RECONSIDERING RLUIPA: DO RELIGIOUS LAND USE PROTECTIONS REALLY BENEFIT RELIGIOUS LAND USERS?

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The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), a federal statute enacted to safeguard religious freedoms from governmental interference, has been broadly and forcefully condemned by academics. In the decade since RLUIPA was passed, scholars have repeatedly denounced the statute as a tool that religious individuals and organizations may use to thwart municipal zoning plans and to undermine local communities' land use needs. However, in criticizing RLUIPA, few authors have examined the statute's real effects. Legal academia has largely ignored the growing body of case law that highlights the statute's ineffectiveness and demonstrates that RLUIPA often fails to benefit or significantly privilege religious groups.

This Comment aims to fill this scholarly gap by arguing that despite the ongoing outcry against RLUIPA's potential and perceived consequences, the statute has often failed to benefit religious groups and has, in many cases, actually worked a detriment to these groups. I question the common assumption that RLUIPA has dramatically empowered religious plaintiffs in battles against local land use authorities. By closely examining dozens of federal and state cases involving RLUIPA causes of action, I illustrate that RLUIPA claims have not typically fared well in court. Though RLUIPA demands strict judicial scrutiny of land use decisions that impose a substantial burden on religious organizations and requires that religious and secular entities be treated similarly in the zoning process, I examine ways courts have avoided the application of strict scrutiny and have made it very challenging for religious entities to show that secular land users have been treated more favorably.

Moreover, despite RLUIPA's reputation as an unconditional boon to religious land users, this Comment points out that religious litigants also incur substantial costs when raising RLUIPA claims. I analyze three of these costs: (1) litigation costs, (2) reliance costs, and (3) reputational costs, and conclude that in some instances, RLUIPA has not merely failed to alleviate the purported burdens on religious land users but has actually saddled religious entities with greater burdens incurred

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INTRODUCTION

Following the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[1] opponents of the statute appeared determined to outdo one another in their criticism of the new federal law. Gregory Walston, a deputy attorney general in California, referred to the statute as "a sweeping statutory *coup d'état*."[2] The former chairman of the New York City Landmarks Preservation Commission, Kent Barwick, called RLUIPA a "hunting license to tear down landmarks, circumvent zoning and thwart established environmental standards."[3] Marci Hamilton, one of only a handful of experts permitted to testify against the bill in Congress, wrote that the statute would "torque all local

1. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc (2006).
2. Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 Is Unconstitutional*, 23 U. HAW. L. REV. 479, 479 (2001).
3. David W. Dunlap, *God, Caesar and Zoning*, N.Y. TIMES, Aug. 27, 2000, at RE1 (quoting Kent L. Barwick).

land use decision-making in favor of all churches and synagogues and mosques."[4] "What's next?" Hamilton asked, "The federal Land Grant for Churches Law that pays for the land the churches want?"[5] To say that RLUIPA was besieged by its detractors would be an understatement.

The law provoking this vitriolic response certainly did not generate such heated emotions in Congress, where the Senate passed it by unanimous consent and the House unanimously approved it only sixteen minutes after its introduction.[6] Enacted "to protect the free exercise of religion from unnecessary governmental interference,"[7] RLUIPA has two components: The first is intended to safeguard the religious freedoms of prisoners and other institutionalized persons.[8] The second addresses land use disputes involving religious organizations. This Comment will only examine RLUIPA's second component, which forbids discriminatory or unequal treatment of religious institutions and mandates strict scrutiny of land use regulations that substantially burden religious exercise.[9] Upon signing the bill, President Clinton praised RLUIPA as a law that would "provide important protections for religious exercise in America."[10] The statute was designed to be remedial, and Congress passed it after hearing testimony documenting instances of land use discrimination against religious entities.[11]

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4. Marci Hamilton, *The Federal Government's Intervention on Behalf of Religious Entities in Local Land Use Disputes: Why It's a Terrible Idea*, FINDLAW, Nov. 6, 2003, http://writ.corporate.findlaw.com/hamilton/20031106.html.

5. *Id.*

6. Dunlap, *supra* note 3.

7. 146 CONG. REC. 16,622 (2000) (statement of Rep. Canady).

8. *See* 42 U.S.C. § 2000cc-1 (2006).

9. *Id.* § 2000cc.

10. William J. Clinton, Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000 (Sept. 22, 2000), *in* 2 PUB. PAPERS 2000, at 1905.

11. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 270–71 (2007). Eisgruber and Sager, like other scholars, question the significance of the testimony Congress heard regarding the land use discrimination faced by religious groups. *Id.*; *see also* Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 868 (2007) ("The results of my study lend empirical support to the claim that pervasive discrimination against churches does not exist in the context of land use."); Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress' New Twist on "Speak Softly and Carry a Big Stick,"* 34 URB. LAW. 829, 851 (2002) ("[I]t is difficult to accept that there is a pervasive and widespread discrimination against religious entities attempting to build, buy, or rent adequate space in which to exercise their faith. After all, it is difficult to reside in a community without being within a short driving distance of a community church or mega-church that occupies several acres of land."). *But see* Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 190, 214–15 (2001) ("Land use discrimination against religious groups and individuals is undoubtedly a problem in municipalities across the nation. Religious groups point to documented accounts of capricious land use discrimination ostensibly based on ignorance, prejudice, and intolerance.").

Despite the statute's salutary purpose, many feared that RLUIPA would go far beyond its intention of eliminating discrimination. Critics claimed that the new law would empower religious individuals and organizations to ignore local zoning restrictions and thwart land use planning schemes. Scholars wrote that the statute would compromise eminent domain power and force legislatures to accede to the will of religious entities. This line of criticism has not abated. In the decade since RLUIPA's passage, academics, municipal planners, and numerous attorneys have continued to excoriate the statute in colorful terms.[12]

In criticizing RLUIPA, scholars have not halted to examine the statute's real effects. By focusing only on instances in which religious entities have used RLUIPA to circumvent the desires of local zoning boards and the expressed needs of communities, academics have largely ignored the growing body of evidence that highlights the statute's *in*effectiveness.[13] This Comment aims to fill the scholarly gap by arguing that despite the ongoing criticism of RLUIPA's potential and perceived consequences, the statute has often failed to benefit religious groups and, in many cases, has actually worked a detriment to these groups. My aim is not to pass judgment on RLUIPA's purpose but to question the efficacy of the statute in achieving its purpose. While I acknowledge that RLUIPA has aided religious land users in a variety of contexts, I question the common assumption that RLUIPA has dramatically empowered religious plaintiffs in battles against local land use authorities.

Part I of this Comment details how legal scholars have reacted to RLUIPA. I focus on the premature, continued, and unwarranted outcry of academics, zoning officials, and developers who have made largely unsubstantiated claims as to RLUIPA's drastic adverse effects on municipal zoning power and land use planning schemes.

Part II illustrates that RLUIPA claims have not typically fared well in court. While RLUIPA mandates strict judicial scrutiny of land use decisions that impose a substantial burden on religious organizations,[14] courts have found several paths around RLUIPA, thereby avoiding the application of strict scrutiny. I then turn to RLUIPA's "equal terms" provision,[15] which prohibits discrimination against religious groups by requiring that religious and secular entities be treated similarly in the land use context. I argue that courts have made it very challenging to establish equal terms violations, and legislatures have sometimes responded to violations not by elevating religious land uses to

12. *See infra* Part I.
13. *See infra* Part II.
14. 42 U.S.C. § 2000cc(a) (2006) (using language articulating the "strict scrutiny" test).
15. *Id.* § 2000cc(b)(1).

the same footing as secular uses but by revoking privileges granted to secular organizations—what I call "reductive equalization." Thus, RLUIPA often fails to benefit or significantly privilege religious groups.

In Part II, I also address two possible counterarguments to my claims regarding RLUIPA's ineffectiveness. First, the statute *must* benefit religious groups because there are a number of cases in which RLUIPA claims have succeeded. Second, even if the statute has not produced courtroom victories, it has fulfilled its role ex ante by preventing burdensome and discriminatory land use decisions. To respond to the first counterargument, I demonstrate that a large number of successful RLUIPA claims have been superfluous because cases that win under RLUIPA also tend to win on constitutional grounds. To respond to the second counterargument, I conjecture that the growing number of cases in which RLUIPA claims have failed undermines the potential ex ante efficacy of the statute. Early evidence indicates that as religious organizations lose their courtroom battles, municipal land use authorities become less fearful of RLUIPA challenges to their decisionmaking power.

Moreover, as I argue in Part III, the potential benefits that religious organizations enjoy are coupled with potential detriments that religious organizations suffer under RLUIPA. I analyze three costs that religious groups have incurred as a result of RLUIPA: (1) litigation costs, (2) reliance costs, and (3) reputational costs. Based on my analysis, I conclude that in some instances, RLUIPA has not merely failed to alleviate the purported burdens on religious land users but has actually saddled religious entities with greater burdens incurred in the pursuit of costly court cases and in the waging of protracted battles with neighbors and community officials.

I. THE PARADE OF HORRIBLES

When examined through the eyes and voices of its critics, RLUIPA appears to be an ill-conceived, dangerous piece of legislation. While the bulk of early RLUIPA scholarship focused on the debate over the statute's constitutionality,[16]

16. *See, e.g.*, Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1, 35 (2001); Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 WHITTIER L. REV. 493, 496, 538 (2002); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 976 (2001); Walston, *supra* note 2, at 481; Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2365 (2002); Evan M. Shapiro, Comment, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255, 1256 (2001); Walsh, *supra* note 11, at 190.

shortly after RLUIPA's passage, vocal opponents forecasted a host of undesirable results. Lawrence Sager, one of the first academics to publish thoughts on RLUIPA, warned of the consequences of what he called "a markedly bad piece of legislation."[17] Describing RLUIPA as "a bald and rather extreme privileging of churches for which no justification is available,"[18] Sager conjectured that "[a]s a result [of RLUIPA], almost any time a community does not allow the developmental plans of a church, it will face the costly and precarious prospect of defending itself in federal court, where its attempt to apply reasonable land use restrictions will be presumed to be invalid."[19]

Other writers also feared that RLUIPA would compromise land use authority by benefiting religious entities at the expense of municipalities. Commenting on the statute's breadth and "far-reaching implications," another critic surmised that RLUIPA might trump safety regulations, such as municipal fire and health codes.[20] Striking a similar chord, the Municipal Art Society of New York labeled RLUIPA a "Pandora's box," claiming that the statute might not only inhibit governmental efforts to protect health, safety, and welfare but could also obstruct historic preservation efforts and community quality-of-life initiatives.[21] The notion that RLUIPA intruded on local authority was echoed by the executive director of the National League of Cities, who claimed that many zoning officials were "extremely disappointed that the federal government has again preempted a fundamental home rule power of local governments."[22]

Some scholars predicted that RLUIPA would be wielded as a powerful weapon by expansionist churches. According to two such scholars, RLUIPA would discourage large religious groups from cooperating with local and regional governments.[23] The editor-in-chief of the *Real Estate Law Journal* lamented that some religious groups were "exploiting their new legal shield," and that they, "unlike Wal-Mart, have not only God, but also strict scrutiny on their side."[24] The analogy to Wal-Mart highlighted the perception that religious entities were a dominant player in the land development context and were therefore undeserving of the privileged judicial treatment prescribed by RLUIPA.

