use permit for construction of a Sikh temple substantially burdened the Sikh practitioners, where the Sikh congregation addressed all of the

117. *Id.* at 1035.
118. *Id.* at 1028-29.
119. *Id.* at 1035.
120. *Id.*
121. *Centro Familiar*, 615 F. Supp. 2d at 990.
122. *Id.*
123. *Id.* at 992.
124. *Id.* at 991.
125. *Guru Nanak*, 456 F.3d at 989-92.
126. *Centro Familiar*, 615 F. Supp. 2d at 989.

city's concerns, and the stated reasons for the denials were not applied to other, similarly-situated land users.[127] The Ninth Circuit concluded that the "net effect" of the denials was to "shrink the large amount of land theoretically available" to the Sikhs "to several scattered parcels that the County may or may not ultimately approve."[128] The county had to a significantly great extent lessened the possibility that the Sikhs would be able to build a temple in the future, and had thus imposed a substantial burden on their religious exercise.[129]

The Ninth Circuit's standard at first glance looks like a rational basis test for determining when to apply the strict scrutiny standard required by RLUIPA section 2(a). If the municipality's reasoning is arbitrary or irrational, then its decision must be subjected to strict scrutiny. Of course, any decision that fails to pass the rationality test will also fail the strict scrutiny test. And any decision that rests on a rational basis, such as environmental considerations for a college campus, or the effects of a church sanctuary on urban economic development, will be exempt from strict scrutiny examination.

On closer examination, however, the Ninth Circuit has not necessarily substituted a rational basis test for the strict scrutiny test contained in RLUIPA section 2(a). A municipality that has provided a plausible rationale for its decision is far less likely to have acted in a discriminatory manner than one that provides no reasons, or that gives an arbitrary or irrational justification. The arbitrariness or opaqueness of a land use decision can serve as a signal that discrimination lurks below the surface. Viewed in this light, the Ninth Circuit's standard, while perhaps not giving sufficient attention to the burden on religious exercise, nevertheless ensures transparency in land use decisions that happen to burden religious exercise. This transparency removes opportunities for municipalities to hide discrimination behind facially-neutral justifications, and thus deflects at least some of the undetectable discrimination that RLUIPA was designed to thwart.

3. OTHER COURTS

Finally, authorities that focus primarily or exclusively on the effect of a land use decision on the religious actor's conduct extend RLUIPA's reach a little farther, but not much. There are a few variations, but the basic practice in these jurisdictions is to find a substantial burden when

127. *Guru Nanak*, 456 F.3d at 989-92.
128. *Id.* at 992.
129. *Id.*

(1) the state action can be shown by coercion or some other form of pressure to have altered the behavior of the religious actor, and (2) the municipality failed to make a record of non-discriminatory reasons for its decision. Despite contrary dicta, the second factor appears to be more significant than the first.

In the District of Connecticut, for example, state action implicates section 2(a) when the religious actor foregoes or modifies the practice of its religion because of government interference or fear of punishment by the government.[130] On this standard, a municipal order requiring homeowners to cease and desist weekly prayer meetings in their home imposed a substantial burden on religious exercise.[131] The order rested upon a finding that a weekly prayer meeting was not a "customary accessory use" in a residential zone.[132] Significantly, the determination which uses qualified for this status was made on a case-by-case basis and without reference to any zoning guidelines.[133]

Using a similar standard, the Second Circuit found a substantial burden where the municipality's denial of a special use permit to a religious day school was arbitrary and capricious and failed to comply with state law.[134] The stated justifications for the denial did "not bear the necessary substantial relation to public health, safety or welfare" and were not supported by the evidence.[135]

The Eleventh Circuit has adopted an effects standard, stating that "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[136] Nevertheless, the court found no substantial burden upon the exercise of the Jewish faith where congregants of a synagogue were forced to walk extra distances because the municipal zoning ordinance prohibited churches and synagogues in the business district.[137] The court noted that churches and synagogues were specifically allowed in

130. Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 189 (D. Conn. 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.").

131. *Id.* at 188-89.

132. *Id.* at 177.

133. *Id.*

134. *Westchester Day Sch.*, 504 F.3d at 351-52.

135. *Id.* at 351.

136. *Midrash Sephardi, Inc.*, 366 F.3d at 1227.

137. *Id.* at 1228.

the two-family residential districts[138] and that the claimants had made no attempt to locate in that district.[139]

Despite the ostensible differences among the standards they employ, courts seem genuinely loathe to find a substantial burden on religious exercise where there is no evidence of discrimination. In the Seventh Circuit, a municipality must render religious exercise effectively impracticable before RLUIPA will come into play. In the Ninth Circuit a municipality must be arbitrary or discriminatory in its treatment of a religious claimant. Courts in other circuits take notice when municipal action has a chilling effect on religious exercise, but generally premise any findings of RLUIPA violations on evidence of discriminatory treatment of, or unexplained opposition to, a religious group.

Thus, municipalities that impose equal terms upon all land users, regardless of religious or sectarian affiliation, are not generally called to identify compelling interests for their decisions under section 2(a). Courts charged with enforcing RLUIPA seem much influenced by the Supreme Court's admonition that "generally applicable burdens, neutrally imposed, are not 'substantial.'"[140] No RLUIPA violation has yet obtained where land use regulations were "'neutral and traceable to municipal land planning goals' and where there is no evidence that government actions were taken 'because [plaintiff] is a *religious* institution.'"[141]

III. Congressional Power and Religious Discrimination

The most forceful argument for a restrictive construction of RLUIPA involves principles of federalism. It rests upon the premises that: (1) as a matter of both constitutional law and sound public policy, Congress should not imperil the balance of powers between central and local governing authorities; (2) a literal or expansive interpretation of RLUIPA would entail an impermissible and unwise expansion of centralized, federal power over an arena in which state and local authorities should be sovereign. In RLUIPA the national legislative authority has charged the national judicial authority with strictly scrutinizing land use regulations enacted by local and state governments. As the reach of this strict

138. *Id.* at 1219.
139. *Id.* at 1220-21.
140. *Westchester Day Sch.*, 504 F.3d at 350 (quoting Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389-91 (1990)).
141. *Westchester Day Sch.*, 504 F.3d at 350 (quoting Vision Church v. Vill. of Long Grove, 468 F.3d 975, 998-99 (7th Cir. 2006)).

scrutiny provision extends, so also the usurpation of national power over state and local discretion extends its range.

This argument proceeds from the observation that land use regulation is a largely local affair. Its proponents assert that local control over many issues, including land use, "is more likely to achieve better results for the public good than federal control."[142] "The smaller the polity in geography and in population, the easier it is for the people (1) to monitor what their government is doing, (2) to criticize or praise, and therefore (3) to affect public policy."[143] Marci Hamilton[144] and Richard Schragger[145] have both offered versions of this federalism argument.

Of course, even if it is generally true that land use regulation is left to local authorities,[146] it is far from universally true. Other federal statutes, such as the Endangered Species Act and the Telecommunications Act of 1996 ("TCA"), force municipalities to accommodate minority interests and values, which often conflict with the interests of the community at large. In the face of local communities' resistance to cell phone towers, the TCA imposes restrictions upon local authorities who would deny permission to build a tower.[147] Any denial must be in writing, supported by substantial evidence, and must neither unreasonably discriminate among providers nor effectively prohibit wireless service.[148] In short, the TCA forces local communities to accommodate cellular service providers, just as RLUIPA requires

142. Hamilton, *supra* note 51, at 321.

143. *Id.*

144. *Id.*

145. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

146. Hamilton offers three reasons why land use regulations have traditionally emanated from state and local governments:

> First, the permanent nature of land—its immovability—makes its uses far more relevant to those who are nearby than those who are far away. Second, how land is used is an essential ingredient for communities to develop their character and to pursue shared purposes. Land use law is one of the key ways that communities come together to set priorities, to establish their character, and to meet fiscal, aesthetic, and lifestyle needs. Third, by keeping land use law local, citizens have more direct access to their representative (than if those representatives were national) and a proportionally larger voice in the land use process that directly affects them. Land use law is enacted by the state and local governing bodies and implemented by locally elected or appointed boards, with publicized public hearings an integral component in altering the law and in applying it.

Hamilton, *supra* note 51, at 335.

147. John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537, 555-65 (2009).

148. *Id.* at 556.

them to accommodate churches and synagogues. Both statutes constitute federal intrusion into local regulatory affairs for the protection of minority interests.

Additionally, the case for an expansive RLUIPA maintains that regulation of religious land use is distinguishable from regulation of other land uses because the First Amendment requires Congress and the other federal branches to protect religious liberty.[149] Religious land use is fundamentally different from widget manufacturing and the practice of law, neither of which is a constitutionally-protected activity. An argument grounded in federalism alone misses this point.

