Denominations and Denominators: Applying Lucas v South Carolina Coastal Council to Resolve RLUIPA "Substantial Burden on Religious Land Use" Cases

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This writing sample is a comment prepared for the University of Chicago Law Review. This comment seeks to resolve the circuit split over the proper application of the Religious Land Use and Institutionalized Persons Act: specifically, how to evaluate “substantial burdens” on religious land use. This comment is cited in Maroonbook style (which the University of Chicago Law Review requires), which means that abbreviated words in the citations are not followed by periods (for example, “FSupp2d” instead of “F. Supp. 2d” and “Sherbert v Verner” instead of “Sherbert v. Verner”). I attest that I am the only one to have edited this writing sample.

/s/ Elliott Joh
Denominations and Denominators: Applying Lucas v South Carolina Coastal Council to Resolve RLUIPA “Substantial Burden on Religious Land Use” Cases

Elliott J. Joh

INTRODUCTION

Five days before the attacks of 9/11, a Muslim congregation purchased land in Wayne, New Jersey, with the intention of building a mosque thereon. The eleven-acre lot was vacant and near an existing church, the congregation’s buildings plans complied with the requirements necessary to obtain a conditional use permit, and construction of the mosque would not adversely impact the neighboring land. Nevertheless, the permit application lingered in committee for three years, until the township finally notified the congregation that its lot was being condemned as part of an effort to preserve open space. Though the facts seemed to indicate that its Free Exercise and Equal Protection rights were violated, the congregation could prove nothing more than circumstantial evidence of discrimination by the zoning authorities.

3 US Const Amend I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).
4 US Const Amend XIV, § 1.
Anecdotes like this\textsuperscript{6} of covert discrimination by land use authorities led to the passage of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")\textsuperscript{7} just a year prior to the events in Wayne. Congress’s purpose in enacting this legislation was for churches, mosques, and synagogues to have a means of protecting themselves from zoning laws that aimed at driving religious organizations off their land or out of a jurisdiction.\textsuperscript{8} Rather than use the RLUIPA as a shield, however, many religious organizations have begun to use the Act as a sword\textsuperscript{9} by bringing suit whenever zoning authorities reject their proposals to build a bigger building than the applicable ordinance allows, or to build a church in an area where such a use would not be permitted. This is possible because the RLUIPA’s language forbids any land use regulation that works a “substantial burden” on the “religious exercise” of a person,\textsuperscript{10} where the definition of “religious exercise” is broad enough to encompass the use of real property for religious purposes.\textsuperscript{11}

Thus, some courts have interpreted the RLUIPA as disallowing any zoning law that work a substantial burden on any religious land use (such as the construction or expansion of a single building), while other courts cannot countenance the idea of giving religious organizations an exemption from local land use laws. The latter courts interpret the RLUIPA as forbidding only those land use laws that work a substantial burden on a person’s religious exercise as a whole.

\textsuperscript{8}See 146 Cong Rec S 7774 (daily ed July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (“[C]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the fact of zoning codes and also in the highly individualized and discretionary processes of land use regulation.”).
\textsuperscript{10}See 42 USC § 2000cc(a)(1).
\textsuperscript{11}See 42 USC § 2000cc-5(7)(b).
Courts have also disagreed as to how to determine what can be considered a “religious exercise” and the degree of burden a law has to work in order for the burden to be “substantial.”

This Comment proposes a solution that relieves courts of these and other difficulties presented by claims brought under the RLUIPA Substantial Burdens provision by applying a familiar framework in the land use context—the regulatory takings cases of *Lucas v South Carolina Coastal Council*\(^\text{12}\) and *Penn Central Transportation Co v New York City*.\(^\text{13}\)

Part I discusses the evolution of modern Free Exercise doctrine, the circumstances that surrounded the enactment of the RLUIPA, and the Supreme Court’s regulatory takings jurisprudence. Part II analyzes the circuit split over application of the Substantial Burdens provision of the RLUIPA. Part III presents this Comment’s solution to the circuit split and justifies its application based on its alignment with the text of the RLUIPA, its faithfulness to Congress’s intent in enacting the RLUIPA, its avoidance of constitutional concerns that plague the current application of the law, and its reduction of certain factually intensive inquiries that current applications of the law demand. Finally, Part IV concludes that the advantages of this Comment’s rule outweigh its weaknesses.

I. BACKGROUND

A. *Sherbert, Smith*, and the RFRA

Modern Free Exercise jurisprudence began with *Sherbert v Verner*,\(^\text{14}\) where the Supreme Court announced a two-part strict scrutiny test:\(^\text{15}\) no government entity could enforce a law in a

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14 374 US 398 (1963) (South Carolina could not deny unemployment compensation benefits to a Seventh-Day Adventist who lost her job for refusing to work on Saturday).
manner that burdened the exercise of a person’s religion unless enforcement of the law was the least restrictive means of achieving a compelling government interest. The Court later articulated the standard for “compelling government interest” in Wisconsin v Yoder, when it stated that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”

The reach of the Sherbert/Yoder strict scrutiny test was dramatically reduced by the Court’s decision in Employment Division v Smith, where the issue presented was whether “the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously-inspired peyote use within the reach of its general criminal prohibition on use of that drug . . . .” The Court held that valid and neutral laws of general applicability that have incidental effects of burdening religion were subject to rational basis scrutiny. Thus, even though the Native Americans in Smith claimed that ingesting peyote was a necessary part of their religious practice, Oregon’s application of its laws prohibiting the drug could survive a Free Exercise challenge.

15 “Strict scrutiny” of a law infringing upon a constitutional right contemplates that “only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . . .” Thomas v Collins, 323 US 516, 530 (1945); a court applying strict scrutiny review will invalidate a law that fails to meet that high standard. In contrast, a court applying rational basis review of such a law will require “a showing merely of a rational relationship to some colorable state interest . . . .” Sherbert, 374 US at 406.
16 See 374 US at 403.
17 406 US 205 (1972) (Wisconsin lacked compelling reason to force Amish children to attend public school against their beliefs).
18 Id at 215.
20 Id at 874.
21 Id at 879–895.
22 Id at 893.
The holding in *Smith* sparked both popular and scholarly outrage.\(^{23}\) Congress responded by passing the Religious Freedom Restoration Act of 1993 (the “RFRA”)\(^{24}\) by a wide margin\(^{25}\) in an effort to overturn *Smith* and to require courts to apply strict scrutiny to generally applicable laws that interfered with a person's religious exercise.\(^{26}\) In the statute itself, Congress announced its intention “to restore the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.”\(^{27}\)

Shortly thereafter, the Supreme Court held the RFRA unconstitutional as applied to the states in *City of Boerne v Flores*\(^{28}\) and explained that the statute was beyond the scope of authority granted to Congress in section 5 of the Fourteenth Amendment.\(^{29}\) In essence, the Court ruled that Congress had improperly attempted to rewrite the meaning of the Free Exercise Clause that was embodied in the holding of *Smith*.\(^{30}\)

**B. The Religious Land Use and Institutionalized Persons Act of 2000**

Immediately after *City of Boerne*, Congress considered a new bill that sought to supersede the holding of *Smith* in every instance of government imposing a substantial burden on

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\(^{27}\) 42 USC § 2000bb.

\(^{28}\) 521 US 507 (1997) (denial of building permit to a church not a substantial burden).

\(^{29}\) Id at 532.