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17. Lawrence G. Sager, *Panel One: Free Exercise After* Smith *and* Boeme, 57 N.Y.U. ANN. SURV. AM. L. 9, 14 (2000).

18. *Id.* at 15.

19. *Id.* at 14.

20. Walsh, *supra* note 11, at 190.

21. Santoro, *supra* note 16, at 494–95.

22. Juan Otero, Nat'l League of Cities, Religious Land Use and Institutionalized Persons Act Becomes Law (Oct. 2, 2000), *available at* http://hpn.asu.edu/archives/2000-November/001889.html.

23. Jonathan D. Weiss & Randy Lowell, *Supersizing Religion: Megachurches, Sprawl, and Smart Growth*, 21 ST. LOUIS U. PUB. L. REV. 313, 323 (2002).

24. Robert Aalberts, *The Religious Land Use and Institutionalized Persons Act: Devil or Angel?*, 31 REAL ESTATE L.J. i, iii (2003).

Critics argued that RLUIPA, by arming religious groups with a litigation trump card and compromising the land use authority of local governments, would subordinate communities' needs to the desires of churches, mosques, and temples. In one of her many tirades against RLUIPA, Marci Hamilton wrote that Congress had "ignored every homeowner in the country," and that after RLUIPA's enactment, religious landowners could act with complete disregard for local preferences.

> When neighbors express their legitimate concern that their property value will be negatively affected by the introduction of a large building and parking lot into their neighborhood, they are subjected to charges of being more concerned with "mammon" than mission, as though their property rights must take a backseat to the church's religious agenda.[25]

In sum, although RLUIPA may not have been particularly controversial in Congress, fervent opponents of the statute spoke out loudly after the statute was enacted.

For the first several years after RLUIPA's enactment, case law under the new legislation was still underdeveloped and much of the criticism directed at the statute was couched in terms of RLUIPA's potential repercussions. By 2004, however, legal writers purported to be assessing RLUIPA's actual consequences. Citing no case law or prior scholarship, one critic concluded that "[t]he law was designed to make things more difficult for cities and it has done just that, often hurtling past a generation of Supreme Court zoning jurisprudence. RLUIPA is a powerful tool and one that can be wielded with a heavy hand."[26] Another detractor claimed—also without citation—that "[t]he federal judiciary is inundated with claims brought under RLUIPA."[27]

Without pausing to seriously examine the outcomes of most RLUIPA cases, authors publishing articles about the statute appear to have reached a near-consensus that RLUIPA's land use provisions have been a complete boon to

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25. Marci Hamilton, *Struggling With Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby*, FINDLAW, Jan. 17, 2002, http://writ.news.findlaw.com/hamilton/20020117.html.

26. Kevin M. Powers, *The Sword and the Shield: RLUIPA and the New Battleground of Religious Freedom*, 22 BUFF. PUB. INT. L.J. 145, 182 (2004).

27. G. Stephen Lowery, Comment, *Ten Paces and Shoot: An Attempt to Make Sense of the Escalating Feud and Imminent Showdown Over the Religious Land Use and Institutionalized Persons Act (RLUIPA)*, 35 CUMB. L. REV. 415, 425 (2005). While federal courts may indeed have faced an inundation of litigation under RLUIPA's institutionalized persons provisions, Lowery confines his analysis to RLUIPA's land use sections, discussing the statute as a "federal land use law." *Id.* at 416. In the four years preceding publication of Lowery's Comment, all the federal district and circuit courts combined had decided approximately thirty cases involving RLUIPA land use claims. To describe this as an inundation seems hyperbolic.

religious organizations and a total burden on local governments.[28] According to Patricia Salkin and Amy Lavine, "RLUIPA has not leveled the playing field for certain groups who might face discrimination, but rather it is [sic] has given religious groups almost free reign to control community development in the name of religious exercise."[29] Daniel Lennington reached a similar conclusion after purportedly analyzing five years of RLUIPA litigation while serving as the chairman of the Georgetown Charter Township Zoning Board of Appeals in Georgetown, Michigan: "[T]he troubling trend in the caselaw [sic] interpreting RLUIPA is that churches may very well become immune from local zoning laws—if they are not already."[30] And in one of her later attacks on RLUIPA, Hamilton wrote, "In the second ring of our RLUIPA circus, we have towns and cities being terrorized by overzealous organizations representing religious landowners."[31]

While much of the anti-RLUIPA rhetoric might be dismissed as attention-grabbing hyperbole, shortly after RLUIPA's enactment, opponents of the statute may have had at least some cause for concern. The first RLUIPA lawsuit was

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28. *See, e.g.*, Michael M. Berger, *Update on Right to Take*, *in* EMINENT DOMAIN AND LAND VALUATION LITIGATION 1, 9 (ALI-ABA Comm. Continuing Prof'l Educ. 2005) ("Municipal planners . . . hate RLUIPA. The reason is obvious: it trims their wings by making houses of worship somewhat more equal than other landowners."); Karen L. Antos, Note, *A Higher Authority: How the Federal Religious Land Use and Institutionalized Persons Act Affects State Control Over Religious Land Use Conflicts*, 35 B.C. ENVTL. AFF. L. REV. 557 (2008); 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, 224–28 (2006) ("Even without consistent statutory standards, courts have generally construed RLUIPA in favor of religious institutions."); Municipal Art Society of New York, Land Use Regulation & Religious Institutions in Focus at MAS, (Oct. 17, 2008) http://mas.org/land-use-regulation-religious-institutions-in-focus-at-mas ("The impact . . . is being felt throughout the country as municipalities must reconsider their planning for, and zoning of, religious institutions under the threat of RLUIPA litigation. The Act's contentious origins aside, RLUIPA is now a well established law with tremendous implications."). *But see* Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1075 (2009) (arguing that courts have weakened RLUIPA's equal terms provision); 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, 507–08 (2005) (noting that some federal courts have rejected RLUIPA claims).

29. Patricia Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 256 (2008). According to Salkin and Lavine, RLUIPA "has proven to be a nightmare for local government officials and for communities." *Id.*

30. Daniel Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806 (2006). Notably, when he authored this article, the Georgetown Charter Township Zoning Board of Appeals had recently been sued under RLUIPA. *Id.* at 805.

31. Marci Hamilton, *The Circus That Is RLUIPA: How the Land-Use Law That Favors Religious Landowners Is Introducing Chaos Into the Local Land Use Process*, FINDLAW, Nov. 30, 2006, http://writ.news.findlaw.com/hamilton/20061130.html.

filed a mere three minutes after President Clinton signed the bill into law,[32] and within three months of RLUIPA's enactment, a church had won a case under the statute.[33] Although results in early RLUIPA litigation were mixed,[34] a number of religious entities entered into favorable settlements with local government officials, lending credence to the notion that the new law offered religious institutions a powerful bargaining chip.[35]

However, while the intense criticism of RLUIPA has continued unabated, the statute's force has proved to be far less commanding and its reach far less extensive than most legal scholarship would lead readers to believe. As I argue in the following Parts, predictions of RLUIPA's potential to dramatically alter municipal zoning processes have largely proven to be unfounded, and RLUIPA has not wreaked the havoc that its detractors forecasted. Perhaps in their

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32. Walsh, *supra* note 11, at 199–200. *See infra* Part III.A discussing the case of *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, No. 00-1072AS, 2001 WL 34137899 (Mich. Cir. Ct. 2001).

33. Walsh, *supra* note 11, at 195. This victory came in the form of a consent judgment between a small church and the city of Grand Haven, Michigan. Although the city had initially rejected the church's building permit application, the judgment permitted the church to occupy a storefront property in a business district that had been zoned to permit places of public assembly. *See* The Becket Fund for Religious Liberty, Haven Shores Community Church v. City of Grand Haven, Michigan, http://www.becketfund.org/index.php/case/58.html (last visited July 10, 2010); Larry Witham, *Michigan Church Wins Zoning Battle*, WASHINGTON TIMES, Jan. 4, 2001, *available at* http://www.washingtontimes.com/news/2001/jan/4/20010104-020455-5541r/print/.

34. RLUIPA plaintiffs were occasionally successful in early litigation. *See, e.g.*, Westchester Day Sch. v. Vill. of Mamaroneck, 236 F. Supp. 2d 349 (S.D.N.Y. 2002); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (enjoining the city's eminent domain proceedings on the Christian center's property). However, RLUIPA plaintiffs also suffered notable losses in the first several years after RLUIPA's passage. *See, e.g.*, Ventura County Christian High Sch. v. City of San Buenaventura, 233 F. Supp. 2d 1241, 1252–54 (C.D. Cal. 2002) (denying the plaintiff's request for a preliminary injunction despite the claim that the city's refusal to permit the expansion of a Christian high school violated RLUIPA).

35. For example, in 2002, a Forest Park, Georgia church entered into a consent order with the city, permitting the church to locate in a zoning district from which the church had previously been shut out. *See* RLUIPA.com, Refuge Temple Ministries Wins Decisive Settlement in Atlanta Suburb (Mar. 15, 2002), http://www.rluipa.com/index.php/article/137.html. Also in 2002, a Jewish congregation in Los Angeles, California invoked RLUIPA to reach a favorable settlement of a protracted legal battle. *See* Julie G. Fax, *Neighbors Renew Etz Chaim Fight*, JEWISH J., May 21–27, 2004, at 17, 17 ("RLUIPA came into the picture just in time to save the congregation, which had lost appeal after appeal of a suit it brought against the city in 1996, alleging that the city was violating the religious freedom of the congregation by preventing it from praying in [a residential] house."). However, local residents then brought suit against the city, successfully alleging that the settlement effectively amounted to the granting of a conditional use permit (CUP) in violation of city statutes requiring public notice and hearing prior to the granting of a CUP. League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052, 1056 (9th Cir. 2007). In light of this conclusion, the Ninth Circuit invalidated the settlement agreement, *id.*, and the drawn-out legal battle between the congregation and its neighbors continues. *See* Congregation Etz Chaim v. City of Los Angeles, No. CV 97-5042 CAS, 2009 WL 1293257 (C.D. Cal. May 5, 2009).

eagerness to oppose the statute, most academics have ignored the growing body of evidence illustrating RLUIPA's ineffectiveness.