Neither Hamilton nor Schragger avoids the issue of religious liberty. Hamilton disputes that Congress' deliberations over RLUIPA and RLUIPA's never-enacted predecessor, the Religious Liberty Protection Acts of 1998 and 1999 ("RLPA"), uncovered a widespread pattern of religious discrimination in the states. Congress, Hamilton asserts, "failed rather abysmally" to generate a record of abuses that would support a finding of anti-religious land use regulation.[150] The evidence of discrimination that Congress uncovered was, Hamilton believes, "not even close to significant";[151] it was "minute."[152]

Hamilton's account of the history of discrimination justifying RLUIPA is the subject of some disagreement.[153] It is clear from her writing that she is not persuaded that states are routinely infringing religious

149. *See, e.g., Eminent Domain and the First Amendment, supra* note 11; *see also* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999).

150. Hamilton, *supra* note 51 at 344-45. Hamilton argues that support for expansive Congressional authority over regulation of religious land uses rests "on the *assumption*—as opposed to proof—that the states cannot be trusted to meet civil rights abuses." *Id.* at 329. She asserts that the Supreme Court's renewed defense of federalism in recent years has exposed Congress "as a slipshod operation not paying attention to the constitutional bases of its actions or the impact of its lawmaking on the states, and the states have proved capable of being responsible members of the polity." *Id.* at 330. *But see* Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485 (2009). Carmella observes that prior to RLUIPA federal courts had focused exclusively on non-discrimination, rather than religious liberty. *Id.* at 487. She points out that RLUIPA requires obligations between churches and their neighbors to be worked out case-by-case, and ensures that religious exercise will largely occur on private property. *Id.* at 536. And she lauds RLUIPA's capacity to look past pretext to discern thinly-veiled discriminatory animus, which has appeared in reported cases. *Id.* at 519-20.

151. *Id.* at 345.

152. *Id.* at 346.

153. Contrast Hamilton's account with that of Douglas Laycock. Laycock, *supra* note 149, at 769-83. Laycock reviewed the evidence of discrimination that came before Congress before the enactment of RLUIPA and concluded, "Land use regulation has become the most widespread obstacle to the free exercise of religion." *Id.* at 783.

liberties. However, other scholars and jurists are so persuaded,[154] and the merits of Hamilton's argument turn on which factual account of the extent of religious discrimination is more accurate. If municipalities routinely discriminate against religious land uses then RLUIPA redresses a real and substantial problem. Individualized land use decisions provide to municipalities opportunities to discriminate with impunity, because they do not lend themselves to ready comparison with land use decisions that are adverse to secular land users. So, if municipalities hide discrimination behind seemingly neutral reasons for their decisions, then section 2(a) has a valuable (even, perhaps, essential) role to play in rooting out that discrimination.

Schragger offers a complementary perspective, arguing that the structural protections of federalism and decentralization of power can actually accrue to the advantage of religious liberty. He challenges the conventional wisdom that "local political institutions are often hostile to religious minorities and therefore particularly in need of central oversight."[155] He claims first, that dispersing authority among decentralized authorities guards against state overreach by preventing any one institution from amassing power that might be used to infringe religious liberty.[156] Second, he suggests that local governments should have the power to counterbalance influential, private religious institutions.[157] The local community acts through its institutions, including local government, to negotiate conflicts between religious institutions and other citizens.[158] Because local institutions play an important role in securing religious liberty, Schragger argues, "a significant diversity in regulatory approaches at the local level is more protective of religious freedom in the aggregate" than uniform rules imposed by centralized authorities.[159]

Far from protecting religious liberty, RLUIPA actually endangers it, argues Schragger. Prior to RLUIPA, the Supreme Court's First Amendment doctrine permitted but did not require legislatures to create religious exemptions to generally applicable laws.[160] RLUIPA "explicitly challenges traditional local prerogatives in the area of land use."[161] In

154. *See, e.g., Civil Liberties for Urban Believers*, 342 F.3d at 770-73 (Posner, J., dissenting).
155. Schragger, *supra* note 145, at 1815.
156. *Id.*
157. *Id.*
158. *Id.* at 1815-16.
159. *Id.* at 1818.
160. Schragger, *supra* note 145, at 1842.
161. *Id.* at 1839.

this way, it concentrates power in one institutional entity to favor religion, which represents "a substantive threat to religious liberty."[162] Schragger comments,

> Instead of treating all legislative exemptions as if they were institutionally identical, [First Amendment] doctrine should be attentive—as Madison and Hume both were—to the relative dangers of any religious faction amassing power in the whole. If concentration of power is a significant threat to religious liberty, then it follows that the Court, in enforcing religious liberty values, should be relatively warier when the political authority to make legislative accommodations is centralized than when it is dispersed. In other words, the decentralization thesis suggests that there are constitutionally relevant differences between wholesale, blanket religion-benefiting trumps, and retail, localized religion-benefiting accommodations.[163]

Schragger then goes on to echo Hamilton's concern that centralized decision-making about religious exemptions from local laws will disproportionately privilege large, organized religious groups.[164] Schragger and Hamilton worry that pro-religion interest groups are able to obtain satisfaction at the national level more efficiently than at the local level because they avoid piecemeal reform, which is "costly, slow, and vulnerable to local resistance."[165]

Furthermore, suggests Schragger, confining religious exemptions to the local level impedes any imbalance between religious interests and other public interests.[166] Local accommodations to religious exercise are likely to be tailored to the needs of the community and to attain a balance between public interests.[167] While some jurisdictions might accommodate religious entities, others might accommodate all charitable uses of land, including religious uses.[168] And even if a particular jurisdiction gets the balance of public interests wrong, "the effects on religious liberty are geographically contained."[169] RLUIPA eradicates this "commonplace local adjustments of benefits and burdens."[170]

It is not immediately clear how a national imbalance in favor of religion and against non-religious interests might infringe religious liberty, as Schragger suggests. To the extent that local authorities are free to tip the balance in favor of secular interests, however compelling or trivial those interests might be, religious exercise does not receive structural

162. *Id.* at 1844.
163. *Id.*
164. *Id.* at 1845.
165. Schragger, *supra* note 145, at 1845.
166. *Id.* at 1846.
167. *Id.*
168. *Id.*
169. *Id.*
170. Schragger, *supra* note 145, at 1847.

protection from infringement but instead is left vulnerable to infringement. Significantly, Schragger has not identified an instance in which religious exercise would receive more protection in the absence of RLUIPA. Furthermore, RLUIPA does not distinguish between religions, but rather provides equal protection for all religious exercises. Indeed, while Schragger appears to be chiefly concerned by large, powerful religious groups amassing power at the national level, small, minority interest groups are most likely to benefit from RLUIPA's protection, as they are most likely to be discriminated against. Obviously, just as the merits of Hamilton's federalism argument turn on the accuracy of her characterization of the Congressional record underlying RLUIPA, the merits of Schragger's argument turn on the strength of his claims about the nature of religious freedom. Schragger, like Hamilton, has not established the predicates for his argument that RLUIPA harms religious liberty.[171]

Rather than an instance of Congressional overreach, RLUIPA thus far appears to be a rather pedestrian anti-discrimination statute. Indeed, as demonstrated in Part II above, RLUIPA's threat to federalism has proven to be quite mild. Courts tend to construe RLUIPA's key terms narrowly. As a result, RLUIPA has not interfered very extensively with local regulatory authority. Thus constrained, RLUIPA has not in its first decade demonstrated the pernicious tendencies that Hamilton and Schragger fear.

IV. Expanding RLUIPA's Reach

A. *The Arguments for an Expansive Interpretation*

The arguments for a broad reading of RLUIPA's key terms, like arguments for a restrictive reading, begin with the terms themselves, and are

171. Nevertheless, an intelligible interpretation of Schragger is possible. If, as Schragger seems to assume, religious freedom generally, and the religion clauses of the First Amendment specifically, entail(s) neutrality between religion and secularism (defined perhaps as practices and beliefs not animated by any of the orthodox religious creeds) then freedom of religious exercise extends not merely to practices traditionally understood to be religious but also to activities traditionally understood to be secular. This understanding of Schragger's argument makes sense of his objection to RLUIPA's "deference to religion as a favored class," *id.* at 1846, and his sympathy with the "troubling equality objection to treating activity animated by deeply held religious belief differently from that animated by an equally deeply held secular belief." *Id.*

The proposition that religious liberty entails equal liberty for both religion and non-religion is not irrational. However, it is controversial, and implicates a long-running scholarly debate, which is beyond the scope of this article and the expertise of this author. In any event, Schragger's argument makes sense if and only if religious freedom consists merely of strict neutrality between religion and non-religion.

reflected in Part II, above. In addition, they tend to invoke two general principles. First, they invoke RLUIPA's admonition that its terms are to be construed broadly, to protect religious exercise to the "maximum extent permitted by the terms of this chapter and the Constitution."[172] Second, they note that the activity that RLUIPA is designed to protect—religious exercise in the use of land—is conduct protected by the First Amendment, and assert on this ground that Congress and the federal courts have a special responsibility to intervene in this area, in which state and local authorities are otherwise pre-eminent. This section considers each argument in turn.