\(^{30}\) See *City of Boerne*, 521 US at 535–36. See also Lennington, 29 Seattle Univ L R at 810 (cited in note 26).
a person’s religious exercise.\textsuperscript{31} The Religious Liberty Protection Act of 1998 (the “RLPA”),\textsuperscript{32} as the bill was known, was reintroduced a year later\textsuperscript{33} but failed to get out of committee.\textsuperscript{34} Congress then considered the narrower Religious Land Use and Institutionalized Persons Act of 2000.\textsuperscript{35} In contrast to the broader RLPA, the RLUIPA’s coverage extended to only two contexts that could be anecdotally shown to be fraught with religious discrimination. In large part due to testimony that zoning authorities were discriminating against religious organizations,\textsuperscript{36} the RLUIPA passed quickly\textsuperscript{37} and unanimously.\textsuperscript{38}

The Act was concise and uncontroversial on its face:

\begin{quote}
PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.
(a) SUBSTANTIAL BURDENS-
(1) GENERAL RULE- 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.
(b) DISCRIMINATION AND EXCLUSION-
(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
\end{quote}

\textsuperscript{31} See Cong Rec S 5791 (daily ed June 9, 1998).
\textsuperscript{32} S 2148, 105th Cong (1998).
\textsuperscript{33} The Religious Liberty Protection Act of 1999, HR 1691, 106th Cong (1999).
\textsuperscript{37} See Evan M. Shapiro, Comment, \textit{The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause}, 76 Wash L Rev 1255, 1266 (2001) ([T]he legislative history behind . . . RLUIPA is limited because it passed both houses without committee action . . . .") (citing 146 Cong Rec E 1563 (daily ed Sept 22, 2000) (statement of Rep. Canady)).
\textsuperscript{38} See Salkin and Lavine, \textit{The Genesis of RLUIPA} at 16 (cited in note 34).
(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--
(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.  

PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS
(a) GENERAL RULE-No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
(1) is in furtherance of a compelling government interest; and
(2) is the least restrictive means of furthering that compelling government interest.

JUDICIAL RELIEF
(b) BURDEN OF PERSUASION-If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of [the land use provisions] of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff’s exercise of religion.

DEFINITIONS
(7) RELIGIOUS EXERCISE
(A) In general-The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
(B) Rule-The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person that uses or intends to use the property for that purpose.

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39 42 USC § 2000cc(a)-(b).
40 42 USC § 2000cc-1(a).
41 42 USC § 2000cc-2(b).
42 42 USC § 2000cc-5(7).
Courts were well-versed in dealing with questions of “substantial burdens” on religion in the First Amendment context, and Congress intended that the RLUIPA be applied against the background of Free Exercise jurisprudence. However, the RLUIPA’s definition of “religious exercise” relating to land use made such an easy application impossible. Under traditional First Amendment jurisprudence, “religious exercise” was narrowly defined as practices that were central to or compelled by one’s religion. The inclusion of real property use as a type of religious exercise in the RLUIPA was an expansion of the Supreme Court’s understanding of the term; read in conjunction with the RLUIPA’s expansive definition of religious exercise, the RLUIPA’s Substantial Burdens provision therefore forbids any land use law that works a substantial burden on any exercise of religion “whether or not compelled by, or central to, a system of religious belief,” and “the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise . . . .”

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43 See Derek L Gaubatz, RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions, 28 Harv JL & Pub Pol’y 501, 515 (2005) (“The term ‘substantial burden’ is a term of art that is a familiar part of Free Exercise Clause jurisprudence . . . .”).
44 See 146 Cong Rec 7774-01, 7776 (2000).
46 See Ariel Graff, Comment, Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?, 53 UCLA L Rev 485, 505 (2005) (“RLUIPA appears to alter profoundly the definition of substantial burden by conflating land use regulations that burden the core of religious exercise with regulations that burden any aspect of religious exercise whatsoever.”).
C. Zoning, Federalism, and the Establishment Clause

Land use control and zoning ordinances have long been recognized by the courts as valid exercises of the police power to protect the public’s health, safety, and welfare. Because knowledge of a locality is necessary to create a coherent zoning ordinance, the task of zoning has been left to the states. When zoning ordinances are challenged, courts apply rational basis review; as can be expected, litigation seeking to invalidate a municipality’s judgment about the general welfare is rarely successful.

Before the RLUIPA was enacted, the Supreme Court held that churches were not “immune” from zoning ordinances, and even post-RLUIPA courts were at first reluctant to interfere with the regulation of churches in this context. However, due to the broad protections provided by the RLUIPA’s expansive definition of “religious exercise,” that presumption has been abolished and local control over land use has been wrested away; the RLUIPA, it seems, essentially grants religious organizations an exemption from adherence to zoning laws. Houses of worship and their affiliated structures could now be built in zones where they were previously

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47 Zoning is a comprehensive scheme of classifications designed to segregate incompatible land uses within a jurisdiction. Such a scheme typically consists of restrictions on both use (residential, industrial, commercial, etc.) and area (minimum lot size, height, setback, etc.).

48 See Berman v Parker, 348 US 26, 33 (1954) (“It is within the power of the legislature to determine that the community should be beautiful as well as healthy.”).

49 See FERC v Mississippi, 456 US 742, 767 n 30 (1982) (“Regulation of land use is perhaps the quintessential state activity.”).

50 See Village of Euclid v Ambler Realty Co, 272 US 365, 395 (1926) (explaining that before a zoning ordinance can be declared unconstitutional, it must be clearly arbitrary and unreasonable and have no substantial relation to the public health, safety, and welfare).

51 See note 15.

52 See Corp of Presiding Bishop of Church of Latter-Day Saints v Porterville, 338 US 805 (1949) (dismissed for want of substantiality an appeal by a church contending that its Free Exercise rights were violated by a zoning ordinance preventing the building of churches in residential areas). See also Marci A. Hamilton, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 Ind LJ 311, 336 (2003).

not permitted, and churches could be expanded to “megachurches” that threaten neighboring properties with their imposing sizes, increased traffic, and other externalities. Once again, this is possible because the RLUIPA appears to forbid land use regulations that substantially burden any discrete religious land use such as the building, conversion, or expansion of a single structure.

In addition to the potential to annoy neighboring landowners, a broad reading of the RLUIPA seems to violate the Establishment Clause in its bestowal upon religious landowners of a privilege not enjoyed by secular landowners. Though the Supreme Court has ruled that the Institutionalized Persons part of the RLUIPA “qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause,” it explicitly declined to extend the holding to the rest of the Act.

54 Allowing churches in zones where they were not permitted could also elicit accusations of “spot zoning.” Spot zoning is a conclusory term that describes instances where a zoning amendment singles out a parcel of land and rezones it to a classification inconsistent with the neighboring parcels. Such an amendment is often passed to favor the landowner and is thus often found to be an invalid exercise of the police power. See 2-13 Zoning Law and Practice § 3-13 (Matthew Bender & Company, Inc 2007).

55 See Jonathan D. Weiss & Randy Lowell, Supersizing Religion: Megachurches, Sprawl, and Smart Growth, 21 St Louis U Pub L Rev 313, 314 (2002) (“Megachurches are defined as churches [or any other religious establishment with similar characteristics] with congregations over 2,000 that provide a multitude of services outside of the traditional Sunday service.”).


57 See Gaubatz, 28 Hary JL & Pub Pol’y at 519 (cited in note 43) (“RLUIPA’s definition of ‘religious exercise’ is significant then, in that it . . . provides prisoners a potential remedy for any discrete act of religious exercise that is burdened.”) (emphasis in original).

58 US Const Amend I (“Congress shall make no law respecting an establishment of religion . . .”). See also Lemon v Kurtzman, 403 US 602, 612–13 (1971) (declaring that a law will be upheld under the Establishment Clause if it has a secular purpose, is neutral towards religion, and does not excessively entangle government with religion).