II. RLUIPA IN THE COURTROOM

RLUIPA litigation has produced mixed results at best. While religious organizations have occasionally won notable victories,[36] some of those victories have been overturned on appeal. Meanwhile, courts have devised multiple ways to avoid application of the statute and to circumvent RLUIPA's strict scrutiny mandate. In the following Subparts, I examine four such judicial circumvention mechanisms. I then briefly consider how municipal legislatures have successfully denied privileges to religious organizations by revoking the privileges of similarly situated secular organizations, a process I call reductive equalization. I also analyze whether other constitutional and statutory provisions render RLUIPA redundant, and I respond to strong counterarguments.

A. Circumventing RLUIPA

1. Ratcheting Up the Substantial Burden Test

The significant majority of land use litigation brought under RLUIPA invokes the statute's "substantial burden" clause, which states:

> 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.[37]

In mandating strict scrutiny of land use regulations that substantially burden religious exercise, RLUIPA never defines "substantial burden."[38] However, the legislative history reveals that the substantial burden requirement is to be "interpreted by reference to Supreme Court jurisprudence."[39] The problem is that an examination of Supreme Court case law reveals that the Court itself

36. *See infra* Part II.C, notes 155–160.
37. 42 U.S.C. § 2000cc(a)(1) (2006).
38. *See* 42 U.S.C. § 2000cc-5 (2006) ("Definitions" subsection of RLUIPA).
39. 146 CONG. REC. 16,700 (2000) (joint statement of Sens. Hatch & Kennedy); *see also id.* ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.").

has not settled upon a definition of "substantial burden."[40] Therefore, in considering RLUIPA claims, federal judges have been able to comb through inconsistent Supreme Court precedent to select language that either expands or narrows the "substantial burden" concept. The majority of federal circuits and other courts appear to have taken the latter course, defining a test that makes it extremely difficult for religious entities to prove that they have been substantially burdened.[41]

In *Civil Liberties for Urban Believers v. Chicago* (*C.L.U.B.*),[42] the Seventh Circuit became the first federal appellate court to render a decision defining RLUIPA's substantial burden prong in the land use context. The plaintiffs, a coalition of churches and religious organizations, argued that RLUIPA was violated by a provision of the Chicago zoning ordinance that required them to seek special use approval in order to operate in commercial and business districts.[43] In analyzing this RLUIPA claim, the Seventh Circuit held that "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 . . . effectively impracticable."[44] Perhaps unsurprisingly, the plaintiffs were unable to overcome this formidable requirement of showing that their religious exercise had become effectively impracticable. Despite acknowledging that five churches involved in the case "expended considerable time and money" to locate within the Chicago city limits, the court held that those expenditures "[did] not entitle them to relief under RLUIPA's substantial burden provision."[45] By defining substantial burden as requiring effective impracticability of religious exercise, the Seventh Circuit articulated a test that substantially diminished RLUIPA's protections.

The Sixth Circuit has set a similarly high bar for showing a substantial burden on religious exercise. In *Living Water Church of God v. Charter Township*

40. *See* Julia H. Miller, *Religious Freedoms: Regulating Historic Religious Properties Under RLUIPA*, *in* HISTORIC PRESERVATION LAW 817, 822 (ALI-ABA Comm. Continuing Prof'l Educ. 2007) ("[N]o single standard for measuring 'substantial burden' has been adopted."); Salkin & Lavine, *supra* note 29, at 226.

41. Prior to RLUIPA's enactment, Ira Lupu noted that the Religious Freedom Restoration Act, RLUIPA's predecessor, was plagued by the same issue. Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 578 (1999) ("RFRA was weakened primarily by very narrow judicial interpretations of its 'substantial burden' requirement.").

42. 342 F.3d 752 (7th Cir. 2003).

43. *Id.* at 755–56, 759–60.

44. *Id.* at 761. Two years later, in *Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 900–01 (7th Cir. 2005), the Seventh Circuit seemed to ease the restrictive language of *C.L.U.B.*; however, the following year, *C.L.U.B.*'s substantial burden test was reaffirmed by *Vision Church v. Village of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006).

45. *C.L.U.B.*, 342 F.3d at 761.

of Meridian,[46] the plaintiff church had obtained a special use permit (SUP) and constructed a sanctuary and daycare center in a residential zone of Meridian Township, Michigan.[47] After occupying the site for six years, the church was granted an SUP to build an elementary school on the property. A year later, shortly before the permit to build the elementary school was set to expire, the church applied for an extension. The court noted that "the Township had a policy of granting extensions on SUPs" but had recently obtained new legal counsel who advised that the church's extension request be denied.[48] When it received a denial letter, the church filed suit under RLUIPA.[49] And lost. Though the court acknowledged that the church stood to lose "its initial investment of $35,000 or $40,000 in planning documents,"[50] the court nonetheless held that no substantial burden could be shown.[51] In determining whether the church had been substantially burdened, the court concluded that the question was not whether the religious exercise has been made "more expensive or difficult" but rather "does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?"[52] While the Sixth Circuit has not reexamined this issue in a published opinion, if the *Living Water* test is maintained, it will significantly limit RLUIPA's application.

It appears that the Fifth Circuit's definition of "substantial burden" is similar to that of the Sixth Circuit. As a Fifth Circuit panel explained in *Adkins v. Kaspar*,[53] "for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[54] Although *Adkins* was brought by a Texas state prisoner under RLUIPA's institutionalized persons provision,[55]

46. 258 F. App'x. 729 (6th Cir. 2007).
47. *Id.* at 730.
48. *Id.* Although this might have given rise to an allegation of an equal terms violation, the court noted that the township's new lawyer had recommended denial of a permit extension to another applicant shortly before denying the church's application. *Id.* at 730–31.
49. *Id.* at 732, 742.
50. *Id.* at 731.
51. *Id.* at 739.
52. *Id.* at 737.
53. 393 F.3d 559 (5th Cir. 2004).
54. *Id.* at 569–70.
55. *See id.* at 567.

the language of the opinion seems to be equally applicable in a RLUIPA land use case.[56] As of yet, the Fifth Circuit has not decided such a case.

The Second Circuit's substantial burden test is also demanding. When a Jewish day school in New York brought a RLUIPA challenge after being denied a special use permit to construct a new building on its campus, the Second Circuit held that proof of a substantial burden required (1) "a close nexus" between the permit denial and the school's religious exercise and (2) a showing that the denial was "absolute," such that the filing of an amended application would not result in a different decision by municipal authorities.[57] The court reasoned that no substantial burden exists where there are "quick, reliable, and financially feasible alternatives" by which a religious entity "may meet its religious needs."[58]

Other courts, both at the federal and state level, have imposed similarly weighty requirements for plaintiffs seeking to establish that they have been substantially burdened in the exercise of their religion. The Eleventh Circuit has held that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[59] A showing of coercion or compulsion may also be required in the state courts of Florida,[60] Maryland,[61] Michigan,[62] New Jersey,[63] Oregon,[64] and Pennsylvania,[65]

56. Indeed, a recent Texas Supreme Court opinion in a land use case quoted the *Adkins* decision as guidance to determine the definition of "substantial burden" for purposes of both RLUIPA and the Texas Religious Freedom Restoration Act. *See* Barr v. City of Sinton, 295 S.W.3d 287, 301–02 (Tex. 2009).

57. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 344, 349 (2d Cir. 2007).

58. *Id.* at 352.

59. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

60. *See* Westgate Tabernacle, Inc. v. Palm Beach County, 14 So.3d 1027, 1031 (Fla. Dist. Ct. App. 2009) (quoting *Midrash Sephardi*'s substantial burden test).

61. *See* Trinity Assembly of God v. People's Counsel for Baltimore County, 941 A.2d 560, 574 (Md. Ct. Spec. App. 2008) (finding no substantial burden where a variance denial "did not compel the Church to modify the behavior of its congregants so as would 'violate [their] beliefs'" and did not render the Church's religious activity "effectively impracticable").

62. *See* Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 750 (Mich. 2007) ("[W]e believe that it is clear that a 'substantial burden' on one's 'religious exercise' exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires.").

63. *See* House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton, 879 A.2d 1212, 1224–25 (N.J. Super. A.D. 2005) (quoting *Midrash Sephardi*'s substantial burden test).

64. *See* Timberline Baptist Church v. Washington County, 154 P.3d 759, 771 (Or. Ct. App. 2007) ("Because petitioner failed to demonstrate that upholding the county's land use decision would force petitioner to forgo its religious precepts, we conclude that petitioner failed to show that the county has imposed a substantial burden under RLUIPA.").

65. *See* Ridley Park United Methodist Church v. Zoning Hearing Bd., 920 A.2d 953, 960 n.15 (Pa. Commw. Ct. 2007) ("To meet the substantial burden prong of the RLUIPA . . . . requires a showing that the burden prevents adherents from conducting or expressing their religious beliefs or causes them to forgo religious precepts." (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990)).

among others. In rejecting RLUIPA claims, judges have frequently emphasized that mere inconveniences[66] or distractions[67] are not substantial burdens.

At times, federal appellate courts have shown a willingness to step back from the stringent requirements imposed on plaintiffs seeking to establish that their religious exercise has been substantially burdened. However, even courts that appear to have adopted less demanding definitions of "substantial burden" regularly reject RLUIPA claims by holding that substantial burdens have not been shown. In *San Jose Christian College v. City of Morgan Hill*,[68] the Ninth Circuit looked to the dictionary definition of "substantial burden" and concluded that "for a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent."[69] However, this more relaxed standard could not save the RLUIPA claim of the plaintiff, which sought to develop a private Christian college with standard student facilities. Despite admitting that the city's zoning law "rendered [the plaintiff] unable to provide education and/or worship at the Property," the court granted summary judgment for the city based on the fact that the college had not resubmitted its rezoning application with information requested by the city.[70] According to the court, the college could not claim to be substantially burdened when compliance with the city's request might result in approval of the college's rezoning application.[71]

Despite the plaintiff's defeat in *San Jose Christian College*, one might argue that the case established precedent beneficial to future religious land users. However, a recent Arizona district court case, *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*,[72] illustrates that even though Ninth Circuit precedent may seem favorable, it remains difficult for religious entities to show that they have been substantially burdened by adverse land use decisions. In *Centro Familiar*, the plaintiff purchased property in downtown Yuma, Arizona to use

66. *See, e.g.*, City of Hope v. Sadsbury Twp., 890 A.2d 1137, 1149 (Pa. Commw. Ct. 2006) (holding that the denial of the church's application to develop a campground and hiking trails was at most an "inconvenience").