1. MAXIMUM PROTECTION

Shelley Ross Saxer has observed that Congress intended for courts to construe RLUIPA broadly, in order to provide the greatest possible protection for religious exercise.[173] This Congressional intent, Saxer argues, suggests that building codes and aesthetic and historic preservation rules should come within RLUIPA's reach.[174] She observes that "even neutral building code regulations can be applied discriminatorily against disfavored people or entities."[175] She asserts that these regulations "while neutral on their face and allegedly enacted for public health, safety, and welfare, should nonetheless be closely scrutinized under constitutional principles or RLUIPA guidelines when they are individually applied to burden the fundamental right of free exercise of religion."[176] RLUIPA is designed to prevent arbitrary or discriminatory decisions from "hiding behind the facial neutrality of public health, safety, and aesthetic or historic regulation."[177] She concludes that "the broad interpretation required by RLUIPA should encourage courts to examine regulations restricting the use of property for purposes of health and safety to be considered *land use* regulations."[178] And she argues that similarly expansive constructions of the terms "religious exercise"[179] and "substantial burden"[180] are also appropriate.

172. 42 U.S.C. § 2000cc-3(g) (2009).
173. *Building Codes, supra* note 13, at 624.
174. *Id.*
175. *Id.* at 628-29.
176. *Id.* at 630.
177. *Id.*
178. *Building Codes, supra* note 13, at 633 (emphasis in original); *see also Eminent Domain and the First Amendment, supra* note 11, at 670 (arguing that a broad construction of "land use regulation" would encompass eminent domain decisions).
179. *Building Codes, supra* note 13, at 635-38; *Faith in Action, supra* note 51, at 618.
180. *Building Codes, supra* note 13, at 638-43; *Faith in Action, supra* note 51, at 627-28.

Saxer cites *Westchester Day School v. Village of Mamaroneck*, in which the Second Circuit gave a broad construction to the term "religious exercise."[181] In the course of explaining why the expansion of an Orthodox Jewish day school constituted religious exercise, the court noted, "To remove any remaining doubt regarding how broadly Congress aimed to define religious exercise, RLUIPA goes on to state that the Act's aim of protecting religious exercise is to be construed broadly and 'to the maximum extent permitted by the terms of this chapter and the Constitution.' § 2000cc-3(g)."[182] The court suggested that expansion of a religiously-affiliated school facility, by itself, might not be sufficient to constitute religious exercise.[183] However, in the case before it, "where every classroom being constructed will be used at some time for religious education," the use would constitute a religious exercise.[184]

Expansive constructions of the terms "land use regulation" and "religious exercise," and a construction of "substantial burden" that is favorable to religious institutions, manifestly raise the stakes in the dispute over the extent of RLUIPA's reach. As RLUIPA expands to cover more categories of local regulatory authority, Congress' assumption of local regulatory authority to the federal government becomes more comprehensive. If that assumption is in fact an arrogation of power, which the First Amendment does not authorize, then the question how broadly to construe RLUIPA's key terms is a question of constitutional significance: only a very restrictive construction can save RLUIPA from constitutional infirmity.

2. FIRST AMENDMENT ACTIVITY

A second argument for giving RLUIPA an expansive reach derives from the presupposition—documented in RLUIPA's legislative history and contested by Marci Hamilton—that facially-neutral land use regulations are often used to discriminate against religious land users in violation of the Free Exercise Clause of the First Amendment.[185] Section 2(b) and the Free Exercise Clause both prohibit discrimination where it can be proven. However, an individualized assessment that a religious land user has failed to comply with a particular land use regulation generally

181. *See* Westchester Day School v. Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007).
182. *Id.* at 347.
183. *Id.* at 347-48.
184. *Id.* at 348.
185. *Compare Faith in Action, supra* note 51, at 618, *and* Laycock, *supra* note 149, at 769-83 *with* Hamilton, *supra* note 51, at 342-52.

defies characterization as either discriminatory or non-discriminatory,[186] because one can seldom identify a comparable secular land use that might serve as a comparator.

Indeed, individualized assessments are not generally applicable laws.[187] As Douglas Laycock has pointed out, "Land use regulation is among the most individualized and least generally applicable bodies of law in our legal system."[188]

> The whole point of requiring a special use permit is to provide for "individualized governmental assessment" of the proposed use. In a survey of Presbyterian congregations, 32% of the congregations that had needed a land use permit reported that "no clear rules permitted or forbade what we wanted to do, and everything was decided based on the specifics of this particular case (e.g., variance, waiver, special use permit, conditional use permit, amendment to the zoning ordinance, etc.)." Another 15% reported that "even though a clear rule seemed to permit or forbid what we wanted to do, the land use authority's principal decision involved granting exceptions to the rule based on the specifics of this particular case." So in 47% of the cases, there was no generally applicable rule and the key decisions were individualized.[189]

Laycock speculates that a more detailed report of individualized decisions would reveal that larger and more important land use decisions are less likely to result from a clear rule.[190] He concludes that the lack of general applicability in these cases removes them from the general rule of *Employment Division v. Smith*.[191]

Furthermore, where the decision-making authority is sophisticated enough not to reveal any discriminatory animus, there may be no way for a religious land user to demonstrate that the stated reason for a land use decision was in fact pretextual.[192] The spectre of pretext hangs especially over individualized assessments that are based on vague stan-

186. *See Eminent Domain and the First Amendment, supra* note 11, at 687-89. Saxer observes, "Motivation is particularly troublesome when individual decisions are made about specific land uses." *Id.* at 688.

187. Laycock, *supra* note 149, at 767; *Eminent Domain and the First Amendment, supra* note 11, at 678.

188. Laycock, *supra* note 149, at 767.

189. *Id.* at 767-68 (citations omitted).

190. *Id.* at 768.

191. *Id.*

192. Laycock highlights one area where even a lack of pretext is insufficient to defeat the inference of discrimination. Where local authorities deny to religious groups permission to build in commercial or industrial zones, Laycock finds it "highly implausible to believe that neighbors will be disturbed or inconvenienced." *Id.* at 761. He believes that "[i]t is hard to identify reasons for opposition that do not either derive from actual hostility to some or all churches, or, however derived, are so universal in scope that they translate into de facto hostility to all churches." Laycock, *supra* note 149, at 761-62. He allows that local officials probably do not want properties taken off the tax roles. *Id.* at 762. However, this reason is not neutral in fact because its effect is to deny to religious groups places to assemble. *Id.*

dards, which leave significant discretion to the decision maker.[193] Those who perceive widespread anti-religious bias look skeptically upon decisions based on "the public health, safety, morals, convenience, order, prosperity, and general welfare of the City. . . ."[194]

Against this backdrop, Judge Posner in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*[195] reasoned that "the 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination."[196] Judge Posner noted the vulnerability of non-mainstream religious institutions to subtle forms of discrimination where, "as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards."[197] To protect these religious actors, section 2(a) raises an inference of hostility or discrimination in cases where a land use decision substantially burdens the actors' religious exercise and the decision maker cannot justify the decision.[198]

3. THE RLUIPA INTEREST GAP

This account of section 2(a), as an extension of section 2(b), essentially designed to root out non-obvious instances of religious discrimination, is not without difficulties. As Judge Posner observed, RLUIPA gives to religious landowners a form of protection, and the benefit of a favorable inference, that secular landowners simply do not enjoy.[199] Individualized assessments of religious land uses are entitled to prophylactic protection because of the mere *potential* for discrimination.[200] This creates an inequality between religious land use and secular land use.

Furthermore, on an expansive construction of RLUIPA it would not be enough for a decision-making authority to provide a coherent justification for its decision in order to avoid the inference of discrimination,

193. Laycock, *supra* note 149, at 774-75.
194. *Id.* at 774 (citation omitted).
195. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005).
196. *Id.* at 900.
197. *Id.*
198. *Id.*
199. *Id.*
200. *See Eminent Domain and the First Amendment, supra* note 11. Saxer notes that RLUIPA subjects to strict scrutiny individualized assessments based on neutral zoning ordinances and concludes that "eminent domain actions should be subject to strict scrutiny under Smith to protect against government abuse because individual assessments have the potential to discriminate against religious freedom." *Id.* at 689.

as Posner seemed to suggest. Under section 2(a), the justification must rest on a compelling interest, and must demonstrate that the means employed to promote that interest were the least restrictive means available. A non-discriminatory reason for the decision, which is legitimate but not compelling, will not suffice to deflect RLUIPA's involvement in the land use regulation process.

RLUIPA's use of the strict scrutiny test thus leaves a gap between discriminatory local government action on one side and obviously-neutral, compelled local government action on the other. This article will refer to this gap as the "RLUIPA interest gap," meaning the space in the continuum of justifications that municipalities offer for their land use decisions, which lies between justifications offered as a pretext for discrimination and compelling justifications. Into this gap fall many land use decisions that might not be discriminatory at all, and which have always before been within the exclusive province of state and local governing authorities.