59 See Westchester Day School v Village of Mamaroneck, 386 F3d 183, 189–90 (2d Cir 2004).


61 Id at 715, n 3.
These federalism and Establishment Clause concerns might suggest that a narrower reading of the RLUIPA Substantial Burden provision is required—such a reading would find the Substantial Burdens provision violated only when a land use regulation substantially burdened the core of religious exercise. Though this reading would be a straightforward application of Free Exercise jurisprudence (and in a certain sense would also follow Congress’s intent), it would contravene the express terms of the RLUIPA. As one state court astutely observed:

“[I]nterpreting the substantial burden provision of RLUIPA as creating a significantly broader right than that guaranteed by the free exercise clause would render the statute constitutionally suspect under Boerne. On the other hand, interpreting the provision as creating a right with precisely the same scope and contours as that guaranteed by the free exercise clause would ignore the statute’s express terms and effectively render it superfluous.”

II. THE CONFUSION AMONG THE COURTS

This Part examines the different approaches courts have taken in applying the RLUIPA Substantial Burdens provision. Generally, courts have seized upon the incongruity between Congress’s instructions and Free Exercise jurisprudence and fashioned interpretations of the RLUIPA Substantial Burdens provision that seem to respond to intuitions about the purpose of the RLUIPA, the desire not to wrest land use control from municipalities, and the need to strike the appropriate balance between the mandates of the Free Exercise and the Establishment

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64 See, for example, Lighthouse Institute for Evangelism, Inc v City of Long Branch, 520 F3d 253, 273 (3d Cir 2007) (“the Free Exercise Clause does not define land use as religious exercise”); Congregation Kol Ami v Abington Township, 2004 US Dist LEXIS 16397, *19 (ED Pa 2004) (“[A]lthough the RFRA was eventually found unconstitutional for impermissibly
As can be expected, the consideration of all these factors, the desire to follow Congress’s instructions, and the particular facts of each case have led to widely divergent standards among the courts over when the RLUIPA Substantial Burdens provision is violated.

A. Religious Exercise

The circuits have split in their application of the Substantial Burdens provision in at least two areas. First, the courts disagree as to what sorts of land use should be considered “religious exercise,” especially when religious organizations operate in buildings that look less like houses of worship and more like shopping malls. It is not uncommon to find congregations that operate day cares, schools, conventions centers, hotels, restaurants, skate parks, baseball fields, bookstores, flower shops, gyms, senior centers, coffee shops, and dormitories. Some even have on-site franchises such as McDonald’s and Starbucks. With so much profit to gain and congregants to attract through these “auxiliary” or “quasi-

expanding free exercise rights, the law did not attempt to change the definition of what constituted a substantial burden on free exercise. Compare the RFRA with the RLUIPA.”). See Sara C. Galvan, Note, Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions’ Auxiliary Uses, 24 Yale L & Pol’y Rev 207, 220 (2006) (“Wary of over-inclusion, and perhaps heeding indications from the law’s framers that RLUIPA be limited in scope, some courts have indicated a growing reluctance to favor religious institutions.”).

The Discrimination and Exclusion provision of the RLUIPA does not reference or require any pleading to “religious exercise.” See Patricia Leigh Brown, Megachurches as Minitowns, NY Times Late Edition F1 (May 9, 2002).


See id. See also Haya El Nasser, Megachurches clash with critics next door: Land-use law lets houses of worship grow; neighbors say enough is enough, USA Today A1 (Sept 23, 2002).

See Galvan, 24 Yale L & Pol’y Rev at 207 (cited in note 65).

religious” uses, religious landowners have brought litigation when their local zoning authorities deny them permits to operate such uses.\(^{73}\)

Though it seems that the Substantial Burdens provision was not intended to protect the non-worship land uses of a religious organization,\(^{74}\) the Act explicitly sweeps within its protection all religious exercises “whether or not compelled by, or central to, a system of religious belief”;\(^{75}\) moreover, courts have long declined to inquire into the centrality or importance of a particular exercise to a person’s religion.\(^{76}\) Courts have not shied from inquiring into whether a particular exercise is actually religious,\(^{77}\) but this is a fairly low hurdle, as the Supreme Court has warned that “[i]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”\(^{78}\)

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\(^{73}\) See, for example, Grace United Methodist Church v City of Cheyenne, 451 F3d 643 (10th Cir 2006) (day care); Greater Bible Way Temple of Jackson v City of Jackson, 733 NW2d 734, 745–46 (Mich 2007) (apartment complex); Men of Destiny Ministries, Inc v Osceola County, 397 FSupp2d 1032, 1050 (SD Ind 2005) (drug and alcohol rehabilitation center).

\(^{74}\) See Mintz v Roman Catholic Bishop, 424 FSupp2d 309, 318 (DMass 2006) (“[o]f course, every building owned by a religious organization does not fall within this definition. Buildings used by religious organizations for secular activities or to generate revenue to finance religious activities are not automatically protected.”).

\(^{75}\) 42 USC § 2000c-5(7). See also Galvan, 24 Yale L & Pol’y Rev at 209 (cited in note 65) (“Congress declined to differentiate between worship and non-worship uses. It also did so by writing certain provisions of the law so broadly and so ambiguously that all non-worship auxiliary uses could conceivably be granted RLUIPA’s protections.”).

\(^{76}\) See Thomas v Review Board of the Indiana Employment Security Division, 450 US 707, 714 (1981) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.”).

\(^{77}\) See Smith, 494 US at 886–87.

\(^{78}\) Fowler v Rhode Island, 345 US 67, 70 (1953). See also Thomas, 450 US at 707 (“Religious exercise need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”).
Where it is unclear whether a particular land use can be considered religious or secular, the benefit of the doubt usually goes to the congregation.\footnote{This inquiry becomes even more difficult when it is unclear whether a particular system of beliefs (to which the claimed religious exercise is a part) should even be considered a religion. See, for example, \textit{Scottish Rite Cathedral Association of Los Angeles v City of Los Angeles}, 67 Cal Rptr 3d 207 (CA Ct App 2007) (overturning the trial court’s judgment that Freemasonry was not a religion).}

\section*{B. Substantial Burden}

The courts have also differed in their assessment of how much a burden a land use regulation has to work in order for it to be deemed “substantial.” Because the RLUIPA sweeps within its protection any religious exercise, “whether or not compelled by, or central to, a system of religious belief,”\footnote{See \textit{Westchester Day School v Village of Mamaroneck}, 417 FSupp2d 477, 543–46 (SDNY 2006) (building may be considered religious even if it has secular aspects). See also \textit{Horen v Commonwealth of Virginia}, 479 SE2d 553, 558 (Va Ct App 1997) (“The showing necessary for a religious belief to be considered genuine is a minimal one . . . .”).} the traditional First Amendment test for substantial burden (which examines laws burdening the “core” of religious exercise) seems to no longer apply.\footnote{42 USC § 2000cc-5(7).} With no clearly applicable jurisprudence to anchor the courts’ analysis of the RLUIPA, the standards for finding substantial burdens on land use have varied considerably.

As an example of how even a single court can annually change its standard for finding RLUIPA substantial burdens, first consider the Seventh Circuit case of \textit{Civil Liberties for Urban Believers v City of Chicago}.\footnote{See \textit{Elsinore Christian Center v City of Elsinore}, 291 FSupp2d 1083, 1090 (CD Cal 2003) (“RLUIPA was intended to and does upset this test.”).} There, the court declared that a zoning law that imposes a substantial burden on religious exercise is one that “necessarily bears direct, primary, and
fundamental responsibility for rendering religious exercise . . . effectively impracticable.”