67. *See, e.g.*, Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp. 2d 1207, 1215 (S.D. Fla. 2005) (holding that RLUIPA's substantial burden prong does not protect worshipping congregants from "distractions").

68. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004).

69. *Id.* at 1034–35 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1170 (10th ed. 2002)). The Ninth Circuit rejected the trend among other courts to seek guidance in RLUIPA's legislative history: "Only if an ambiguity exists in the statute, or when an absurd construction results, does this court refer to the statute's legislative history." *Id.* at 1034.

70. *San Jose Christian*, 360 F.3d at 1035. *But see* Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 988–89 (9th Cir. 2006) (holding that the denial of two applications for permits to build a Sikh temple in an agricultural area constituted a substantial burden under RLUIPA).

71. *San Jose Christian*, 360 F.3d at 1035.

72. 615 F. Supp. 2d 980 (D. Ariz. 2009).

as a church.[73] After the city rejected its application for a conditional use permit, the church brought suit. Acknowledging that the city's decision "prevented the Church from using its newly acquired . . . property for religious practices,"[74] the court nonetheless held that the church had not been substantially burdened. According to the court, the church had failed to show that it was unable to fulfill its religious mission elsewhere.[75] No such showing is explicitly required under RLUIPA. Evidently, courts are often unwilling to find RLUIPA violations even when land use regulations dramatically restrict a religious organization's ability to use its property.

2. Narrowing the Scope of Religious Exercise

Even if plaintiffs successfully meet the substantial burden requirement, they do not necessarily benefit from RLUIPA's strict scrutiny protection. *Grace United Methodist Church v. City of Cheyenne*[76] concretely evidences this reality. In *Grace United*, after a Wyoming district court instructed a jury that the substantial burden test applied only to "fundamental" religious activities, the Tenth Circuit found the instruction erroneous, reasoning that the district court had improperly restricted RLUIPA's substantial burden prong.[77] However, the Tenth Circuit went on to find that the district court's erroneous instruction was harmless error. RLUIPA, the Tenth Circuit pointed out, only protects against regulations that impose a "substantial burden on the *religious exercise* of a person . . . ."[78] The court concluded that the weightiness of the substantial burden was of no consequence when "the jury found that the Church failed to prove it was engaged in a *sincere* exercise of religion."[79] The church had sought to establish a 100-child daycare center that would be open to the public but would provide "religious education."[80] The jury found—and the Tenth Circuit affirmed—that because such a use would not constitute a "religious exercise,"

73. *Id.* at 983.
74. *Id.* at 989.
75. *Id.* at 990–91. In a passage that seems almost a direct response to the many critics who have assailed RLUIPA, the court wrote: "[T]he Church argues that denial of a [conditional use permit] imposes a substantial burden any time a religious organization has purchased a new facility to replace its current, inadequate facility. Such a rule would provide a growing religious organization with a de facto exemption from the zoning laws, allowing it to locate anywhere it pleases so long as it has purchased an adequate facility. That was not Congress's purpose in enacting RLUIPA." *Id.* at 991.
76. 451 F.3d 643 (10th Cir. 2006).
77. *Id.* at 662–63.
78. *Id.* at 661 (citing 42 U.S.C. § 2000cc(a)(1) (2006)) (emphasis added).
79. *Id.* at 663.
80. *Id.* at 647–48, 655 (citing Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1201 (D. Wyo. 2002)).

it would not be protected by RLUIPA.[81] As examined in further detail below, *Grace United* was neither the first nor the last case where a RLUIPA claim was denied on the grounds that the land use at issue was not a religious exercise.

Although RLUIPA does not define "substantial burden," it does define "religious exercise." According to the statute, "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[82] In addition, the term is defined to encompass "[t]he use, building, or conversion of real property for the purpose of religious exercise."[83] A separate subsection of RLUIPA mandates a "[b]road construction . . . in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[84]

Early RLUIPA scholarship expressed the concern that when construed broadly, "religious exercise" could protect virtually any land use in which a religious entity might engage. One critic predicted that RLUIPA would come to safeguard accessory uses such as "parochial schools, day care centers, playgrounds, baseball or softball fields, homeless shelters, administrative buildings, cemeteries, and coffee houses."[85] This prediction has not come to fruition. In fact, despite the statute's requirement of broad construction, and despite unsubstantiated scholarship suggesting that RLUIPA has "expand[ed] the class of protected religious uses to all auxiliary uses,"[86] courts have often contracted the concept of religious exercise in a manner that further limits RLUIPA's reach.

Cathedral Church of the Intercessor v. Village of Malverne[87] provides a probative example of how a court can narrow the definition of "religious exercise." In *Cathedral Church*, the plaintiff desired to expand its facilities to accommodate its growing congregation.[88] In order to undergo its proposed expansion in a residential zone, the church applied to the Malverne village building department for approval.[89] After repeated applications and rejections, the church was ultimately granted a permit.[90] Nevertheless, the church, complaining of harassment and delay on the part of building department officials, filed suit under RLUIPA.[91] In dismissing the church's RLUIPA claim, the federal district court reasoned

81. *Id.* at 669.
82. 42 U.S.C. § 2000cc-5(7)(A) (2006).
83. *Id.* § 2000cc-5(7)(B).
84. *Id.* § 2000cc-3(g).
85. Hook, *supra* note 11, at 854 (citations omitted).
86. Galvan, *supra* note 28, at 220.
87. 353 F. Supp. 2d 375 (E.D.N.Y. 2005).
88. *Id.* at 379.
89. *Id.* at 379–80.
90. *Id.*
91. *Id.* at 381–82.

that "while some of the expansion plans dealt with development of the sanctuary area, the majority of it was in building out administrative offices."[92] Where an undeniably religious use was coupled with what was perceived to be a nonreligious use, the court rejected the church's RLUIPA claim in its entirety. In sum, the court concluded, "Simply because the Church is a religious institution does not mean it receives an unencumbered right to zoning approval for non-religious uses."[93]

Seeming to ignore the statutory language prescribing an expansive conception of religious uses,[94] other courts have followed the example of *Cathedral Church* in expanding the category of *non*religious uses. The Michigan Supreme Court held that a religious institution's construction of an apartment complex generally will not constitute a religious exercise.[95] A California court, allowing sanctions against a Masonic "Cathedral" that had rented out its property to raise money, reasoned that "a burden on commercial enterprise used to fund a religious organization does not constitute a substantial burden on 'religious exercise' . . . ."[96] A Pennsylvania court concluded that Alcoholics Anonymous meetings, despite their invocation of a belief in a higher power, "are for the purpose of treating addictions and not for exercising religion."[97] And the Seventh Circuit, declaring that "there is nothing inherently religious about cemeteries or graves," ruled that Chicago could force a cemetery to disinter the dead and relocate to make way for the expansion of the O'Hare Airport.[98] In each of these cases, RLUIPA claims were rejected.

3. Defining Land Use Regulation More Narrowly

The term "land use regulation" provides yet another opportunity for judges to constrict RLUIPA's application. Just as courts have pointed out that not every activity performed by a religious organization is a religious exercise, courts have also reasoned that not every government limitation on land use constitutes a "land use regulation" under RLUIPA. In instances in which there is

92. *Id.* at 390. It is also interesting to note that the court effectively ignored the text of RLUIPA and proceeded directly to an examination of the statute's legislative history. *See id.* (quoting from the Congressional Record).

93. *Id.* at 390–91. *Accord* Greater Bible Way Temple v. City of Jackson, 733 N.W.2d 734, 746 (Mich. 2007) ("Something does not become a 'religious exercise' just because it is performed by a religious institution.").

94. *See supra* notes 82–84 and accompanying text.

95. *Greater Bible Way Temple*, 733 N.W.2d at 746.

96. Scottish Rite Cathedral v. City of Los Angeles, 67 Cal. Rptr. 3d 207, 215–16 (Ct. App. 2007).

97. Glenside Center, Inc. v. Abington Twp. Zoning Hearing Bd., 973 A.2d 10, 18 (Pa. Commw. Ct. 2009).

98. St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 632 (7th Cir. 2007).

ambiguity as to whether a government activity should be characterized as a land use regulation, courts have repeatedly imposed a definition that disadvantages religious litigants.

According to RLUIPA, "[t]he term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land . . . ."[99] In line with other overstated projections of RLUIPA's potential to undermine governmental regulatory authority, legal scholars analyzing RLUIPA's definition of "land use regulation" incorrectly predicted that the statute could seriously compromise eminent domain power. One student Note claimed that "RLUIPA prevents any government from taking a church's land through eminent domain for the purpose of economic development."[100] Offering a less definitive conjecture, Shelley Ross Saxer surmised that "parsing of language to exclude eminent domain actions from the reach of RLUIPA's land use regulation definition would probably be unsuccessful."[101] Even if the use of eminent domain was not itself a zoning or landmarking law, Saxer reasoned, it would at least be viewed as "the application of such a law."[102]

Judges disagreed. The first court to address the question of whether RLUIPA applies to an exercise of eminent domain power answered affirmatively, albeit in the dicta of a footnote.[103] Since then, however, no other federal or state case has applied RLUIPA to an eminent domain proceeding, and several courts have explicitly held that RLUIPA does not proscribe eminent domain power. When the Hawaii Supreme Court considered the question, the court engaged in an extended examination of the definitions of "zoning" and "landmarking," ultimately concluding that it was "very unlikely that Congress assumed that courts would interpret RLUIPA's reference to zoning laws as including eminent domain proceedings as well."[104] Shortly thereafter, the Seventh Circuit agreed, emphasizing that Congress would have to be more explicit if it intended to abrogate eminent domain power.[105] Two federal district

99. 42 U.S.C. § 2000cc-5(5) (2006).

100. G. David Matheus, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After* Kelo, 81 NOTRE DAME L. REV. 1653, 1657 (2006).

101. Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 669 (2004).

102. *Id.*

103. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002) ("Even if the Court were only considering the condemnation proceedings, they would fall under RLUIPA's definition of 'land use regulation.'").