Consider, for example, a typical decision, coming expressly within the reach of RLUIPA section 2(a),[201] to landmark a church building, which belongs to a small but resourceful congregation hoping to renovate and expand its facility. A building is generally landmarked without regard to any religious function that the building might presently serve.[202] There is little evidence to suggest that landmarking authorities are often or usually motivated by anti-religion animus. Indeed, there are good reasons to infer that the reasons for many landmarking decisions are benign. As Douglas Laycock acknowledges, "[s]ome churches are landmarked to prevent more intensive redevelopment, some on the apparent theory that any distinctive structure should be landmarked, some out of genuine affection for the building."[203]

Yet RLUIPA requires the decision maker to identify not a benign reason but rather a compelling interest, on the ground that the landmarking decision places a substantial burden on the landowner's religious exercise. The decision maker is unlikely to meet this test. No one's life is at stake; health, safety, and sanitation are unlikely to be affected; the decision might not affect traffic in the area at all. No one supposes that the landmarking authority has discriminated against the church on the basis of the church's theological convictions, and there is unlikely to be any suggestion that the decision maker has treated "a religious assem-

201. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-5(5) (2009).
202. Laycock, *supra* note 149, at 762.
203. *Id.* at 763.

bly or institution on less than equal terms with a nonreligious assembly or institution."[204] The application of section 2(a) here does not, in fact, serve merely as a backstop to RLUIPA's nondiscrimination provisions of section 2(b). The decision falls into the gap described above.

B. *The Equality Problem with an Expansive Interpretation*

Schragger has articulated another problem. RLUIPA privileges religious land use over land use animated by secular motivations. This, Schragger suggests, amounts to "religious favoritism."[205] Schragger doubts that one can identify a "normatively persuasive difference" between a religious homeless shelter and a secular one, both of which operate in violation of local land use regulations.[206] Nevertheless, RLUIPA requires courts to treat the two entities differently.[207]

An expansive interpretation of RLUIPA exacerbates this problem. As the scope of RLUIPA section 2(a) expands, it begins to cover land uses in which both religious and secular land users engage, and the disparity between religious and non-religious land users under RLUIPA becomes more manifest (and more troubling). An expansive section 2(a) would extend protection to a religious homeless shelter. It is not immediately obvious why a religious homeless shelter should enjoy an exemption from land use regulations that a comparable shelter, operated by a secular organization, does not enjoy.

1. RELIGION AS A BASIC GOOD

Is there, in fact, a normative difference between two land users engaged in the same activity, one of which operates for religious reasons while the other does not? Schragger's jurisprudential question deserves a

204. 42 U.S.C. § 2000cc(b)(1) (2009).

205. Schragger, *supra* note 145, at 1846.

206. *Id.*

207. *Id.* Mark Spykerman has articulated a version of this argument. He asks his readers to imagine a city denying a special use permit to a church for the purpose of condemning the church's land and clearing space for a Costco store. Spykerman, *supra* note 72, at 291. He then postulates a hypothetical homeowner hosting worship services for hundreds in her home in a residential neighborhood. *Id.* at 291. Notions of fairness rest with the church in the first case and with the neighbors in the second, yet RLUIPA privileges the religious land use in each case. *Id.* Spykerman asserts, "Favoring religious uses equates to disfavoring uses for not being religious." *Id.* at 312.

Spykerman believes that RLUIPA can be fairly applied only if the term "substantial burden" is given a strict, narrow construction. *Id.* at 310. This narrow construction would entail finding a substantial burden only "when a locality's land use decision knowingly discriminates or has the effect of discrimination against a religious use." Schragger, *supra* note 145, at 310.

jurisprudential answer. Pro-RLUIPA scholars often appear to assume that there is just such a difference, though they have not identified it. One can only speculate about their presuppositions. However, it is worthwhile here to consider one rational (though not always conclusive) ground for arguing that religious land use deserves special protection over the same use made by a secular organization.

One might begin by observing that religious land uses often accrue to the benefit of the community. Angela Carmella has offered a defense of RLUIPA on the ground that religious land use is a constituent aspect of the common good.[208] In her view, freedom to make religious uses of land contributes to conditions that promote human flourishing.[209] Though she does not expressly differentiate between the instrumental and intrinsic values of religious exercise, she locates a central justification for RLUIPA on the value of religious land use. Though churches sometimes abuse their freedom, religious exercise that contributes to social responsibility and stability should receive protection (and usually does).[210]

This argument goes partway, but not completely, to Schragger's concern. (Carmella did not set out to address it.) To be sure, religious organizations often use their lands in such a way to benefit their communities. However, the same can be said of other social and communal institutions, many of which have no discernable religious mission or purpose. Private, secular schools serve the good of knowledge, and help to educate good citizens. Businesses produce prosperity, which can be used to promote human flourishing. Health clinics serve a very basic need within the community. All of these land uses are capable of generating opposition on arbitrary grounds. Yet none of them enjoys prophylactic protection from discrimination. Is there another explanation?

Many legal philosophers, particularly natural lawyers and Christian scholars, maintain that religion, defined for our purposes here as "the establishment and maintenance of proper relationships between oneself (and the orders one can create and maintain) and the divine,"[211] is a basic good.[212] In other words, religion is a reason for human choice and action, valuable in and of itself, the fundamental and inherent value of which is intelligible and evident to rational minds. Because it is a basic good (the argument goes) its value is underived from any more funda-

208. Carmella, *supra* note 150, at 488-90.
209. *Id.* at 516.
210. *Id.* at 517.
211. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 89 (1980).
212. *Id.* at 89-90; ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 219-28 (1993).

mental, or more basic, ends.[213] Its value does not depend upon its usefulness to secure ends extrinsic to itself. So religious exercise is valuable whether or not it happens to (for example) produce greater happiness in its adherents or result in more people being fed. Serving the health and lives of the poor and the emotional and intellectual well-being of the oppressed are laudable activities, but they do not determine the value of the religious exercise. Because religion is both instrumentally and intrinsically valuable, the law ought to protect religious freedom.[214]

Advocates for an expansive RLUIPA might on this ground argue that religious exercise *as such* deserves the protection afforded by section 2(a), even where the extrinsic benefits it serves are indistinguishable from the benefits produced by comparable secular activities. Religious exercise deserves the prophylactic protection of RLUIPA not merely because religious organizations provide benefits to their communities but also because religious land use is inherently and fundamentally valuable, unlike placing a political advertisement on one's lawn[215] or operating an adult bookstore in a commercial building.[216] Those activities, if they are valuable, are valuable only instrumentally, because and only to the extent that they serve more fundamental, extrinsic ends.

2. RELIGION AS AN INCOMMENSURABLE GOOD

One who affirms the proposition that religious exercise is a basic good can discern the rationality of legal protection, even special protection, for religious land users. Where a religious organization is making a use of land in which secular organizations do not engage, such as worship services or religious education, the underived, fundamental value of religious exercise is a rational foundation for extending prophylactic protection to that land use (assuming *arguendo* that Congress has uncovered a history of discrimination against religious land users).

Ultimately, however, the fundamental value of religious exercise does not by itself support an expansive interpretation of RLUIPA's key terms. The fundamental value of religion is not a reason to treat religious activity more favorably than analogous secular activity. While RLUIPA rationally protects exclusively religious activities, one cannot say that a church's operation of a homeless shelter is more valuable, or deserving of greater protection, than the same operation conducted by a

213. ROBERT GEORGE, IN DEFENSE OF NATURAL LAW 263-64 (1999).
214. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 49-57 (1996).
215. *See* City of Ladue v. Gilleo, 512 U.S. 43 (1994).
216. *See Eminent Domain and the First Amendment*, *supra* note 11, at 655-62.

secular organization. This is because the basic good of religion and the basic goods that homeless shelters instrumentally serve—health, life—are not commensurable with each other.[217] It is thus a mistake[218] to claim that religion is more or less valuable, or more or less basic or fundamental, than health.[219] Both the church-run homeless shelter and the secular homeless shelter instrumentally serve the basic good of health, and it is often difficult to measure or identify the value that religious commitment adds to this valuable service.

Nor is the fundamental value of religion by itself a reason to expand RLUIPA's reach to land use regulations other than zoning ordinances and land marking decisions. Exempting religious land users from neutral regulations—building codes, for example—designed to protect other basic goods, such as health and life, can be justified only by a finding that those regulations are not, in fact, neutral but rather are used to cover discriminatory treatment of religious organizations. Here again, it must be a history of discrimination, and not merely the value of religion, which justifies the prophylaxis.

V. The Collision Between Churches and Community Interests: Not as Lethal as Perhaps Feared

A. *A Conflict of Interests*

An expansive RLUIPA produces other conflicts, in addition to its unequal treatment of religious and secular land users. Except when they are irrational, land use regulations deflect real harms to actual communities. That is, they protect discernable community interests that private land users often threaten in tangible ways. To the extent that an expansive RLUIPA exempts religious land users from these regulations, it generates the potential to place religious organizations in direct conflict with the communities in which they operate.

217. For more on the incommensurability of basic goods, *see, e.g.*, JOHN FINNIS, FUNDAMENTALS OF ETHICS 86-90 (1984); FINNIS, *supra* note 211, at 92-95, 112-15; GEORGE, *supra* note 213, at 266-72; JOSEPH RAZ, THE MORALITY OF FREEDOM 321-66 (1988).