Under this standard, the court ruled that the fact that the plaintiff churches “expended considerable time and money [to eventually obtain their property did] not entitle them to relief under RLUIPA’s substantial burdens provision.” Two years later, the same court ruled that “delay, uncertainty, and expense” in the permit application process could constitute a substantial burden on religious exercise before reverting back to its Civil Liberties standard the year after that.

Other courts have adopted less stringent standards for finding liability. The Ninth Circuit declared that substantial burdens on religious exercise “must impose a significantly great restriction or onus upon such exercise,” and the Eleventh Circuit ruled that the kind of zoning law that the RLUIPA was enacted to invalidate “is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.” Though not obvious, the variation in language between these standards means that in one jurisdiction, a municipality can be found liable for granting a five-year use permit to a church that requested a ten-year permit, while in another jurisdiction a municipality can escape liability for denying a permit outright if the court determines that the complaining religious organization is still able to gather at its members’ homes to worship.

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84 Id at 761.
85 See Constantine & Helen Greek Orthodox Church, Inc v City of New Berlin, 396 F3d 895, 901 (7th Cir 2005).
86 See Vision Church v Village of Long Grove, 468 F3d 975 (7th Cir 2006).
87 Guru Nanak Sikh Society of Yuba City v County of Sutter, 456 F3d 978, 988 (9th Cir 2004).
88 Midrash Sephardi v Town of Surfside, 366 F3d 1214, 1227 (11th Cir 2004).
89 See Grace Church of North County v City of San Diego, 555 FSupp2d 1126 (SD CA 2008) (applying the Ninth Circuit’s standard for finding substantial burdens on religious exercise).
90 See Cambodian Buddhist Society v Planning & Commission of Newtown, 2005 Conn Super LEXIS 3158, at *28 (Conn Super Ct 2005) (applying the Second Circuit’s standard (“The
To some degree, a court’s definition of “substantial burden” is dependent on its definition of “religious exercise” and vice versa. However, even where courts agree which uses and structures are sufficiently religious to warrant RLUIPA protection and how far a land use regulation has to go in order to work a substantial burden, there is disagreement among the courts about whether a substantial burden on a particular land use is sufficient to trigger a violation of the RLUIPA. There seems to be a fundamental, yet unacknowledged confusion about whether the RLUIPA forbids land use laws that work a substantial burden on: (1) a discrete land use; (2) all land use; (3) all religious exercise, or some other permutation of religion, land, and land use. This is akin to the “denominator problem” posed by regulatory takings cases where courts once disagreed whether a taking occurs if only a portion of a property or a single property interest is eradicated of all value. The denominator problem and regulatory takings cases in general are described in more detail in the next section.

91 See Civil Liberties for Urban Believers, 342 F3d at 761 (reasoning that RLUIPA’s expansive view regarding religious exercise necessitates a narrower reading of the substantial burden standard because applying a broader reading would render the word “substantial” meaningless).
92 See Gaubatz, 28 Harv JL & Pub Pol’y at 519 (cited in note 43) (“RLUIPA’s definition of ‘religious exercise’ is significant then, in that it . . . provides prisoners a potential remedy for any discrete act of religious exercise that is burdened.”) (emphasis in original).
93 See Midrash, 366 F3d at 1226 (explaining that the proper inquiry is whether a land use regulation imposes a substantial burden on “the congregations’ use of real property for the purpose of religious exercise”). See also G. David Mathues, Note, Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo, 81 Notre Dame L Rev 1653, 1671–72 (2006).
94 See Civil Liberties for Urban Believers, 342 F3d at 761 (substantial burden only when a law renders religious exercise ‘effectively impracticable’).
95 Compare Penn Central Transportation Co v City of New York, (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a
III. REGULATORY TAKINGS JURISPRUDENCE AND THE DENOMINATOR PROBLEM

This section briefly explains the Supreme Court’s regulatory takings jurisprudence, describes the “denominator problem” particular to those cases, and analogizes the problem to the one that courts face in applying the RLUIPA Substantial Burdens provision.

Takings claims are governed by the Fifth Amendment, which states that “private property [shall not] be taken for public use, without just compensation.”96 From the Founding to the 1920s, courts uniformly interpreted this clause to only demand compensation when the government physically appropriated a person’s property.97 Over time, however, “the Supreme Court recognized that fairness and justice demanded constitutional protection not only for physical takings, but for regulatory takings as well.”98

Regulatory takings jurisprudence began with Pennsylvania Coal Co v Mahon,99 where the Supreme Court held that a land use regulation that went “too far” in diminishing the value of a parcel of land would work a taking under the Fifth Amendment. Fifty-six years later in Penn Central Transportation Co v New York City,100 the Court refined its jurisprudence and outlined an “essentially ad hoc inquiry”101 for determining whether a regulatory takings had occurred by examining the extent to which a land use regulation interfered with the reasonable investment-
backed expectations of the landowner, the economic impact on the landowner, and the character of the governmental action.¹⁰²

This ad hoc Penn Central test was later supplemented by Lucas v South Carolina Coastal Council,¹⁰³ in which the Court held that a land use regulation that deprived the owner of all economically viable use of his property would be considered a taking.¹⁰⁴ In that case, the landowner Lucas brought suit after the South Carolina Beachfront Management Act prevented him from building homes on his two beachfront lots.¹⁰⁵ Without having to evaluate the claim under the Penn Central factors, the Court determined that Lucas had suffered a taking by the single fact that he was unable to develop his property.

Notwithstanding the simplicity of the Lucas rule, courts have recognized that there is a “denominator problem” in determining whether a taking has occurred, as litigants sometimes claim that the total economic deprivation of fractions of their property should be considered per se takings:

Under Lucas, a court must compare the loss of property use resulting from a regulation, x, to the sum of all usage rights inherent in a piece of property, y. If \( \frac{x}{y} \) equals 1, then a taking has occurred; if \( \frac{x}{y} \) is something less than one, the property owner is entitled to nothing. If the relevant property interest, y, is defined narrowly enough, as, for example, only those rights that have been regulated away, then a taking will always have occurred, rendering the Lucas test useless. On the other hand, if the relevant property interest is defined broadly enough, a regulatory taking will never occur. Determining the relevant parcel is not only an essential ingredient of the Lucas test, but indeed has proven one of the most difficult challenges in takings law.¹⁰⁶

¹⁰² Id at 123–24.
¹⁰⁴ Id at 1019.
¹⁰⁵ Id at 1008–09.
While the Supreme Court eschewed any set formula for determining what the proper
“denominator” should be, it indicated that it would only consider the physical, contiguous
“parcel as a whole” in applying the Lucas rule.107 Despite that guidance, lower courts still
vacillate between applying “parcel as a whole” as the proper denominator and adjusting the
denominator when fairness seems to demand it. That ad hoc adjustment means that recovery
under the Lucas test is sometimes unpredictable and at other times unlikely.

This uncertainty and unfairness that surrounds regulatory takings jurisprudence is
analogous to what happens when courts evaluate RLUIPA Substantial Burdens claims. On the
one hand, courts do not want to rule that every burden on land use constitutes a “substantial
burden” on religious exercise within the meaning of the RLUIPA, and yet they also do not want
to render the statute useless by finding liability only when the totality of a person’s religious
exercise is substantially burdened—the only alternative left is to determine the proper
“denominator” of religious exercise against which to measure the restrictive effect of a zoning
law. Though the Supreme Court’s clear definition of the proper denominator in regulatory
takings cases has largely proved unpopular and unfair, this Comment argues that a clarification
of the proper denominator for RLUIPA Substantial Burdens cases will ensure that courts
uniformly apply the law in a manner that furthers Congress’s purpose in enacting it.