104. City & County of Honolulu v. Sherman, 129 P.3d 542, 562 (Haw. 2006).

105. *See* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 641 (7th Cir. 2007) ("Given the importance of eminent domain as a governmental power affecting land use, we think that

courts in New York were even more emphatic in concluding that RLUIPA is not applicable to the exercise of eminent domain. In *Faith Temple Church v. Town of Brighton*,[106] the court held that the "employment of eminent domain . . . is simply too far removed from any zoning regulations to fall with[in] the purview of RLUIPA."[107] And in *Congregation Adas Yereim v. City of New York*,[108] the court stated succinctly, "RLUIPA does not apply to eminent domain proceedings."[109] Given the near consensus among judges as to RLUIPA's inapplicability in the eminent domain context, it is confounding that scholars continue to devote entire law review articles to the question of what is to be done about RLUIPA's effect on eminent domain.[110]

Beyond the eminent domain context, other courts have honed in on the term "land use regulation" to deny RLUIPA relief to religious groups lacking an ownership interest in the disputed property. In *Prater v. City of Burnside*,[111] a Kentucky church sought to use RLUIPA to halt the development of a public roadway that passed between two lots owned by the church.[112] In *Navajo Nation v. U.S. Forest Service*,[113] American Indians invoked RLUIPA in an attempt to prevent public mountains sacred to their religion from being sprayed with artificial snow produced from recycled wastewater.[114] In both of these cases, decided by the Sixth and Ninth Circuits respectively, the courts reasoned that there had been no "land use regulation" under RLUIPA because the plaintiffs could not show that the use of *their* land had been regulated.[115]

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if Congress had wanted to include eminent domain within RLUIPA, it would have said something."). *Cf.* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 998 (7th Cir. 2006) ("[A]n annexation statute is not itself a 'zoning' or 'landmarking' regulation and its application therefore does not constitute government action covered by RLUIPA.").

106. 405 F. Supp. 2d 250 (W.D.N.Y. 2005).

107. *Id.* at 257.

108. 673 F. Supp. 2d 94 (E.D.N.Y. 2009).

109. *Id.* at 105.

110. *See, e.g.*, Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1 (2009); Andrew M. Englander, Note, *God and Land in the Garden State: The Impact of the Religious Land Use and Institutionalized Persons Act in New Jersey*, 61 RUTGERS L. REV. 753 (2009). These authors claim that *Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217, 2007 WL 2904194 (D.N.J. Oct. 1, 2007), an unpublished New Jersey district court case, provides a second example of a court applying RLUIPA to limit the exercise of eminent domain power. *See* Serkin & Tebbe, *supra*, at 17; Englander, *supra*, at 786. However, despite the contentions of these authors, the court in *Albanian Associated Fund* explicitly declined to address the question of whether "eminent domain proceedings are within the context of the RLUIPA." *Albanian Associated Fund*, 2007 WL 2904194, at *8.

111. 289 F.3d 417 (6th Cir. 2002).

112. *Id.* at 422–23.

113. 535 F.3d 1058 (9th Cir. 2008).

114. *Id.* at 1062.

115. *See Prater*, 289 F.3d at 434 ("[A] government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may

These rulings may seem appropriate given that RLUIPA, by its terms, limits the definition of "land use regulation" to instances in which claimants have "an ownership, leasehold, easement, servitude, or other property interest in the regulated land . . . ."[116] On the other hand, courts have not seriously considered the possibility of broadly construing the phrase "other property interest" to include the claims of religious plaintiffs who may have an interest in land over which they lack legal possessory rights. Surely, one might argue that American Indians have a property interest in public land that they hold to be sacred. Nonetheless, the decision in *Navajo Nation* leads to the conclusion that absent an ownership interest in the land being regulated, a religious group cannot state a viable RLUIPA claim. Following this logic, irrespective of the burden a government action imposes upon a religious group, a court may reject a RLUIPA cause of action on the ground that there has been no land use regulation.

B. Similar Situations and Reductive Equalizations

Although less frequently invoked in the courtroom, RLUIPA's equal terms provision has also failed to significantly or consistently benefit religious plaintiffs. The equal terms provision states: "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."[117] In theory, this provision prohibits state and local governments from implementing land use regulations in a manner that favors secular institutions over religious ones.[118] In practice, not only has the equal terms mandate been limited in its application by courts, but even when applied, it has often entirely failed to advance the interests of religious entities due to the manner in which legislatures may correct equal terms violations.

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develop or use property in which the claimant has an interest."); *Navajo Nation*, 535 F.3d at 1077, 1077 n.22 ("RLUIPA applies only to government land-use regulations of private land—such as zoning laws—not to the government's management of its own land.") (citing 42 U.S.C. § 2000cc-5(5) (2006) (defining "land use regulation")).

116. 42 U.S.C. § 2000cc-5(5) (2006).

117. *Id.* § 2000cc(b)(1). This provision is coupled with prohibitions on any land use regulation that "discriminates against any assembly or institution on the basis of religion or religious denomination," "totally excludes religious assemblies from a jurisdiction," or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." *Id.* §§ 2000cc(b)(2)–(3).

118. *Id.*

1. Requiring a Showing of Similar Situation

One reason RLUIPA's equal terms provision is infrequently invoked may stem from the fact that an equal terms violation is difficult to prove. Under the statute, once a plaintiff has presented prima facie evidence of an equal terms violation, "the government shall bear the burden of persuasion on any element of the claim . . . ."[119] However, courts have limited the ability of religious plaintiffs to make out prima facie cases by requiring that plaintiffs show "similarly situated"[120] secular organizations that are favored. As the Eleventh Circuit explained in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*:[121]

> A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation. If a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof.[122]

Though nowhere mandated by the text of RLUIPA, the similar situation requirement has been widely adopted by courts applying RLUIPA's equal terms prong.[123]

In requiring evidence of a similarly situated secular organization that has been treated more favorably by a state or local government, courts have frequently imposed a demanding conception of what it means to be similarly situated. In *Primera Iglesia*, the plaintiff church, which was located in a Broward County A-1 zone, sought a variance from a requirement that nonagricultural, nonresidential uses be separated a minimum distance from agricultural and residential uses in A-1 zones.[124] When the variance was denied, the church

119. 42 U.S.C. § 2000cc-2(b) (2006).

120. The words "similarly situated" have long been applied in analyses under the Equal Protection Clause. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 472 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").

121. 450 F.3d 1295 (11th Cir. 2006).

122. *Id.* at 1311.

123. *See, e.g.*, Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007) ("[A] religious plaintiff under [RLUIPA's] Equal Terms Provision must identify a better-treated secular comparator that is similarly situated . . . ."); Int'l Church of Foursquare Gospel v. City of San Leandro, 632 F. Supp. 2d 925, 946 (N.D. Cal. 2008); Layman Lessons, Inc. v. City of Millersville, 636 F. Supp. 2d 620, 647 (M.D. Tenn. 2008). Courts that have rejected the similar situation requirement as formulated in equal protection cases have nonetheless applied an analogous standard by comparing religious assemblies and institutions with nonreligious assemblies and institutions. *See, e.g.*, Vision Church v. Vill. of Long Grove, 468 F.3d 975, 1002–03 (7th Cir. 2006); Konikov v. Orange County, Fla., 410 F.3d 1317, 1324–25 (11th Cir. 2005).

124. *Primera Iglesia*, 450 F.3d at 1300.

pointed out that within 1,000 feet of its location was a preparatory school that occupied seventy acres of land and was not subjected to the same separation requirement.[125] However, as the court explained, the school had not been granted a variance; instead, the school had successfully petitioned to have its land rezoned such that the separation requirement would not apply.[126] Stating that "rezoning and variance plainly have different purposes," the court concluded that the church and the school were not similarly situated.[127] In reaching this conclusion, the court further observed that the church occupied less than one acre while the school covered nearly seventy acres.[128] The court reasoned that "[t]his neatly describes one of the powerful reasons the School is an inapt comparator; its property is seventy times as large as Primera's."[129]

Given that Congress, in enacting RLUIPA, was especially concerned with the protection of religious institutions lacking local political clout,[130] the Eleventh Circuit's reasoning in *Primera Iglesia* shows little regard for congressional intent. Because the plaintiff church was smaller than a neighboring secular institution, and because the neighboring secular institution had convinced the local legislature to rezone its property—a far more dramatic alteration than the granting of a variance—the court held that the church had not pointed to a similarly situated secular institution and had therefore "failed to establish a prima facie Equal Terms violation."[131] Somehow the Eleventh Circuit seems to have missed the point that once a secular institution has already received more favorable treatment in the land use process—an equal terms violation under RLUIPA—the religious and secular institutions will no longer be similarly situated.

Primera Iglesia is not the only circuit court case demonstrating a remarkable ability to find dissimilarities between religious and secular entities subject to land use limitations. The Seventh Circuit, noting the restrictive nature of the similar situation requirement, has held that "a plaintiff need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects."[132] Nonetheless, in the same case, the court went on to reject a Korean-

125. *Id.* at 1300–01.
126. *Id.* at 1301.
127. *Id.* at 1311.
128. *Id.* at 1313.
129. *Id.*
130. *See* 146 CONG. REC. S7774-01, S7774 (2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("[N]ew, small, or unfamiliar churches in particular, are frequently discriminated against . . . in the highly individualized and discretionary processes of land use regulation.").
131. *Primera Iglesia*, 450 F.3d at 1313.
132. Vision Church v. Vill. of Long Grove, 468 F.3d 975, 1003 (7th Cir. 2006).

American church's allegation of an equal terms violation despite the fact that the defendant village denied the church's application for annexation and a special use permit in 2000, only one year after granting the same type of permit to an elementary school across the street.[133] According to the court, because the church's and the school's applications for special use permits were considered in different years, there was no unequal treatment.[134] If this holding is applied in future cases, a religious institution alleging an equal terms violation may have to find a nearby secular institution that applied for and was granted a land use permit or variance in the same year during which the religious institution's similar permit or variance was denied.