218. Indeed, if the commensurability thesis is true, it is nonsensical to make this claim. I do not mean to use the word "nonsensical" in a pejorative sense here, though I understand that many people understand it that way. I mean rather to use it in the strictly technical sense that it assumes when used in moral and legal philosophy. That is to say, the statement is nonsense because it has no intelligible meaning. Because basic goods are incommensurable, to say that the religious exercise of the church that operates the homeless shelter is more valuable than the health of the homeless persons served there is akin to saying that twelve inches is greater than four hours.

219. John Finnis' insights on the relationship between religious practice and the other basic goods are helpful. FINNIS, *supra* note 211, at 92-95, 113.

As anti-RLUIPA scholars point out, and religious liberty advocates acknowledge, there is often a tension between the religious liberty of a religious institution in a community and the interests of the community at large. Churches, synagogues, mosques, and other religious institutions generate both positive and negative externalities when they use land, just as any land user does. As Douglas Laycock has observed, "A growing church in too small a place can impose substantial costs on its neighbors, especially if it lacks parking or other facilities and, thus, spills over into surrounding properties."[220] An absolute right to assemble for worship wherever, and under whatever circumstances, a religious group happens to prefer would lead to unjustifiable results. Scholars on both sides of the religious liberty divide agree that "[l]egitimate land use regulation can exclude churches from inappropriate locations and protect neighbors from serious inconvenience" as long as that regulation does not substantially or unduly burden religious exercise.[221]

RLUIPA does not create an absolute right to assemble. However, it does make it difficult for local governing authorities to require religious landowners to internalize many of the negative externalities that they generate. As the cases discussed above demonstrate, many land use regulations by their natural operation burden religious exercise when applied to religious institutions. Under an expansive construction of RLUIPA section 2(a), the local land regulation authority finds itself fighting uphill to overcome a presumption of invalidity. An expansive RLUIPA thus affords to religious land users, if not an absolute right, at least a very strong hand against local governments.

Even framing the matter this way misses part of the problem. Local governments do not (at least in theory and generally in practice) act for their own sakes but rather for the common good of the communities they govern. The point of neutral land use regulations is of course to secure reciprocity of advantage among landowners and land users. If local governments are deprived of this tool for protecting one group of property users from another then it is citizens and property users who suffer the consequences.

Viewed in this light, the prophylactic provision of RLUIPA looks less like a security measure for property rights against government encroachment and more like a strengthening of the property rights of religious land users at the expense of the property rights of non-religious

220. Laycock, *supra* note 149, at 756.
221. *Id.*

land users.[222] Land use regulation need not always be a zero-sum exercise, but it often is.[223] Thus, categorically strengthening the hands of religious land users against their neighbors (or, to be precise, the elected authorities through whom those neighbors work out their myriad land use conflicts) prevents communities from addressing those negative externalities that some religious land uses generate.

As the extent and nature of religious land uses expand, the externalities that those uses generate—both positive and negative—also grow in size and number. A church that opens a homeless shelter or soup kitchen on its premises manifestly affects its local community in both positive and negative ways. While it provides necessary eleemosynary services to unfortunate members of the community, it also attracts to its neighborhood people who might not otherwise be welcomed there. Neighboring landowners, who do not enjoy the benefits of the church's charity, are likely to experience only the negative externalities.[224]

Contributing to the controversy over mega-churches, Marci Hamilton has observed that many religious landowners today submit to local governments' plans for "all-inclusive religious communities, from megachurches that are on the scale of a sizable shopping mall to planned communities that encompass not just a house of worship, but many social services and even private homes."[225] If religious land use is understood to encompass accessory uses such as education facilities, movie theaters, coffee houses, day care centers, and social service facilities, then RLUIPA potentially insulates from regulation all sorts of negative externalities, as long as those externalities are generated by a religious, rather than secular, landowner.[226] This function of RLUIPA has prompted the attention paid to the term "religious exercise" and the attendant debate over what constitutes religious land use, discussed in Part II.C, above.[227]

222. Marci Hamilton takes this view. *See* Hamilton, *supra* note 51, at 355.

223. *Id.* Hamilton observes:

> Land use law is the quintessential zero-sum game, where giving privileges to one landowner more often than not undermines the rights of neighbors and other members of the community. The way RLPA/RLUIPA was presented [to Congress]—with the focus on religious entities alone—permitted the question of whether other landowners would be harmed to remain unasked.

Id. at 355.

224. *See* 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 (1995-96).

225. Hamilton, *supra* note 51, at 340.

226. *Id.*

227. *See* Hamilton, *supra* note 51; *see also Faith in Action, supra* note 51.

B. *Focusing the Debate*

Rather than step into that debate, this article explores a different inquiry: which of the externalities generated by religious landowners should local governments have the power to regulate, even to the point of burdening religious exercise? RLUIPA answers: those negative externalities that endanger compelling interests, which the local authority is charged with protecting by narrowly tailored, least restrictive means. This answer suggests to many observers that RLUIPA effectively exempts religious land users from land use regulations, based on the common understanding that strict scrutiny is strict in theory and fatal in fact.[228]

However, at least two centripetal forces push inward on section 2(a). First, as discussed above, courts tend to give narrow constructions to section 2(a)'s key terms. In particular, of claimants attempting to prove a substantial burden on religious exercise, courts tend to require more than a showing of mere deleterious effect on the religious land user. They also inquire into the local government's reasoning for its decision.

Second, informed critics have recently begun to question the proposition that strict scrutiny is fatal in fact. The Supreme Court's *Grutter* decision[229] is perhaps the best known, but by no means the only, recent judicial recognition of compelling state interests that justify infringement of some right or rights.[230] And some scholars have challenged the conventional wisdom that strict scrutiny review is necessarily fatal.[231]

228. This canonical formulation first appeared in Gerald Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

229. Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (determining that student body diversity is a compelling interest justifying racial discrimination); *see also* Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000).

230. Other compelling interests include preserving the integrity of government and public servants as decided in Mancuso v. Taft, 476 F.2d 187, 189 (1st Cir. 1973); *see also* Jenevein v. Willing, 493 F.3d 551, 559 (5th Cir. 2007); Sylvester v. Fogley, 465 F.3d 851, 860 (8th Cir. 2006); Person v. Ass'n of Bar of City of N.Y., 554 F.2d 534, 538 (2d Cir. 1977); United States v. Bd. of Educ., 911 F.2d 882, 889 (3d Cir. 1990) (avoiding the establishment of religion); Goodall v. Stafford County Sch. Bd., 930 F.2d 363, 370 (4th Cir. 1991); Prejean v. Foster, 227 F.3d 504, 515 (5th Cir. 2000) (protecting voting rights); Burson v. Freeman, 504 U.S. 191, 199 (1992) (preserving the integrity of the electoral process and of the citizenry's confidence in the electoral system); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789-90 (1978); ACLU v. Mukasey, 534 F.3d 181, 188 (3d Cir. 2008) (protecting minors from exposure to obscenity); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 746 (5th Cir. 2008); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006); Murphy v. Arkansas, 852 F.2d 1039, 1042 (8th Cir. 1988) (adequately educating young citizens).

231. *See* Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861 (2000); Adam Winkler, *Fatal in Theory and*

One study noted that religious liberty claims involve a particularly weak form of strict scrutiny, under which a majority of challenged laws are upheld.[232] The author observed, "Strict scrutiny is clearly survivable in religious liberty cases, where 59 percent of applications result in the law being upheld."[233] And religious liberty claims brought under RLUIPA and the Religious Freedom Restoration Act ("RFRA") are far less likely to topple challenged laws than claims brought under the Free Exercise Clause. "Under the RFRA and the RLUIPA, the federal courts upheld 72 percent of the challenged laws, while under the Constitution-based strict scrutiny the survival rate was 21 percent—the latter in line with most other constitutional doctrines."[234] The reasons for the weakness of RLUIPA's strict scrutiny standard are unknown. The study's author suggests that, while courts are sympathetic to non-frivolous religious discrimination claims, religious exemptions claims, which RLUIPA subjects to strict scrutiny review, are far less likely to succeed.[235] Another scholar believes "that courts find strict scrutiny disproportionate to the harms typically involved in religious land use cases."[236] For that reason, courts rarely apply the test with any vigor.[237]

One might also reasonably infer that the laws against which RLUIPA is most often invoked, land use regulations, are especially easy to defend against religious liberty challenges because they protect communities' most basic interests, such as life and health, and thus rest upon important considerations other than discriminatory animus. Indeed, there is reason to believe that many land use regulations and decisions do, in fact, rest upon compelling interests, such as the protection of life and health. Local communities are generally most capable of identifying

Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 VAND. L. REV. 793 (2006); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

232. Winkler, *supra* note 231, at 814.

233. *Id.* at 815.

234. *Id.* at 860. It is not clear whether Winkler's data set includes RFRA and RLUIPA decisions in which courts declined to employ the strict scrutiny standard because one or more of the statutory predicates did not pertain. These decisions, of course, would not provide much insight into the fatality of strict scrutiny review, though they do cast light on the overall success of RLUIPA claims.