107 See Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency, 535 US 302
(2002) (landowners claimed that a takings occurred because a moratorium temporarily prevented
them from developing their property).
IV. A NEW RULE

Though Congress’ express intent was for the courts to use existing First Amendment jurisprudence in applying the RLUIPA, that expectation has been proven to be unrealistic given the plain language of the statute. “Religious land use” has never enjoyed protection under the Free Exercise Clause, and the disconnect between that fact and Congress’s instructions has led courts to fashion their own interpretations of what a substantial burden on such land use is. This Comment argues that if First Amendment jurisprudence is unsuitable and unpredictable as applied to the RLUIPA, then some other framework is necessary to achieve consistency.

In response to this need, this Comment proposes that courts should apply the RLUIPA in a way that mimics the Supreme Court’s regulatory takings jurisprudence; namely, that the “Substantial Burdens” provision should be a per se rule that is backstopped by the more ad hoc and flexible “Discrimination and Exclusion” provision (which does not require a finding of substantial burden). Thus, courts should read the RLUIPA’s “Substantial Burdens” provision to forbid only those land use regulations that deprive a landowner of all religious use of his parcel of land. Such a formulation aligns with the express terms of the statute, accords with Congress’s intent in enacting the law, avoids the constitutional concerns presented by current applications of the law, and eliminates the difficult judgment over how much of a burden is a “substantial” burden.

This Comment’s formulation of the “Substantial Burdens” provision also solves the unacknowledged “denominator problem” of having to determine exactly what (a religious

109 See, for example, Lighthouse Institute for Evangelism, Inc v City of Long Branch, 520 F3d 253, 273 (3d Cir 2007) (“the Free Exercise Clause does not define land use as religious exercise”).
exercise, all religious exercise, etc.) needs to be burdened before a violation can be found. Under the *Lucas* test, the applicable denominator is *all economically viable use of the parcel of land*; likewise, the proper denominator for evaluating RLUIPA Substantial Burdens claims should be *all religious use of the parcel of land*. Though it would seem that a parcel of land always has some religious use available no matter how harshly restrictions are placed upon it, *Lucas* suggests that an inability to build upon the land would be considered a total taking.\(^\text{110}\) Similarly, this Comment proposes that an inability to build any religious structure on a parcel of land constitutes a substantial burden on religious exercise within the meaning of the RLUIPA. Other sorts of zoning restrictions that totally disallow religious use of a plot of land (such as a ban on gathering or prayer) may also be considered to effect substantial burdens on religious exercise according to this Comment’s rule, but those sorts of laws seem far less likely to be enacted.

This rule means, in effect, that a Substantial Burdens plaintiff, like a regulatory takings plaintiff, can only recover in the extreme case of total deprivation of use; the sort of plaintiff who can recover under the Substantial Burdens provision will typically be a new landowner who has no religious structure already built upon his newly acquired property. This means, in turn, that the Equal Terms, Nondiscrimination, and Exclusions and Limits provisions of the RLUIPA will become the sole means of recovery for plaintiffs who suffer less than total deprivations of the religious use of their property. These provisions are not merely duplicative of the protections provided by the First Amendment, as RLUIPA plaintiffs can make easier prima facie cases and avoid summary judgment by demonstrating that they were treated less equally than other landowners. Thus, under this Comment’s rule, an RLUIPA plaintiff cannot recover under the

\(^{110}\text{The Supreme Court was bound, however, by the lower court’s finding that Lucas’s inability to develop his land deprived him of all economically beneficial use of the land. See *Lucas*, 505 US at 1020.}\)
Substantial Burdens provision if his property has any religious use remaining, but he may still recover if he pleads and proves discrimination.

As the previous section on regulatory takings jurisprudence makes clear, the use of “parcel as a whole” as the denominator against which takings (or in this case, substantial burdens) are measured has not always been simple, fair, or popular. Courts have often been confused over whether contiguous, yet separately acquired parcels should be considered a single “parcel” for purposes of the *Lucas* rule, whether unity of ownership should determine a single parcel, or whether some other criterion should delineate the boundaries of a parcel of land for the purpose of applying the *Lucas* rule.\(^{111}\) This Comment asserts that a contiguous piece of land held by a single owner should be considered the relevant “parcel as a whole,” but it recognizes that it has no satisfactory answer when its rule is faced with the sorts of nuanced situations listed above. However, this Comment argues that its interpretation of the Substantial Burdens provision limits the provision’s application to the situation where a landowner seeks to build his first religious structure; as such, it is unlikely that the same complexity of problems will plague a court’s inquiry of how to determine the relevant “parcel as a whole.” At the least, this Comment’s rule takes a first step in identifying the general denominator problem and attempts to fix a single standard for courts to follow in applying the Substantial Burdens provision. The resulting increases in predictability and uniformity of application would themselves make adoption of this Comment’s rule an attractive option.

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\(^{111}\) See Fee, 61 U Chi L Rev at 1550–1553 (cited in note 106).
A. The New Rule Accords with the Express Terms of the Statute

This Comment first looks to the plain terms of the RLUIPA to examine whether the language contained therein can support its rule. 112

1. “the use, building, or conversion of real property . . . .”

The first textual hurdle that this Comment’s rule must overcome is the RLUIPA’s definition of “religious exercise.” The statute defines it as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” and “the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise . . . .” 113 The RLUIPA, then, unambiguously protects discrete acts of religious exercise in its more general definition (due to the determiner “any”), and thus it is tempting to assume that it more specifically protects any discrete use, building, and conversion of real property as well. However, the RLUIPA states that the use, building, or conversion of real property is protected as religious exercise. This generic use of the definite article is significant, especially in contrast to the more general statutory subsection preceding it, as it suggests that while the totality of a person’s religious exercise can be subdivided into discrete acts of religious exercise, each one of which qualifies for protection under the RLUIPA, “religious land use” will not be so subdivided and protected. Rather, “the” signifies that RLUIPA protects religious land use as a category of activity. 114 This Comment’s rule is responsive to that subtlety in the

113 42 USC § 2000cc-5(7).
114 See Purdue University Online Writing Lab, The Use and Non-use of Articles, http://owl.english.purdue.edu/handouts/esl/eslart.html (last visited June 30, 2008).
RLUIPA’s language, as it only considers the entirety of religious land use available to a parcel of land in determining whether a substantial burden exists.

Though the scope of protection that this Comment’s rule provides to religious land use is in harmony with the RLUIPA’s express terms, the statute unambiguously indicates that land use is to be considered a kind of religious exercise (and not the entirety of religious exercise covered by the RLUIPA). Therefore, this Comment’s focus on total wipeouts of “all religious land use of a parcel of land” as its touchstone for liability is narrower in scope than what the statute intended to cover. However, it should be noted that this Comment’s rule is not intended to displace First Amendment jurisprudence as it applies to other religious practice. To the extent that a land use regulation or other law can burden other aspects of a person’s religion, First Amendment jurisprudence should be followed according to Congress’s wishes. In the context of the RLUIPA itself, the Free Exercise Clause should play a larger role in evaluating substantial burdens on religious exercise in the Institutionalized Persons provisions of the Act. Rather than totally abandoning First Amendment jurisprudence, this Comment proposes that in the specialized context of religious land use, a different and more appropriate framework should be adopted.

115 See Graff, 53 UCLA L Rev at 506 (cited in note 46) (“Zoning regulations seldom have the capacity to impose a substantial burden on religious exercise within the meaning of Sherbert because land use regulations rarely implicate a central tenet of religious belief or practice.”).