Other courts have found more ways to limit the ability of religious entities to establish prima facie equal terms violations. When the city of Long Branch, New Jersey planned to exclude religious assemblies from a downtown development area that would permit theaters, dance studios, restaurants, and culinary schools, the Third Circuit held that religious institutions were "not similarly situated to the other allowed assemblies" because a New Jersey state statute barred liquor licenses within two hundred feet of a church.[135] The court reasoned that since the presence of churches would undermine the redevelopment plan by preventing the sale of alcohol in the area, other assemblies could be permitted to locate in a zone from which churches were banned.[136] Recently, an Arizona district court credited this same concern when the city of Yuma asserted that the presence of a church would interfere with the development of a "tourism, entertainment, and retail center" because Arizona law prohibits the issuance of liquor licenses within three hundred feet of a religious organization.[137] In these cases, state statutes intended to benefit religious institutions effectively allowed city development plans to disfavor those institutions.[138] If municipal planners can point to state liquor laws as a reason to bar churches

133. *Id.* at 1001–03. In 2002, after the church ended up being involuntarily annexed by the village, it again applied for and was denied a special use permit to exceed the size and capacity restrictions in its residential zone.

134. *Id.* at 1003 ("[T]he fact that [the church] and the elementary school were subject to different standards because of the year in which their special use applications were considered compels the conclusion that there was no unequal treatment.").

135. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007).

136. *See id.*

137. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980, 998 (D. Ariz. 2009).

138. *But see* Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612, 615 (7th Cir. 2007) ("[T]he City may not . . . bestow on churches in districts in which it allows them to operate more rights than identical secular users of land have [so as to] justify excluding churches from districts in which, were it not for those superadded rights, the exclusion would be discriminatory.").

from certain areas of the city, RLUIPA's guarantee of equal treatment appears far less potent than its detractors would have us believe.

Offering what may be an even greater hurdle for religious entities seeking to show similarly situated secular entities, a Seventh Circuit case recently suggested that a local government may distinguish between land uses that generate tax revenue and those that do not.[139] After a small congregation attempted to relocate into a business district zone where religious services were not permitted, the court rejected the congregation's RLUIPA claim, reasoning that "commercial gymnasiums, health care clubs, salons, day care centers, and hotels . . . are all commercial entities that contribute to the business district in ways a church cannot."[140] Where "[t]he Village sought to create a tax revenue-generating commercial district," the court held that religious organizations were not similarly situated to commercial enterprises.[141] Of course, a municipal government could always express a preference for tax-generating land uses over those that do not contribute tax revenue. Although en banc review was recently granted in this case, if the holding stands, religious plaintiffs may be highly limited in their ability to identify similarly situated secular comparators. In sum, courts have made it very challenging for a plaintiff to successfully establish a prima facie equal terms violation under RLUIPA.

2. Reductive Equalization

Even if a religious institution can successfully make the demanding showing of unequal treatment that courts have required, RLUIPA imposes no obligation on municipal executives or legislatures to remedy the inequality by granting a religious entity the permit, variance, or other land use benefit it desires. Instead of correcting inequities by elevating religious land uses to the same footing as secular uses, governments can and do eliminate equal terms violations by rescinding privileges granted to secular institutions.[142] This reductive equalization process has been condoned, if not encouraged, by courts.

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139. *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 585 F.3d 364, 374 (7th Cir. 2009).

140. *Id.* at 371.

141. *Id.* at 374. *Cf.* Elijah Group, Inc. v. City of Leon Valley, No. SA-08-CV-0907 OG (NN), 2009 WL 3247996, at *8 (W.D. Tex. Oct. 2, 2009) ("That the zoning ordinance permits some other non-religious assemblies to locate in [retail] zone B-2 is of no consequence because those assemblies further the City's goal of developing a retail corridor . . . .").

142. *See, e.g.*, The Becket Fund for Religious Liberty, Flatirons Community Church, http://www.becketfund.org/index.php/case/49.html (last visited June 13, 2010) (reporting that after being threatened with a RLUIPA lawsuit for requiring churches to go through a special use review to locate in C-1 zoning districts, "[t]he city's initial reaction . . . was to solve its equal treatment problem by voting . . . to require

In *Petra Presbyterian Church v. Village of Northbrook*,[143] the defendant village had a 1988 zoning ordinance that allowed membership organizations such as community centers, fraternal associations, and political clubs, but not churches, to locate in the village's industrial zones.[144] In 2000, the plaintiff church purchased a warehouse in an industrial zone (intending to convert the building into a church) and submitted an application for rezoning to the village's board of trustees.[145] After the application was rejected, the church filed suit, challenging the 1988 ordinance under RLUIPA.[146] However, in 2003, before the case reached the Seventh Circuit, the village passed "a revised ordinance . . . that banned all membership organizations (not just churches) from the industrial zone."[147] As a result, when the Seventh Circuit did hear the case, the court concluded that the church's RLUIPA claim was doomed.[148] As Judge Richard Posner explained, the church "knew or should have known that Northbrook could redo its ordinance to comply with the 'less than equal terms' provision of RLUIPA in one of two ways: by permitting religious organizations in the industrial zone, or by forbidding all membership organizations in the zone."[149] RLUIPA's promise of equal treatment may be cold comfort to religious land users whose RLUIPA complaints result not in the lifting of restrictions on religious entities but in the imposition of restrictions on secular entities.

Reductive equalization should be of less concern if secular entities wield political power and do not want to be excluded from areas where religious entities desire to locate. Because the process of reductive equalization rescinds access previously granted to secular land users, opposition by secular entities may safeguard against its frequent application. However, there might not always

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all of the *other* assembly uses in the C-1 district (i.e., hospitals, libraries, day care centers, etc.) to go through the special review process as well").

143. 489 F.3d 846 (7th Cir. 2007).

144. *Id.* at 847.

145. *Id.* Presumably, the church expected its application to be granted. As the court explained, "[o]f the eleven applications for rezoning and permits under the 1988 ordinance made by churches, [the plaintiff's] was the only one not granted." *Id.*

146. *Id.* at 848.

147. *Id.*

148. *See id.* at 849 ("We cannot find any basis, whether in cases or other conventional sources of law, or in good sense, for the proposition that the federal Constitution forbids a state that has prevented a use of property by means of an invalid (even an unconstitutional) enactment to continue to prevent that use by means of a valid one.").

149. *Id.*; *accord* River of Life Kingdom Ministries v. Vill. of Hazel Crest, No. 08C0950, 2008 WL 4865568, at *4 n.5 (N.D. Ill. 2008) ("[T]he ability of the Village to amend its zoning ordinance and thereby attempt to moot the Church's RLUIPA claim is beyond question."); City of Elgin v. All Nations Worship Ctr., 960 N.E.2d 853, 858 (Ill. App. 2006) (holding that a church does not have a right to continue using its property without a required conditional use permit once a city amends its zoning ordinance to comply with RLUIPA's equal terms provision).

be secular organizations located in or attempting to locate in areas from which they become excluded when the process of reductive equalization is used to cure equal terms violations. More importantly, for reductive equalization to be effective, municipalities need only exclude those secular uses that are similarly situated to the religious uses already prohibited. For example, when the Village of Hazel Crest, Illinois refused to allow the assembly of a religious congregation in the village's business district, it also amended its zoning ordinance to remove nonreligious "meeting halls" from the list of permissible business district uses.[150] Although hotels, health clubs, and daycare centers continued to be allowed in the business district, the village argued—and the Seventh Circuit panel appeared to agree—that the village's amendment to its zoning ordinance had "cured any potential RLUIPA concerns."[151]

On occasion, judges almost encourage reductive equalization. In *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*,[152] the district court held that an ordinance could not bar religious uses while permitting cultural facilities and membership organizations in the city's O1 Office Districts.[153] Nonetheless, the court repeatedly emphasized that equal treatment of similarly situated organizations was all that was required of the city. The court then offered its own solution, suggesting a means by which the city might permissibly continue to exclude the plaintiff church from the O1 District: "[T]he court suspects that a simple amendment to the [zoning] ordinance could readily solve Evanston's problem in a way that eliminates the unequal treatment. For example, the City could potentially bar not for profit cultural institutions from the O1 District . . . ."[154] When courts go so far as to suggest that equal treatment of religious entities may be accomplished by excluding more, rather than fewer, land users, RLUIPA begins to seem fairly ineffective. At the very least, it is safe to assume that plaintiffs have less incentive to litigate RLUIPA claims if equal terms violations can be remedied in a manner that offers plaintiffs little, if any, benefit.

C. RLUIPA Victories and Redundancies

It is likely that both opponents and proponents of RLUIPA would dispute my contention that the statute has failed to significantly benefit religious plaintiffs. Those who disagree with me would point out that successful

150. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 585 F.3d 364, 370 (7th Cir. 2009).
151. *Id.* However, an en banc hearing has now been granted.
152. 250 F. Supp. 2d 961 (N.D. Ill. 2003).
153. *Id.* at 975–79.
154. *Id.* at 979.

RLUIPA claims have been brought by churches,[155] synagogues,[156] temples,[157] religious schools,[158] religious retreats,[159] and even individuals seeking to practice religion in their own homes.[160] While it is undeniable that religious entities have won notable RLUIPA victories, it is likely that many, if not most, of these victories would have been achieved even in RLUIPA's absence. Given the Free Exercise and Equal Protection Clauses of the Constitution, RLUIPA often appears redundant and unnecessary.[161]

1. Substantial Burdens and Free Exercise

When recently asked if RLUIPA's efficacy was declining in light of the many failed RLUIPA claims, Daniel Dalton, a leading RLUIPA proponent who has represented religious plaintiffs in a number of prominent RLUIPA cases, emphasized that we should not forget the power of the Free Exercise Clause to protect religious land users when RLUIPA claims are rejected.[162] But even in cases in which RLUIPA plaintiffs have won, the Free Exercise Clause should not be forgotten. In many of those cases, courts have held that since government land regulations substantially burden religious practices, free exercise claims would likely have succeeded even in RLUIPA's absence.

Some courts have made this fact explicit. As one Connecticut district court concluded, ruling in favor of a church on its free exercise claim inevitably meant that the church's RLUIPA claim would also succeed:

> The court has already found that defendants' actions violate the Free Exercise Clause . . . . Because the elements of a RLUIPA claim are virtually identical to a free exercise claim, the court holds, based on the

155. *See, e.g.*, Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005).

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

157. *See, e.g.*, Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).

158. *See, e.g.*, Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007).

159. *See, e.g.*, Dilaura v. Twp. of Ann Arbor, 112 Fed. Appx. 445 (6th Cir. 2004).

160. *See, e.g.*, Konikov v. Orange County, Fla., 410 F.3d 1317 (11th Cir. 2005).