The most reasonable reading of Winkler's study, however, is that it reveals specifically the fatality of strict scrutiny review. In explaining the methodology for his overall study, which includes strict scrutiny reviews from several areas of the law other than RLUIPA, Winkler states, "The data set includes all published federal court decisions applying strict scrutiny in a final ruling on the merits." *Id.* at 811.

235. *Id.* at 860-62.

236. Tuttle, *supra* note 231, at 867.

237. *Id.*

their own compelling interests and are best suited to tailor ordinances to the preservation and protection of those interests. One might for these reasons expect courts regularly to identify compelling interests underlying local land use regulations. This makes RLUIPA section 2(a) less of a threat to community self-governance than it is often supposed to be.

RLUIPA opponents would no doubt here respond that RLUIPA endangers even land use regulations that would survive strict scrutiny review because the mere threat of RLUIPA litigation is a weapon that religious organizations can use to obtain exemptions from nondiscriminatory land use regulations. Most RLUIPA claims, like most civil claims generally, are settled some time before final resolution in a court of law. RLUIPA gives religious land users a strategic advantage over local governments trying to operate with limited resources.[238]

Yet consider how ineffectual this weapon is likely to be once one or two federal courts have recognized some of the compelling interests underlying common land use regulations. It would not take very many decisions upholding land use regulations on strict scrutiny review before the threat of RLUIPA litigation would lose much of its bite. And if RFRA and RLUIPA strict scrutiny is, in fact, far less fatal than strict scrutiny review in other contexts, then one should expect the disagreement over the proper scope of RLUIPA to narrow considerably.

C. *Compelling Interests and Basic Goods*

This hypothesis raises an obvious question: how are courts to identify compelling interests underlying land use regulations, and to distinguish them from merely substantial or legitimate interests? One response to this question draws upon the concept of self-evident basic goods, discussed briefly above. One might observe that the most fundamental and significant interests on the basis of which municipalities often regulate land use are interests in the preservation and protection of basic human goods, such as health and life. One might then infer that those interests that qualify as compelling are those that directly implicate basic goods.

It would be a mistake to conclude that one can rank interests in the protection of basic goods according to the basic good each interest protects. Because basic goods are incommensurable, one cannot rank them against each other; the basic good of religion is no more or less valuable than the basic good of knowledge. Therefore, one cannot say that

238. For an iteration of this argument, see Hamilton, *supra* note 70, at 421-25.

a community's interest in protecting religious exercise is more or less compelling than its interest in educating its children. If this is what section 2(a) means when it requires courts to identify "compelling" interests, then RLUIPA creates a real problem, not just of inequality (and potential unconstitutionality), but also of coherence. How does one compare the value of a church's ministry to the poor and a community's safeguards around its elementary schools? It cannot be done.

On the other hand, one can rank basic goods against non-basic goods—those ends of human choice and action that are not valuable in themselves, but merely as instruments for securing more basic ends, from which they derive their value. A municipality's interest in protecting a human life, a basic good, is arguably more compelling than its interest in protecting a furniture factory, which is instrumentally valuable for producing employment and prosperity within the community, but is not intrinsically valuable.

So, we might hypothesize that, at least in the context of land use regulations, compelling interests are those interests that a municipality has in the direct protection and preservation of basic, as opposed to non-basic (merely instrumental), human goods. This is not to suggest that a community's interest in the preservation of a merely instrumental good is necessarily less than compelling. However, the case for a compelling interest in the protection of a merely instrumental good is certainly more attenuated than that for protection of a basic good.

In different words, we might say that both prongs of RLUIPA's strict scrutiny test are intended to ensure tight connections between means and ends. Whereas the least restrictive means prong requires a close nexus between the community's interest and the land use regulation chosen to protect that interest, the compelling state interest prong requires a close nexus between the community's interest and the fundamental, intelligible end that the community has an interest in preserving. Considered this way, the compelling interest prong is a way to measure directness between the community's stated goals and the objective, intelligible ends of human choice and action to which those goals correspond. Where the local government's goal corresponds directly to an underived (basic) good, its interest is compelling. Where the local government's goal corresponds to a merely instrumental good, the value of which derives from its usefulness for securing more fundamental ends, its interest is less compelling. Viewed this way, the strict scrutiny review mandated in RLUIPA is about getting directly from intelligible ends to community interests in protecting those ends, and thence directly to regulations that protect those interests.

Contrast a community's interest in protecting its citizens from fatal toxins with its interest in raising tax revenue. No one doubts that both interests are important. But are both interests compelling? Protecting citizens from fatal toxins by (for example) segregating sewage treatment plants from worship facilities directly and indubitably serves the basic good of health. Health is a basic good, intelligible as a reason for action in itself, without reference to any more fundamental end. And it would be surprising for a court to find that the municipality's interest in segregating sewage treatment plants from churches and residential neighborhoods was less than compelling.

By contrast, increasing tax revenues by (for example) excluding a church from a business district serves the good of economic prosperity. But prosperity is not a basic good. One cannot intelligibly claim to pursue money for its own sake.[239] The intelligible value of money rests in its exchange value, its capacity to enable its possessor to acquire other, more fundamental ends, such as food or serviceable roads.[240] We should not be surprised, under the thesis of this section, not to find cases identifying increased tax revenue as a compelling state interest.

That money is a merely instrumental, and not basic, good does not entail that raising tax revenue can *never* be a compelling interest. Indeed, one can conceive of cases where increasing tax revenues might be compelling, as where a city is going broke and is in danger of ending its basic services, such as police and fire protection. But note here that the compelling nature of the city's interest in this hypothetical does not rest on the value of the tax revenues themselves but rather on the value of the more basic ends—life and health—that the increased tax revenues will instrumentally serve.

This interpretation of the strict scrutiny standard resolves two difficulties. First, on this view, the extent of section 2(a)'s interference in local regulatory affairs is not as great as some fear. A community's effort directly to promote or defend any basic good should satisfy the strict scrutiny standard. Section 2(a) thus ensures deference to a community's ordering of its interests. Only where a municipality burdens religious land use (which is the instantiation of the basic good of religion) must the

239. Indeed, we have names for people who pursue money for its own sake, and none of them are flattering.

240. And it might be observed that these ends rest on still more basic ends and are thus merely instrumental. Food, for example, is instrumentally valuable for securing health, a basic good. But having food for food's sake, storing it in one's basement merely to possess it without the intent to consume it, is not a rational end of choice and action.

community justify that burden with direct defense of some other, incommensurable good. And if the community provides a justification grounded in direct protection of a basic good, it is entitled to deference. If the community acting through its local government decides to segregate churches from sewage treatment plants, RLUIPA does not override that decision.

Second, though RLUIPA protects religion rather than other basic goods (it does not mandate strict scrutiny review for land use regulations that substantially burden health), its effect is not to give religion a trump card over other concerns of the community but rather to force communities to take religion seriously as a basic good deserving like consideration. In other words, it elevates religion to its rightful position: co-equal with other basic goods, such as life and health. As Carmella points out, RLUIPA rejects *both* uncritical deference to governmental land use decisions that burden religion *and* uncritical deference to religious land uses.[241] The statute thus avoids to some degree the inequality problem ascribed to it.

D. *Some Compelling Interests*

So which interests directly correspond to basic goods, and therefore qualify as compelling? Life and health are two basic goods of particular interest to land use regulators. Nearly any list of basic goods includes both of these.[242] One can affirm the self-evident, underived value of life (for example); a rational actor rationally chooses life for its own sake. That is not to say that life is not also instrumentally valuable for securing other, fundamental ends. Indeed, having life enables a person to experience all the good things that humans experience. Rather, to recognize that life is a basic good is to acknowledge that life is not *merely* instrumentally valuable, and that its value is not contingent upon the value of the other goods it enables its liver to enjoy. Human life has value whether it belongs to a paraplegic, a soldier, or a playboy millionaire, simply by being human life.

It is not surprising to find that the state has an "unqualified interest in the preservation of human life,"[243] even very young human life.[244] And

241. Carmella, *supra* note 150, at 517-18.

242. Arguably the most influential list of basic goods is the one provided by John Finnis. FINNIS, *supra* note 211, at 92-95. But Finnis' list shares much in common with theorists as divergent from the Natural Law tradition as Ronald Dworkin. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993).

243. Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

244. *See* Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)); *see also* Roe v. Wade, 410 U.S. 113, 146,

the well-being of children has long been recognized as a compelling state interest.[245] Without too active an imagination or too deep a knowledge of land use regulation law, one can recognize scores of land use regulations designed directly to protect children from fatal harm. Zoning ordinances segregate schools from major highways and industrial complexes. They impose stringent safety requirements on any structure built to house daycare centers. Housing and building codes regulate dozens of design features that affect child safety, from the space between spindles on a banister to the number of points of egress, which become crucial in a house fire.