While the substantial burden required under the RLUIPA and that required under the Free Exercise clause are related, there are important differences relating to their distinct definitions of ‘religious exercise.’ In contrast to the substantial burden required under RLUIPA, a substantial burden under the Free Exercise Clause is confined to the practices and beliefs of a religion, not associated land use. Therefore, it is necessary to acknowledge that, while the definitions are highly related, the Religious Land Use and Institutionalized Persons Act is appropriately focused on land use, while the Free Exercise Clause is focused on beliefs and practice.
2. “for the purpose of religious exercise . . .”

Next, it is important to note that the statute does not protect any and all land use relating to a parcel of property; rather, the RLUIPA states that “the use, building, and conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” Thus, it is not enough that a religious organization wants to use its land—the land use itself must further some other religious exercise of the landowner in order to qualify for RLUIPA’s protections. This Comment’s rule is responsive to that language, as its interpretation of the Substantial Burdens provision is only triggered when a religious organization has no available religious land use on its property. Secular structures and land uses have no place in the Substantial Burdens provision of the RLUIPA (although they may in the Discrimination and Exclusion provision); accordingly, this Comment’s rule only considers “land use for the purpose of religious exercise” and does not find the RLUIPA violated when zoning laws substantially burden a landowner’s non-religious land uses and structures.

3. “imposes a substantial burden on the religious exercise of a person . . . .”

Lastly, it is important to examine whether this Comment’s interpretation of “substantial burden” is consistent with the statutory text. The RLUIPA Substantial Burdens provision states that “no government shall impose or implement a land use regulation in a manner that imposes a

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119 The Supreme Court’s definition of “religious exercise” is very broad. See Part II.A.
substantial burden on the religious exercise of a person . . . .”120 This Comment’s rule is only concerned with land use as religious exercise, so the relevant statutory text from the Definitions section can be substituted to simplify the analysis: “no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on [the use, building, or conversion of real property for the purpose of religious exercise] of a person . . . .”

This statutory rearranging should reveal something subtle, yet significant: the prepositional phrase following “substantial burden” is “on the use, building, or conversion of real property . . . .” That is, the language of the Substantial Burdens provision indicates that the RLUIPA forbids substantial burdens on the religious land use of a person (and not on a person of his religious land use). This nuance in word order is crucial to this Comment’s rule remaining a viable solution, because it indicates that Congress intended the courts to place their focus on the burdened religious exercise and not on the burdened person. In contrast, if the statute had been drafted to forbid a government from imposing a substantial burden on a person of his religious exercise, this Comment’s rule and its emphasis on discrete parcels of land would become irrelevant to the task of determining liability. Thus, this Comment’s rule is compliant with a close reading of the statutory text because its examination of “all religious land use of a parcel of property” follows the statute’s language and responds to substantial burdens on land use, not people.

120 42 USC § 2000cc(a)(1).
B. The New Rule is Faithful to Congress’s Intent

The next step in evaluating this Comment’s rule is to measure it against the legislative history of the Act. The RLUIPA is unusual in its scarcity of legislative history because it passed the Senate and the House without committee action and by unanimous consent. Nevertheless, enough can be gleaned from the Congressional records to discern what the purpose of the RLUIPA is.

As a preface, the mere adoption of a different rule for evaluating substantial burdens under the RLUIPA may be in direct contravention to the Congressional intent for courts to apply existing Free Exercise Clause jurisprudence. However, the inclusion of land use in the definition of “religious exercise” makes literal adherence to that intent impossible.

Another commentator has identified two broad themes that emerge from reviewing the RLUIPA’s sparse legislative history: Congress’s desire to protect religious organizations from exclusion and discrimination and its recognition that religious organizations should not be exempt from zoning laws. It is useful, then, to examine how well this Comment’s rule advances those goals in order to evaluate its appropriateness in analyzing the Substantial Burden provision of the RLUIPA.

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121 See Burlington Northern Railroad Co v Oklahoma Tax Commission, 481 US 454, 461 (1987) (“Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity . . . .”)
122 See 146 Cong Rec E 1563 (daily ed Sept 21, 2000).
123 Graff, 53 UCLA L Rev at 510 (cited in note 46) (“Although courts . . . have successfully harmonized the substantial burden provision with prior case law concerning religious land use, they have achieved this consistency by contravening the plain meaning of the statute.”).
124 See Lennington, 29 Seattle Univ L R at 816–819 (cited in note 26).
1. Congress’s Desire to Protect Religious Organizations from Exclusion and Discrimination

At its core, the RLUIPA land use provisions (both the Substantial Burdens and the Equal Terms provisions) were enacted to protect religious organizations from exclusion and discrimination by zoning authorities. Despite the Act’s short legislative history, there is no shortage of statements by the RLUIPA’s sponsors describing the exact evils they wished to prevent:

Some [land use restrictions] deliberately exclude all new churches from an entire city, others refuse to permit churches to use existing buildings that non-religious assemblies had previously used, and some intentionally change a zone to exclude a church.\(^\text{125}\)

Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. . . . [D]iscrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or “not consistent with the city’s land use plan.” Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don’t generate enough traffic. . . . Where it occurs, it is often covert.\(^\text{126}\)

The Act’s sponsors, then, were most concerned with protecting “new, small, or unfamiliar” religious organizations from acts of exclusion and covert discrimination by zoning authorities—no mention is made about intending to protect the established, large, or visible religious organizations in their efforts to build or expand. The focus on the more marginal religious groups is reflected in Congressional statements equating the inability to obtain property with the prevention of worship:

I rise today to introduce a narrowly focused bill that protects religious liberty from unnecessary governmental interference. It will provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith.\textsuperscript{127}

Churches and synagogues cannot function without a physical space adequate to their needs . . . . The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.

To protect these smaller religious organizations, Congress inserted two independent bases for liability in the RLUIPA land use provisions:

The land use section of the legislation would prohibit discrimination against or among religious assemblies and institutions, and prohibit the total unreasonable limits on religious assemblies and institutions.\textsuperscript{128}

Upon review of the RLUIPA’s language, it appears that the Equal Terms, Nondiscrimination, and Exclusions and Limits provisions comprise the base of liability prohibiting “discrimination against or among religious assemblies and institutions,” while the Substantial Burdens provision was designed to “prohibit the total unreasonable limits on religious assemblies and institutions.” The two halves of the RLUIPA land use section are analytically distinct: liability under the Equal Terms, Nondiscrimination, and Exclusions and Limits provisions does not require a finding of “substantial burden,” and liability under the Substantial Burdens provision does not require a finding of discrimination.\textsuperscript{129} This two-tiered protection scheme means that plaintiffs need only plead either discrimination or substantial burden on religious exercise in order to make a prima facie case and survive summary judgment.

It becomes imperative, then, to measure the faithfulness that this Comment’s rule has to Congress’ purposes in enacting the RLUIPA land use provisions in order to evaluate it as a solution. A court applying this Comment’s rule will impose liability on a municipality for totally depriving a parcel of land of its religious use, whether or not the particular application of the zoning law at issue was discriminatory. This rule, then, protects the plaintiff who is denied the ability to build any religious structure on his land; in most cases, this kind of plaintiff will be the small, yet-to-be-established religious group that Congress sought to protect with passage of the RLUIPA.

In contrast, this interpretation of the Substantial Burdens provision does not protect religious organizations who wish to either expand their previously existing religious structures, build additional structures (whether religious or not), or to build a religious structure that exceeds what is allowed under the applicable zoning laws. In each of those instances, the parcels of property that would support those structures or expansions would not have been totally deprived of religious land use, and the sort of plaintiff who claims RLUIPA protection for those additional developments and expansions will typically not be “new, small, and unfamiliar.” Such a denial of protection for those plaintiffs is consonant with the legislative purpose behind the passage of the Substantial Burdens provision. This Comment’s rule provides, and the legislative history of the RLUIPA seems to demand, that those plaintiffs plead and prove discrimination under the Equal Terms, Nondiscrimination, and Exclusions and Limits provisions in order to find recourse. The sort of protection provided by these RLUIPA provisions is not

129 See Civil Liberties for Urban Believers, 342 F3d at 762 (“the substantial burden and nondiscrimination provisions are operatively independent of one another”).
130 In the case of the religious organization that seeks to build a structure that is not allowed under the zoning laws, the fact that a conforming structure would have been allowed would mean that the parcel of property would not be totally deprived of religious use.
merely duplicative of that provided by the First Amendment law, as plaintiffs asserting these claims can more easily make a prima facie case and avoid summary judgment.

2. **Congress’s Recognition that Religious Landowners are Not Exempt from Zoning Laws**

As much as Congress was focused on combating religious discrimination in the zoning context, it was also wary of the potential mischaracterizations and abuses that enactment of the RLUIPA could bring. To ensure a swift passage, the Act’s sponsors made sure to address and allay those concerns every time the bill was brought before Congress:

This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay. . . . [N]ot every activity carried out by a religious entity or individual constitutes “religious exercise.” In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution . . . this alone does not automatically bring these activities or facilities within the bill’s definition of “religious exercise.”

It is only the use, building, or conversion for religious purposes that is protected, and not other uses or portions of the same property. Thus, if a commercial enterprise builds a chapel in one wing of the building, the chapel is protected if the owner is sincere about its religious purposes, but the commercial enterprise is not protected. Similarly if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services may be protected but the secular commerce is not.

The fear, it seems, was that some religious landowners might read the RLUIPA as conferring upon them an exemption from the applicable zoning laws by virtue of their religiosity.

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Surprisingly, none of the cautions contained in the Congressional record found their way into the language of the Act itself, and as a result courts have struggled with religious litigants claiming that their commercial land uses should be protected as “religious exercise.”

The challenge for this Comment’s rule, then, is that the sweep of its protection must only reach those land uses that can be clearly deemed “religious.” Though this Comment’s rule cannot avoid that factual inquiry entirely, it can sidestep that quagmire to a large degree by denying recovery under the Substantial Burdens provision whenever the subject parcel of property has any existing, clearly religious structure upon it. This denial of recovery to a certain category of plaintiff captures the appropriate scope of the Substantial Burdens provision’s protection, as each religious organization wishing to build its first (and probably primary) religious structure will be protected, whereas a plaintiff who wishes to build an additional (and possibly commercial) structure will have to plead and prove discrimination according to the Equal Terms, Nondiscrimination, or Exclusions and Limits provision in order to recover. Though the scope of protection of this Comment’s rule is not perfect in application, it should appropriately dismiss a majority of the types of claims that Congress explicitly declined to protect.

C. The New Rule Avoids the Constitutional Concerns that Plague Other Applications of the RLUIPA

Since this Comment’s rule is faithful to Congress’s intent in enacting the RLUIPA and is compliant with the plain terms of the statute, the next step in evaluating the rule as a viable solution is to analyze its advantages and disadvantages in maneuvering between the Free Exercise Clause and the Establishment Clause.
This Comment’s interpretation of the Substantial Burdens provision has several advantages over previous formulations by the courts. First, this Comment’s rule is not merely duplicative of existing First Amendment jurisprudence as the narrow interpretation of the Substantial Burdens provision seems to be: the restriction of the otherwise broad discretion of zoning authorities provides some additional protection to the religious landowner. This Comment’s rule ensures that religious landowners cannot be “zoned out” for any reason other than nuisance prevention, which places them on a more equal footing with secular landowners in the eyes of the zoning authorities and stymies any attempt at subtle exclusion.

Second, the rule avoids the most glaring Establishment Clause concerns of the broad interpretation of the Substantial Burdens provision; no longer can religious organizations be exempted from the zoning ordinance and thus privileged over secular organizations under the law so long as their properties retain some religious use. As a result, land use control is placed firmly back in the hands of the local authorities.

1. The Free Exercise Clause and Exclusion

Though it has been stated repeatedly that Free Exercise jurisprudence does not translate well to the context of land use, that fact should not mean that Free Exercise principles drop out of the statute entirely. Indeed, “the right to build, buy, or rent [] a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes”\textsuperscript{133} regardless of how the courts analyze substantial burdens on religious land use. Thus, any proposed rule that

fails to adequately protect religious organizations’ right to free exercise in the face of exclusion by zoning authorities will ultimately be deficient.  

This Comment argues that its interpretation of the Substantial Burdens provision is effective in combating exclusion in derogation of the Free Exercise Clause and is thus faithful to the spirit in which the RLUIPA was enacted. By limiting the justifications a zoning authority can make in depriving a religious organization of the use of its land, this Comment’s rule ensures that a congregation cannot be excluded by concerns about congestion or property values.

This Comment’s rule does not relieve religious landowners from the burden of having to apply for permits, nor does it protect them from having to comply with generally applicable zoning ordinances. Though this means that religious organizations cannot always build auxiliary structures or megachurches, the legislative history of the RLUIPA indicates that Congress never contemplated protecting religious organizations that extensively:

[A] burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building’s operation would be used to support religious exercise, is not a substantial burden on “religious exercise.”

2. The Establishment Clause and Local Land Use Control

Another concern about using this Comment’s rule to apply the Substantial Burden provision of the RLUIPA is that it may violate the Establishment Clause of the First Amendment. In a trivial sense, any law that singles out religious individuals for protection has

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134 See Lennington, 29 Seattle Univ L R at 818 (cited in note 26) (“What is clear is that RLUIPA seeks to stop intentionally discriminatory zoning practices that treat churches and other religious institutions unfairly.”).

135 See Konikov v Orange County, 410 F3d 1317, 1323 (11th Cir 2005) (“requiring applications for variances, special permits, or other relief provisions would not offend RLUIPA’s goals”).

potential Establishment Clause problems; the issue here is whether this Comment’s interpretation of the Substantial Burdens provision, in order to avoid unconstitutionality, has a secular purpose, is neutral towards religion, and does not excessively entangle government with religion.\(^{137}\) It should be noted that the prisoner sections of the RLUIPA (which protects any discrete exercise of religion from being substantially burdened)\(^{138}\) were upheld by the Supreme Court as “permissible legislative accommodation[s] of religion.”\(^{139}\)

This Comment argues that its rule does not privilege religious landowners or religious land uses and thus satisfies all three prongs of the \textit{Lemon} test\(^ {140}\) — by not allowing a zoning authority to deny a permit to a religious landowner under the cover of pretext, this Comment’s rule places religious landowners on a par with secular landowners. Though landowners wishing to put their property to only secular uses do not obtain the same sort of protection under this Comment’s rule, they do not possess the same characteristics or potential to receive discriminatory treatment at the hands of zoning authorities.\(^ {141}\) Thus, by removing the discretion to discriminate, this Comment’s rule ensures that every religious landowner’s land use request will be considered as fairly and thoroughly as that of a secular landowner’s.


\(^{138}\) See Gaubatz, 28 Harv JL & Pub Pol’y at 519 (cited in note 43) (“RLUIPA’s definition of ‘religious exercise’ is significant then, in that it . . . provides prisoners a potential remedy for any discrete act of religious exercise that is burdened.”) (emphasis in original).