Local authorities perhaps have a slightly less compelling interest in protecting a church's neighbors from spillover parking and traffic hazards.[246] Controlling traffic is one of the land use regulator's common goals. Density provisions, segregation of uses, and other zoning ordinances rest on the community's interest in traffic safety.[247] Nevertheless, traffic safety is at least one step removed from a basic good such as health or life; traffic control is instrumentally valuable for securing more basic ends, but is not an end in itself. And traffic safety has been deemed a substantial, but not necessarily compelling, interest.[248] Traffic safety might become a compelling interest for a community that suffers a disproportionate number of fatal traffic accidents. However, that circumstance would present a fact question; the degree of compulsion would depend upon the directness between the harm to life and the regulation adopted.

Similarly, ordinances designed to ensure general, public safety and to order or prioritize incompatible activities also rest upon important

163 (1973) (holding that the state's interest in preserving life becomes compelling at the first moment of fetal viability).

245. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240 (2002); *see also* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that the state has a compelling interest in protecting the physical and psychological well-being of minors); ACLU v. Ashcroft, 322 F.3d 240, 251 (3d Cir. 2003); Paul P. v. Verniero, 170 F.3d 396, 400 (3d Cir. 1999).

246. Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 190 (D. Conn. 2001). Douglas Laycock "would concede that a community has a compelling interest in not permitting a church (or any other place of assembly) to regularly take over all the street parking in a neighborhood, making it difficult or impossible for people to have guests or to park in front of their own homes. In the case of a church that provides wholly inadequate parking for its membership, the compelling interest test is easy to apply." Laycock, *supra* note 149, at 766.

247. *See Vill. of Euclid*, 272 U.S. at 392.

248. *See* Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1268 (11th Cir. 2005) (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981)); Bonita Media Enters. v. Collier County Code Enforcement Bd., No. 2:07-CV-411-FtM-29DNF, 2008 WL 423449 (M.D. Fla. Feb. 13, 2008); Savago v. Vill. of New Paltz, 214 F. Supp. 2d 252, 259 (N.D.N.Y. 2002).

interests[249] that are perhaps less than compelling. Public safety and civil order are genuine concerns of state and local governments.[250] But they are valuable to the community instrumentally for securing more basic ends, not as ends in themselves.

The state's interest in promoting the health of its adult citizens is compelling.[251] This makes sense if health is a basic human good (as many believe it is) and compelling interests are interests in the direct protection and preservation of basic human goods. Land use regulations often directly serve the end of health, and are justified on that ground.[252] For example, the sewer tap requirement at issue in *Second Baptist Church v. Gilpin Township*,[253] the septic system ordinance challenged in *Beechy v. Central Michigan District Health Department*,[254] were undoubtedly intended to promote the community's compelling interest in the health of its citizens.

Health and sanitation ordinances such as these well illustrate how the debate over RLUIPA can benefit from focusing on the meaning of the strict scrutiny test. By focusing on the nature of a regulated land use rather than the degree of tailoring between the regulatory means (sewer tap requirement) and ends (protecting the health of citizens), courts and scholars miss an inquiry that (arguably) has a much higher degree of relevance to the purpose for which RLUIPA was enacted in the first place: deflecting discrimination against religious land users.

249. To say that these and other regulations rest upon important interests is not to suggest that municipalities should enact them. *Ex ante* land use regulations are not always the most effective or desirable mechanisms for mediating incompatible land uses, especially where basic nuisance rules will do the job. *See* Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1 (1998). I mean only to suggest that these regulations might survive some lesser standard of scrutiny, if not strict scrutiny.

250. *See* Schleifer v. City of Charlottesville, 159 F.3d 843, 848 (4th Cir. 1998); Grider v. Abramson, 180 F.3d 739, 749 (6th Cir. 1999) (protecting against risk of serious violence in KKK demonstration); Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 998 (2d Cir. 1997) (combating crime, corruption and racketeering evils that eat away at the body politic); Grove v. City of York, No. 05-2205, 2007 WL 465568, at *9 (M.D. Pa. Jan. 10, 2007); United States v. Miles, 238 F. Supp. 2d 297, 303 (D. Me. 2002) (preventing family violence).

251. Platinum Sports Ltd. v. City of Detroit, No. 07-12360, 2008 WL 624051, at *8 (E.D. Mich. 2008) (preventing the spread of sexually transmitted diseases); Caddy v. Dep't of Health, 764 So. 2d 625, 629 (Fla. Dist. Ct. App. 2000) (protecting citizen's mental health and the integrity of the medical profession).

252. *Murphy*, 148 F. Supp. 2d at 190 ("There appears to be no dispute that local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations.").

253. *Second Baptist Church*, 118 F. App'x at 615.

254. Beechy v. Cent. Mich. Dist. Health Dep't, 475 F. Supp. 2d 671 (S.D. Tex. 2007).

Where a municipality acts to preserve a basic good and narrowly tailors its regulatory decision to that end, courts are rightly skeptical of claims that the municipality has discriminated against religious land users who are burdened by the regulation.

Debating the meaning of "land use regulation" and similar terms from section 2(a) arguably casts much less light on the central question of discrimination. The disagreement over whether the ordinances challenged in *Second Baptist Church* and *Beechy* were land use regulations within the meaning of RLUIPA does not lend itself to easy resolution. As reviewed above, scholars and jurists disagree in good faith over what counts as a land use regulation. Furthermore, even on a narrow construction of that term, the applicability of section 2(a) turns on the happenstance that a sewer or septic ordinance appears in a municipality's zoning ordinance, rather than its housing or building code. Surely that circumstance is irrelevant to the question whether the municipality is discriminating against a particular religious landowner.

On the other hand, nearly everyone should be able to agree that the community's interest in sanitation and disposal of human wastes is a compelling interest, because it directly serves the basic good of the health of the community's members. And there should be unanimity that an ordinance that is well designed to promote sanitation does not discriminate against religious land users in violation of RLUIPA. Sanitation cases thus can best be resolved by looking to the relationship between the undeniably compelling community interest at stake and the regulation or decision that the local government adopted to promote that interest. In short, RLUIPA opponents should not fear strict scrutiny review in these cases.

Consider a dispute between an Amish congregation and a municipal government over a building code requirement that the Amish find objectionable and unnecessary, such as a smoke detector or septic system mandate.[255] No one disputes that saving lives from house fires and disposing of human waste are compelling interests, or that the challenged code provision serves one of these interests. It is no accident that courts faced with RLUIPA claims brought by Amish claimants seeking exemptions from building codes have expressly identified compelling interests on which the challenged code provisions rest.[256] As long as the municipality has narrowly tailored its regulation to the compelling

255. *See Building Codes, supra* note 13, at 630-31; *Beechy*, 475 F. Supp. 2d at 671.
256. *Building Codes, supra* note 13, at 644.

interest justifying the regulation, the dispute should resolve itself without reference to whether the regulation appears in the zoning ordinance or the building code.

For these reasons, one would expect these cases to resolve themselves along rather unremarkable lines, even under strict scrutiny review. One should expect an Amish challenge to a new construction inspection to fail, because the inspection is the least restrictive means to ensure compliance with minimum construction standards, an undeniably compelling interest.[257] By contrast, though physical safety in house fires is also a compelling interest, a smoke alarm ordinance arguably does not strictly serve the end of safety when enforced against people who refrain from using electricity for religious reasons.

E. *The RLUIPA Interest Gap*

What anti-RLUIPA and pro-RLUIPA scholars are arguing about, then, are those cases that fall into the RLUIPA interest gap. These are cases in which the local government has a non-discriminatory but less-than-compelling reason or set of reasons for its regulation or decision, or where the local government has adopted some regulation or decision that does not strictly serve any compelling ends. This is not an insignificant group of cases, but it is considerably less than all. If, as argued above, local communities often act to protect compelling community interests, then one should expect well-reasoned land use decisions to survive strict scrutiny review, if not always, at least sometimes. That is to say, RLUIPA strict scrutiny need not be, and often is not, fatal. On the other end of the interest continuum, Congress has (not unreasonably) found that many apparently-innocent land use decisions are in fact discriminatory, and that apparently benign justifications often mask genuine discrimination. Thus the category of genuinely-benign-but-not-compelling interests, which fall into the RLUIPA interest gap, may very well be smaller than supposed.

Nevertheless, the gap is real. It is reasonable to suppose that many local authorities who genuinely harbor no discriminatory animus against religious groups (generally, or particular religious land users specifically) might run athwart section 2(a). Consider the landmarking board that is genuinely and innocently trying to preserve the unique, cultural and historical character of the community, and does so by designating for historic preservation the oldest church building in town. If the build-

257. *Id.*

ing now houses a church that is hoping to expand its youth ministry by building a gymnasium, the designation is likely to burden substantially the church's religious exercise. RLUIPA section 2(a) ensures that the church in this case holds the trump card because preserving a physical artifact of the town's history is unlikely to be sufficiently compelling to satisfy the statute.