\(^{140}\) See note 137.

\(^{141}\) See \textit{City of Boerne}, 521 US at 520 (in order for legislation to be a valid exercise of the enforcement power, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”). See also Salkin and Lavine, \textit{The Genesis of RLUIPA} at 22 (cited in note 34).
D. Application of the New Rule

Finally, this section examines the administrative advantages and disadvantages of applying this Comment’s interpretation of the Substantial Burdens provision and describes how a court should apply the rule.

1. The New Rule Reduces, But Does Not Eliminate, the Need to Determine Whether a Particular Exercise is Religious

This Comment’s proposed rule reduces, but does not eliminate the need to determine whether a particular land use should be considered “religious.” The necessity of this inquiry is demonstrated by Congress’s intent that only religious land uses should be protected by the RLUIPA:

If the religious claimant cannot demonstrate that the regulation places a substantial burden on sincere religious exercise, then the claim fails without further consideration.\textsuperscript{142}

As was discussed previously, houses of worship seem to fall clearly within the definition of “religious structure,” but beyond that no easy generalizations can be made (it may not even be clear whether a claimed “house of worship” should be considered as such). Thus, a court applying this Comment’s interpretation of the Substantial Burdens provision may still have to inquire into the specifics of a religion in order to determine whether the inability to build a particular structure would constitute a total deprivation of the religious use of a parcel of property.

While this Comment’s rule does not eliminate the need to inquire into whether a particular structure is religious, it does reduce the need for the inquiry in a vast number of cases.
This is so because this Comment’s interpretation of the Substantial Burdens provision only allows recovery if there is no religious structure already existing or allowed on the subject parcel of property. Thus, for those plaintiffs that already have unmistakably religious structures built on their property, recovery under the Substantial Burdens provision is unavailable. Recovery under the Equal Terms, Nondiscrimination, and Exclusions and Limits provisions of the RLUIPA remains available for all plaintiffs, but no showing of “religious land use” is necessary.

2. The New Rule Clarifies What Constitutes a Compelling Government Interest

An important aspect of the Lucas test is that even if a zoning law totally deprives the landowner of all economic use of his land, a court will not declare a taking if the same result could be achieved through the law of nuisance. The RLUIPA also allows a government to escape a violation of the Substantial Burdens provision if it can show that the burden was in furtherance of a compelling government interest and was the least restrictive means of furthering that interest. The Lucas rule could simplify the Substantial Burdens provision by stating that a government’s interest in abating nuisances is the only one compelling enough to justify depriving a landowner of all religious use of his land. This could prevent the building of churches in industrial areas (where the church would “come to a nuisance”) and certain residential areas (where the church might itself be a nuisance) while allowing them in areas where their presence would not be objectionable. This simplification would also be a boon to religious organizations, as they could be confident that they could not be totally deprived of their

143 See Lucas, 505 US at 1029.
religious land use for minor reasons (traffic,\textsuperscript{144} aesthetics,\textsuperscript{145} decline in property values\textsuperscript{146}) or in favor of a more revenue-generating use.\textsuperscript{147}

Critics may argue that application of this Comment’s rule seems to wrest land use control away from the local authorities. To the extent that zoning authorities were using their powers to discriminate against religious landowners, this Comment argues that Congress did intend to remove that discretion. Though zoning authorities often have good faith, non-nuisance reasons for denying a permit to a religious landowner, Congress recognized that the potential for abuse was too great.\textsuperscript{148}

This Comment’s rule also deprives municipalities of the justification that other suitably zoned property exists for religious organizations to build upon.\textsuperscript{149} Indeed, one of the major motivations that the RLUIPA’s sponsors had in proposing the law was to stop municipalities

\textsuperscript{144} See Salkin and Lavine, The Genesis of RLUIPA at 53 (cited in note 34) (“To date, traffic and congestion concerns have not been found to be compelling interests under RLUIPA by any court . . . .”).  
\textsuperscript{145} See, for example, Westchester Day School v Village of Mamaroneck, 417 FSupp2d 477, 553–54 (SDNY 2006); Cottonwood Christian Center v City of Cypress, 218 FSupp2d 1203, 1228 (CD Cal 2002) (both courts holding that aesthetic impacts are not compelling interests).  
\textsuperscript{146} See Westchester Day School, 417 FSupp2d 477, 553 (goal of preserving property values is not compelling).  
\textsuperscript{147} Compare Cottonwood Christian Center v City of Cypress, 218 FSupp2d 1203, 1228 (CD Cal 2002) (“revenue generation” held not to be a compelling interest) with Elsinore Christian Center v City of Lake Elsinore, 270 FSupp2d 1163, 1173 (CD Cal 2003) (combating urban blight found to be a compelling interest) and Lighthouse Institute for Evangelism, Inc v City of Long Branch, 406 FSupp2d 507 (DNJ 2006) (city’s interest in creating a “dynamic commercial center” is a compelling interest).  
\textsuperscript{148} See Lighthouse Institute, 406 FSupp2d at 518 (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . .”).  
\textsuperscript{149} See Petra Presbyterian Church v Village of Northbrook, 489 F3d 846, 851 (7th Cir 2007) (a ban on churches in one type of zone “cannot in itself constitute a substantial burden on religion, because then every zoning ordinance that didn’t permit churches everywhere would be a prima facie violation of RLUIPA”).
from segregating religious organizations away from the commercial and residential areas of the city.\textsuperscript{150}

Attempting to locate a new church in a residential neighborhood can often be an exercise in futility. Commercial districts are frequently the only feasible avenue for the location of new churches, but many land use schemes permit churches only in residential areas . . . .\textsuperscript{151}

Because this Comment’s rule is parcel-centric rather than landowner-centric, the fact that other property in a jurisdiction is available for the religious organization’s use is neither here nor there—religious use of a parcel of land, and not the total religious land use of an organization, is this Comment’s focus for determining a municipality’s liability.

Lastly, this Comment’s narrow definition of “compelling interest” sheds some light on what the least restrictive means of furthering those interests\textsuperscript{152} could be. Because the prevention of nuisance is the only compelling interest a municipality can have in totally depriving a landowner of all religious use of his land, the availability of more lenient means to prevent nuisances would mean that the total deprivation is an unjustified substantial burden. For example, if a municipality did not grant a church a special use permit for the reason that the use would create too much light pollution for the surrounding residents, then the fact that other restrictions would have been as effective in containing the light would mean that denial of the permit was a violation of the RLUIPA Substantial Burden provision.

3. The Rule in Practice

A court applying this Comment’s rule to evaluate a religious organization’s RLUIPA Substantial Burdens claim will have to determine whether the religious organization can build any religious structure upon its property. If such a showing can be made, then the municipality must demonstrate that such a restriction was necessary to prevent a nuisance and that forbidding the religious organization from building was the least restrictive means available. If the court determines that there has not been a “total wipeout” (or that the municipality demonstrated the necessity for such a wipeout), then the religious organization may still have recourse under the ad hoc inquiries of the Equal Terms, Nondiscrimination, and Exclusion provisions.

V. CONCLUSION

This Comment proposes a new approach for applying the RLUIPA land use provisions. It argues that courts should use a framework analogous to that announced in the Supreme Court regulatory takings cases of Lucas and Penn Central, where a per se rule is supplemented with a more flexible, ad hoc approach. This should resolve the circuit split over the meaning of the RLUIPA Substantial Burden provision, eliminate some of the factual inquiries concerning religion, and adequately address the conflicting concerns and mandates presented by the express terms of the Act, the Act’s legislative history, the First Amendment, and the preference for local control over land use.