The argument for extending RLUIPA to cover cases that fall into the RLUIPA interest gap derives from the ambiguity that often inheres in individualized land use decisions. Every land use generates negative externalities, so there is always a reason to decide against a land user.[258] Authorities do not always decide against a land user, otherwise land would never be developed or used.[259] The problem is thus always one of which land uses generate externalities that the local government is willing to tolerate.[260] Within the broad range of tolerable land uses, "subjective judgments about questions of degree can be consciously or unconsciously distorted by other factors, including how the neighbors or the authorities feel about the proposed use and the proposed occupant."[261] In an individualized decision, which does not admit of comparison to decisions involving other uses and other occupants, these subtle biases may be impossible to root out or identify. In a community governed by secular elites, who harbor animosity to "'fundamentalists' and 'minority sects,'"[262] these biases might be fatal to a religious group's efforts to exercise its faith. In such cases discriminatory animus "affect[s] such discretionary judgments as the general welfare, the character of the neighborhood, aesthetics, and traffic" assessments, and is impossible to prove or disprove.[263]

Let us grant that this is true, that widespread anti-religion bias in some or many communities colors the inherently discretionary judgments that land use regulators must form when imposing or implementing land use regulations. Can the same thing not be said of other biases, prejudices, and animosities? The general contractor who once beat the chair of the Zoning Board of Appeals in a questionable and decisive hand of poker; the culturally-insensitive outsider who has never managed to understand or appreciate local customs; even the active

258. Laycock, *supra* note 149, at 775.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. Laycock, *supra* note 149, at 776.

supporter of a minority political party, whose conduct is protected under the First Amendment to the same degree as religious exercise—all of these people must either prove some form of impermissible discrimination against them or live with the unfavorable land use decisions that they obtain. There is no RLUIPA interest gap to protect these folks.

Consider a business venture that operates a mechanical billboard on a city building. The billboard displays in rotating succession various commercial and non-commercial messages, which qualify as speech within the meaning of the First Amendment.[264] The city enforces against the venture a content-neutral ordinance, which prohibits the use of such signs without exception, on the ground that they constitute a traffic hazard.[265] Unlike content-based ordinances, content neutral ordinances that substantially burden speech are not subject to strict scrutiny review.[266] The ordinance that burdens speech has a stronger chance of surviving than the ordinance that burdens religion; though both speech and religion are activities that the First Amendment protects.

Pro-RLUIPA scholars would here no doubt remind us of the record of anti-religion discrimination upon which this special protection rests. Places of secular assembly simply receive from local codes more favorable treatment than places of religious assembly.[267] This reply tells only half the story. Is there a similar, unexamined history of discrimination against particular types of speech? Do all places of assembly generate equivalent negative externalities? Are religious assemblies generally more or less harmful to local communities than other assemblies?

So, difficult questions persist.[268] And RLUIPA and the record underlying it are silent on these questions. But perhaps what is at stake in these disputes is not the fundamental authority of municipalities to regulate land use but rather the authority to regulate land use based upon interests that fall into the RLUIPA interest gap. And that gap is bounded by those community interests that are compelling. If some (or many) land use decisions do, in fact, rest upon compelling interests, then courts may affirm local authority where municipalities tailor their decisions to those interests. If so, many of the most hotly-disputed con-

264. *Cf.* Bonita Media Enters. v. Collier County Code Enforcement Bd., No. 2:07-cv-411-FtM-29DNF, 2008 WL 423449 (M.D. Fla. Feb. 13, 2008).
265. *Contra id.*
266. Rappa v. New Castle County, 18 F.3d 1043, 1065-68 (3d Cir. 1994).
267. Laycock, *supra* note 149, at 775-76.
268. I hope to address some of these difficult questions in a future article.

flicts between religious exercise and community interests in peaceful resolution of land use conflicts can be avoided by an (straight forward and non fatal) application of the strict scrutiny standard.

F. *Narrow Tailoring*

What might this look like? Unfortunately, the case law provides little guidance because the issue has not been litigated. However, two observations together suggest a potential framework for reconciling section 2(a)'s prophylactic provision with RLUIPA's goal of preventing religious discrimination. First, the least restrictive means prong of the strict scrutiny test is not a mere formality. Even where the government has identified compelling interests, "restrictions intended to accomplish those interests have failed to pass strict scrutiny and have been struck down."[269] The inquiry does not end with identification of a compelling interest in the abstract.[270] Rather, the state must make the contours of the interest sufficiently clear to enable a reviewing court to examine the nexus between the interest and the regulation employed.[271]

Second, courts trying to construe section 2(a) take their cues from First Amendment doctrine, which permits regulating authorities to satisfy strict scrutiny review by stating specific, demonstrable connections between their ends and the means they choose to achieve those ends. In order to satisfy the least restrictive means requirement, a municipality must show that it chose the least burdensome means to fulfill the state interest.[272] The degree of tailoring is a fact question on which the state bears the burden of proof, and the state must make specific showings about the nature and effect of the regulation.[273] It is not enough to say that a regulation promotes health in the abstract. Rather, a regulation survives if it rests on specific findings of the ways in which it promotes the health of the citizens to whom it applies.

All of this suggests that, of the two prongs of the strict scrutiny standard, the least restrictive means prong is the more difficult for land use regulators to satisfy and the more likely to reveal discrimination. The test is anything but insuperable, and a regulation that is the least restrictive means to achieve the municipality's stated goal is highly unlikely

269. *Murphy*, 148 F. Supp. 2d at 190 (quoting Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322, 330 (S.D.N.Y. 2000)).
270. *Murphy*, 148 F. Supp. 2d at 190.
271. Snell v. City of York, 564 F.3d 659, 669 (3d Cir. 2009).
272. *Snell*, 564 F.3d at 669; *Murphy*, 148 F. Supp. 2d at 190 (citing Sherbert v. Verner, 374 U.S. 398, 407 (1963)).
273. *Snell*, 564 F.3d at 669-70.

to constitute discrimination. Where a municipality knows that its land use decision will substantially burden religious land use, it can tailor its decision to the compelling interests it hopes to protect, and so satisfy RLUIPA, by making specific and express showings that the regulation constitutes the least burdensome means of protecting the compelling interest at stake. Where the municipality has substantially burdened religious land use and has not made this showing, an inference of discrimination is not unreasonable.

Murphy v. Zoning Commission illustrates the point. The Murphys, residents of New Milford, Connecticut, held regular prayer meetings in their home. The town issued an order requiring them to desist. They sought a preliminary injunction against the order. During consideration of the Murphys' motion, the court agreed with the town that it had identified a compelling interest in ensuring the safety of its residents through the enforcement of traffic and parking ordinances.[274] However, the town failed to show narrow tailoring because its decision, ordering an end to the prayer meetings, "did not address the amount of traffic generated by the participants of the prayer group meetings."[275] The court noted that fifty prayer meeting attendees arriving in ten or fewer vehicles would create less disruption on the street than twenty-five attendees each arriving in separate vehicles.[276] The town attempted to control the extent of the activities within the Murphys' home rather than directly regulate the volume of traffic outside their home.[277]

Significantly, when the case reached the summary judgment stage, the town produced no new evidence bearing on the grounds for its order.[278] The court observed,

> Although defendants' primary concern with plaintiffs' activities was the increased level of traffic on the street, and the safety issues inherent in an increased volume of traffic, defendants' actions did not address the amount of traffic generated by the participants in the prayer group meetings. Rather, the Cease and Desist Order. . . regulates only the *number of people* allowed to be present in plaintiffs' home on Sunday afternoons. This is not even a rational restriction, let alone a narrowly-tailored one.[279]

274. *Murphy*, 148 F. Supp. 2d at 190.
275. *Id.*
276. *Id.*
277. *Id.* at 190-91.
278. Murphy v. Zoning Comm'n, 289 F. Supp. 2d 87, 109 (D. Conn. 2003). This decision was reversed on appeal when the Second Circuit determined that the Murphys' claims were not ripe and that jurisdiction was therefore lacking. Murphy v. Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005). The Circuit Court did not address the merits of the Murphys' claims, and it ordered their action dismissed without prejudice to re-file when ripe.
279. *Murphy*, 289 F. Supp. 2d at 109.

One need not exercise masterful powers of inference to gather that the town of New Milford might have fared better had it offered some nexus—any nexus—between its compelling interest in traffic safety and the action it took against the Murphys. To emphasize: the problem was not that the town took action. Rather the problem was that it chose to take action in a manner that did not address its stated concern, and amounted to an individualized decision, which adversely affected only a small group of religious land users. In short, this was just the sort of case in which an inference of discrimination was quite reasonable.

VI. Conclusion

The scholarly debate over RLUIPA section 2(a) can for all of these reasons narrow its focus in two ways. First, in practice courts have given section 2(a)'s key terms narrow constructions, particularly in their determinations what burdens on religious exercise are substantial. Though not all scholars affirm this practice, it is helpful to recognize that the statute has not yet reached expansively into the affairs of local communities.

Second, one can recognize compelling community interests on the basis of which local governments should have the authority to regulate religious land use, even where the regulation places a substantial burden on religious exercise. As long as municipalities narrowly tailor their regulations and decisions to those interests, those decisions should survive RLUIPA challenges.