161. I am not the first to raise this proposition. In arguing that RLUIPA was unnecessary because religious institutions did not face discrimination in the zoning process, Hamilton has written: "In any case, if there were discrimination—and the evidence shows there is not—churches could have sued under the Establishment or Free Exercise Clause; they did not need RLUIPA. If a local government discriminates against religious entities in land use, it violates the Constitution." Marci Hamilton, *The Federal Government's Intervention on Behalf of Religious Entities in Local Land Use Disputes: Why It's a Terrible Idea*, FINDLAW, Nov. 6, 2003, http://writ.news.findlaw.com/hamilton/20031106.html.

162. Telephone Interview With Daniel Dalton, Partner, Tomkiw Dalton (May 27, 2009) [hereinafter Dalton Interview].

> reasoning already articulated, that plaintiffs are entitled to summary judgment on their RLUIPA claim.[163]

While this reasoning might only indicate that plaintiffs who prove free exercise violations will also win under RLUIPA and not vice versa, other courts have concluded that if RLUIPA's substantial burden test is satisfied, the protections of the Free Exercise Clause are also invoked. As early as 2002, a California district court, in holding that RLUIPA's strict scrutiny would be applied when a church's religious practice had been substantially burdened by a land use regulation, reasoned that "[e]ven in the absence of RLUIPA, a strict scrutiny standard of review is appropriate in this case under the Free Exercise Clause."[164] A Hawaii district court reached the same conclusion in a case in which a church was denied a special use permit to develop and renovate property in an agricultural zone.[165] In that case, the court passed on the question of RLUIPA's constitutionality, noting that strict scrutiny was mandated by the Free Exercise Clause regardless of RLUIPA's validity.[166] Insofar as RLUIPA overlaps with a long history of free exercise jurisprudence, criticism of the statute's sweeping effects appears to be substantially misguided.

2. Equal Terms and Equal Protection

Just as RLUIPA's substantial burden test is somewhat redundant in light of the Free Exercise Clause, RLUIPA's equal terms prong is somewhat superfluous in light of the Equal Protection and Establishment Clauses. Long before RLUIPA's enactment, it was well-established that just as one religion may not be favored over another, nonreligious entities may not be favored over religious ones.[167] Because the Equal Protection Clause, along with the religion clauses of the First Amendment, already forbids disparate treatment of religious and secular land users, the utility of RLUIPA's equal terms provision seems questionable. Indeed, as one federal district court recently explained, "RLUIPA's requirement of equal treatment essentially parrots the requirements of the

163. Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 113 (D. Conn. 2003), *overturned on other grounds*, 402 F.3d 342 (2d Cir. 2005) (internal citations omitted).

164. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002). To the extent that RLUIPA overlaps with existing free exercise law, one law professor has suggested that RLUIPA may actually contribute to the atrophy of free exercise jurisprudence as judges assume that the Free Exercise Clause can no longer contribute anything of value to the religious land use dialogue. Lupu, *supra* note 41, at 580.

165. Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002).

166. *Id.* ("Questions of RLUIPA's constitutionality are therefore moot.").

167. *See* Karcher v. Daggett, 462 U.S. 725, 748 (1983); United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring) (reasoning that a statute "preferring some religions over others" would deny equal protection).

religion clauses and the Equal Protection Clause."[168] Likewise, in another recent district court case, the judge dismissed the plaintiff's claims under both RLUIPA and the Equal Protection Clause, applying a similar analysis to both claims and holding that unless a religious institution can point to a similarly situated nonreligious institution, neither RLUIPA nor the Equal Protection Clause can be properly invoked.[169]

Arguably, RLUIPA extends further than the Equal Protection Clause given that strict scrutiny under the Equal Protection Clause is generally only invoked upon a showing of intentional discrimination.[170] Nevertheless, if a religious plaintiff is able to produce enough evidence to establish that a similarly situated secular institution has been treated more favorably under RLUIPA's equal terms provision,[171] such evidence would provide strong support to an intentional discrimination allegation under the Equal Protection Clause. Alternatively, if a similarly situated secular institution is one that would affect the surrounding neighborhood in a manner corresponding to the effect a religious institution would have on its neighbors, a court applying rational basis review might find that the local government could have no legitimate interest in treating the religious and secular entities differently.

D. RLUIPA's Ex Ante Effects

Even if we accept that RLUIPA's effectiveness in the courtroom has been underwhelming and often superfluous, critics of my analysis might further point out that the statute may have a more powerful effect ex ante. In other words, RLUIPA's primary utility may be its use as a bargaining tool or a legal threat that empowers religious land owners outside the courtroom. When faced with the possibility of prolonged litigation and potential fee-shifting,[172] local

168. Rocky Mountain Christian Church v. Bd. of County Comm'rs, 612 F. Supp. 2d 1163, 1188 (D. Colo. 2009).

169. Int'l Church of Foursquare Gospel v. City of San Leandro, No. C 07-3605 PJH, 2008 WL 5384548, at *19–20, *25–26 (N.D. Cal. Dec. 22, 2008).

170. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (establishing the intent requirement in the equal protection standard); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.") (internal citations omitted).

171. *See supra* Part II.B.

172. *See* 42 U.S.C. § 1988(b) (2006). In another colorful criticism of RLUIPA, Hamilton has written, "[T]he specter of having to pay both sides' fees could break the community bank . . . . Local authorities fold like a house of cards, regardless of the merits of either side's position." MARCI HAMILTON, GOD VS. THE GAVEL 98 (2005).

governments may be acceding to the demands of religious institutions. If this is the case, many lawsuits may never materialize due to RLUIPA's efficacy.

Admittedly, this counterargument is more incisive and more difficult to disprove. However, it also lacks evidentiary support. While RLUIPA's critics claim that "religious groups are steam-rolling local government officials to grant permit approvals under the threat of litigation,"[173] critics tend to provide no authority to prove that state or city governments are being steamrolled.[174] In fact, by the end of 2006, one author admitted that she could provide little evidence to support her contention that religious institutions, "[i]nstead of waiting for a land use dispute to become litigious[,] . . . immediately invoke RLUIPA at the first stage of the dispute."[175] If churches were, in fact, defeating the will of local governments by threatening litigation to obtain permits, one would imagine that these stories would be widely reported by local media outlets.

Nevertheless, despite the lack of evidence proffered by critics, there are indeed documented stories of governments settling or succumbing to the demands of religious land owners in order to avoid RLUIPA litigation. For example, in 2006, the Baltimore, Maryland Archdiocese was permitted to raze a 100-year-old building despite the city's urban renewal plan, which called for preservation of historic buildings.[176] According to the local media, "officials were swayed to permit the demolition after considering the possibility of a church lawsuit under [RLUIPA]."[177] Likewise, in Rockland County, New York, when an Orthodox community wanted to develop a yeshiva and accompanying housing in a residential area, the mayor of the town where the development would be situated reportedly opposed the project but approved a settlement to

173. Salkin & Lavine, *supra* note 29, at 255; *see also* Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 450–51 ("Land use applicants who assert religious reasons for the use of property . . . at the very least obtain tremendous leverage from the highly credible threat of imposing litigation costs and an award of attorney's fees.").

174. Notably, critics insistence that RLUIPA claims are inundating the courts seems incompatible with their simultaneous assertion that government officials are consistently succumbing to RLUIPA threats outside the courtroom.

175. Galvan, *supra* note 28, at 231. Galvan claimed that the practice of immediately invoking RLUIPA "has been chronicled only rarely but is sure to increase in frequency." *Id.* She fails to illuminate the source of her confidence.

176. Caryn Tamber, *Religious Institutions Claim Federal Law Trumps Local Zoning*, BALTIMORE DAILY REC., Feb. 19, 2008, *available at* http://www.mddailyrecord.com/article.cfm?id=4379&type=UTTM.

177. *Id.* Not too far away, in Frederick, Maryland a similar story was written when city officials fearing RLUIPA litigation granted a church's expansion request. *See* Gallart v. City of Frederick, Case No. 02-2504-CV (Cir. Ct. Frederick Md. Nov. 5, 2003), *available at* http://www.becketfund.org/index.php/case/50.html; Kelli Esters, *Town Uses Religious Act as 'Shield' in Court*, FOXNEWS.COM, Mar. 10, 2003, http://www.foxnews.com/story/0,2933,80629,00.html.

avoid the risk of a RLUIPA suit.[178] Stories such as these lend credence to the theory that RLUIPA serves its function outside the litigation arena.

However, given the criticism of RLUIPA's steamrolling power, reports of local governments capitulating in the face of RLUIPA threats are surprisingly limited in number. If the statute were benefitting religious institutions by instilling fear in local governments, one would expect to see far fewer RLUIPA court decisions and many more government concessions in the face of potential litigation. Furthermore, even if RLUIPA has in fact provided religious entities with a strong bargaining tool, evidence indicates that the power of that tool is diminishing. As RLUIPA plaintiffs continue to lose cases in court, RLUIPA defendants appear to be less afraid of crippling expenses and therefore less willing to succumb to the demands of religious institutions. Indeed, in a more recent dispute between Orthodox Jews and their neighbors in Rockland County, the local government did not capitulate in the face of a RLUIPA threat but instead budgeted funds for a court battle that has now begun.[179] And two years after acceding to the demands of the archdiocese, Baltimore County emerged victorious in the first RLUIPA dispute to be litigated up to Maryland's highest court.[180] Tellingly, the Baltimore County Office of People's Counsel said, "One of the good things about this case is that it shows—and there are other ones around the country—that land-use laws are legitimate."[181] If courts continue to rule against religious plaintiffs, cities like Baltimore will be increasingly willing to litigate RLUIPA disputes and increasingly unwilling to yield to the demands of religious entities.

III. THE COSTS OF RLUIPA

Even if RLUIPA is not always a powerful bargaining tool and even if RLUIPA plaintiffs do not always emerge from courtrooms victorious, the

178. Peter Applebome, *In the Character of a Village, It's Property vs. Religion*, N.Y. TIMES, Jun. 26, 2005, http://query.nytimes.com/gst/fullpage.html?res=9506EFDE173AF935A15755C0A9639C8B63&sec=&spon=&pagewanted=all.

179. *See* James Walsh, *Pomona, Rabbinical College to Face Off in Federal Court*, LOWER HUDSON J. NEWS, May 17, 2009, http://www.lohud.com/apps/pbcs.dll/article?AID=/20090517/NEWS03/905170375; *see also* Peter Applebome, *Where Religion Meets Real Estate, a Developer and a Town Face Off*, N.Y. TIMES, Jan. 21, 2007, http://select.nytimes.com/2007/01/21/nyregion/21towns.html?_r=1. In separate litigation, likely brought in retaliation, the town successfully revoked the tax-exempt status of the Orthodox group's summer camp, which had been operated at a profit. *See Town Wins Court Decision Over Tartikov*, JEWKEY BETA, Apr. 17, 2009, http://jewkey.com/ramapo-ny-town-wins-court-decision-over-tartikov/random.

180. Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. County, 962 A.2d 404, 430 (Md. 2008); *see also County Law, Not Federal Law, Governs Lutherville Church's Beltway Sign*, BALTIMORE DAILY REC., Dec. 29, 2008.

181. Tamber, *supra* note 176.

statute's drafters and supporters can certainly celebrate some RLUIPA successes.[182] However, many of the statute's proponents and opponents alike consistently ignore the fact that RLUIPA battles come with costs that are incurred by religious institutions. In fact, in many cases, not only has RLUIPA not served to significantly benefit religious groups, but it has actually had the reverse consequence—it has created the burdens it set out to eliminate. In considering how RLUIPA may work a detriment to religious institutions, I analyze three possible costs: (1) litigation costs, (2) reliance costs, and (3) reputational costs.

A. Litigation Costs

RLUIPA litigation is expensive. Battles can last for years with attorneys' fees piling up. Indeed, the very first lawsuit filed under RLUIPA, *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*,[183] remains unresolved, following nine years of litigation and multiple appeals that led to six separate Michigan state court opinions before the plaintiff's RLUIPA claim was ultimately rejected.[184] Although fee-shifting is permitted (not mandated) when religious plaintiffs succeed on their RLUIPA claims,[185] religious institutions undoubtedly incur large legal costs when their RLUIPA claims are rejected. Many such fees might be deferred by pro bono representation,[186] but according to Daniel Dalton most churches no longer receive free legal services.[187]

Just how costly RLUIPA litigation can be is not easy to measure, but RLUIPA cases where fee-shifting has been granted provide insight into how much religious plaintiffs stand to lose if they do not succeed in court. In cases

182. *See supra* notes 155–160.

183. No. 00-1072AS, 2001 WL 34137899 (Mich. Cir. Ct. 2001), *rev'd in part and remanded by* 675 N.W.2d 271 (Mich. App. 2003), *appeal denied by* 471 Mich. 877 (2004).

184. *See* Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., No. 00-1072AS, 2001 WL 34137899 (Mich. Cir. Ct. 2001); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W.2d 271 (Mich. App. 2003); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 471 Mich. 877 (2004); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 739 N.W.2d 664 (Mich. App. 2007); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 746 N.W.2d 105 (Mich. 2008); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 761 N.W.2d 230 (Mich. App. 2008). The plaintiff's equal protection claim is still being litigated. *See* Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 767 N.W.2d 451 (Mich. 2009).

185. 42 U.S.C. § 1988(b) (2006).

186. With her usual hyperbole, Hamilton has claimed that the participation of religious interest groups has "[made] litigation free for the religious entity." HAMILTON, *supra* note 172, at 98.

187. Dalton Interview, *supra* note 162. The Becket Fund for Religious Liberty has supported religious institutions in dozens of RLUIPA cases. *See* The Becket Fund, http://www.becketfund.org (last visited July 10, 2010). However, Dalton reports that the Becket Fund now focuses on RLUIPA appellate work and does not represent religious institutions at the trial level.

in which religious plaintiffs have prevailed, courts have generally awarded fees and costs in the tens of thousands of dollars,[188] but at least one recent fee award exceeded $1 million.[189] Cases that have settled after extended litigation have also occasionally resulted in fees and costs approaching the $1 million mark.[190] Even cases that settle fairly early on have consistently resulted in attorneys' fees in excess of $10,000.[191] These sums may sound small, but the religious entities bringing RLUIPA claims are often small themselves and cannot afford to devote significant resources to battling local governments.[192] Though religious land users that succeed in court may benefit from significant fees and damage awards,[193] those churches, mosques, synagogues, temples, and schools that lose their RLUIPA claims may be left with crippling legal bills.

B. Reliance Costs

In addition to substantial litigation costs, some religious organizations have suffered far greater financial losses after investing in property with the expectation that RLUIPA would safeguard their investments. Perhaps convinced by the critics that all religious landowners can rely on RLUIPA to overcome the will of local governments, churches have purchased and

188. *See, e.g.*, DiLaura v. Twp. of Ann Arbor, 471 F.3d 666, 668 (6th Cir. 2006) (reversing the district court's reduction of $178,535.61 in attorneys' fees and costs to $72,214.24); Layman Lessons, Inc. v. City of Millersville, Tenn., 550 F. Supp. 2d 754, 755, 757 (M.D. Tenn. 2008) (awarding nominal damages of $2 along with attorneys' fees and costs of $53,721.50).

189. Rocky Mountain Christian Church v. Bd. of County Comm'rs, No. 06-cv-00554-REB-BNB, 2010 WL 148289, at *7 (D. Colo. 2010) (awarding a total of $1,341,991 for attorneys' fees and expenses).

190. For example, see the case of *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), which settled on remand for nearly $5 million plus almost $1 million in attorneys' fees. Juli S. Charkes, *Mamaroneck and School Settle Dispute*, N.Y. TIMES, Jan. 27, 2008, at WE2. *See also* Daniel Dalton, *The Religious Land Use and Institutionalized Persons Act Update*, 40 URB. LAW. 603, 607 (2008) (reporting a case that settled under confidential terms in 2007 for "what was then the largest settlement in the nation for a RLUIPA violation"); Press Release, U.S. Dep't of Justice, Justice Department Resolves Lawsuit Alleging Religious Discrimination by City of Hollywood, Florida (July 5, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/July/05_crt_416.html (reporting a RLUIPA settlement of damages, costs, and fees amounting to $2 million).

191. *See, e.g.*, Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d. 857 (E.D. Pa. 2002) (settlement included $10,000 in attorneys' fees); RLUIPA.com, Pine Hill Zendo, Inc. v. Town of Bedford Zoning Board of Appeals, http://www.rluipa.com/index.php/case/68.html (last visited Jun. 18, 2010) (reporting a settlement that included $30,000 in attorneys' fees and costs).

192. Indeed, RLUIPA's legislative history reveals that Congress was especially concerned with the plight of small churches. *See supra* note 130.

193. Of course, such fee awards are never paid if RLUIPA victories are overturned on appeal. *See, e.g.*, Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W. 2d 734, 738, 755 (Mich. 2007) (reversing lower courts' finding of a RLUIPA violation and award of $30,000 in attorneys' fees and costs); St. Joseph's Korean Catholic Church v. Zoning Bd. of Adjustment of Rockleigh, 2006 WL 1320089, at *10 (N.J. Super. A.D. 2006) (reversing trial court's finding of a RLUIPA violation and award of nearly $40,000 in attorneys' fees and costs).

developed property without receiving the necessary permits or zoning variances. If their RLUIPA claims are rejected, the value of their investments may be greatly diminished.

This appears to be what happened in the case of *Petra Presbyterian Church v. Village of Northbrook*,[194] discussed above in Part II.B.2. Around the time that RLUIPA was enacted, the plaintiff church was looking to purchase property in Northbrook, Illinois, a suburb of Chicago.[195] After locating a warehouse and an office building that it hoped to convert into a church facility and classrooms, the church signed a purchase contract for $2.9 million, contingent on Petra receiving a permit to use the warehouse as a church.[196] However, when the Northbrook planning commission recommended that the village's board of trustees reject the church's permit application, the church withdrew its application to avoid a formal denial.[197] "But then, remarkably, it went ahead and bought the warehouse, albeit at a reduced price of $2.6 million, and began using it as a church."[198] Following years of litigation—and legal fees—the Seventh Circuit rejected the church's RLUIPA claim and upheld an injunction prohibiting the church from using the warehouse for services. Local media reported that the church's membership had declined and coffers had been substantially drained.[199] The court expressed little sympathy for the church's plight: "Having decided to go ahead and purchase the property outright after it knew that the permit would be denied, [the church] assumed the risk of having to sell the property and find an alternative site for its church should the denial be upheld."[200] Evidently, if religious groups and their attorneys believe the scholarly claim that RLUIPA will empower them to ignore land use laws,[201] these groups learn too late that ignoring land use regulations can come at quite a cost.

Although the *Petra Presbyterian* case may seem like an anomaly, instances of churches purchasing and investing in property and then being denied the necessary development permits are not uncommon.[202] *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*,[203] discussed above in Part II.B.1,

194. 489 F.3d 846 (7th Cir. 2007).
195. *Id.* at 847.
196. *Id.*
197. *Id.* at 847–48.
198. *Id.* at 848.
199. *See* Ken Goze, *Court Affirms Ruling That Bars Warehouse Worship*, NORTHBROOK STAR, Jun. 21, 2007; Irv Leavitt, *Petra Church Vows to Continue Court Fight*, NORTHBROOK STAR, Jan. 26, 2006.
200. *Petra Presbyterian*, 489 F.3d at 851.
201. *See supra* Part I.
202. Dalton Interview, *supra* note 162. When asked whether other religious institutions have had their RLUIPA claims rejected after making significant expenditures on land development, Dalton said, "I'm sure it happens all the time."
203. 450 F.3d 1295 (11th Cir. 2006).

tells a similar story. As in *Petra Presbyterian*, the plaintiff church in *Primera Iglesia* purchased property that was "unambiguously . . . subject to zoning ordinances and other restrictions and prohibitions" only to find that the required variance was not forthcoming.[204] And as in *Petra Presbyterian*, the court in *Primera Iglesia* rejected the church's RLUIPA claim, noting that "[t]he Church was represented by counsel in the purchase," and yet went ahead with its plan despite lacking a permit to do so.[205] Again, churches may suffer significant economic losses if they are confident that federal laws protect religious land users who purchase and develop property without the approval of local land use authorities.

Bethel World Outreach Church v. Montgomery County,[206] a recent Maryland appellate court case, provides yet another telling example. In *Bethel World Outreach*, the plaintiff church spent over $3 million to purchase property on which to construct new facilities.[207] When the church's request to change the water and sewer category designation of its property was rejected,[208] construction plans were stymied, and a RLUIPA claim was raised in state court. Although the church argued that it had been led to "expend substantial funds" and to "expect[ ] that it would receive a category change," the Maryland Court of Special Appeals held that the church had not adequately demonstrated a substantial burden resulting from the denial of its category change request.[209] According to the court, the church had not shown that it was "entirely prohibited . . . from building on its property," and it should not have expected that its land use request would be approved.[210] After all, the court reasoned, the purchase of property by a religious group does not make approval of a category change request automatic.[211] In light of holdings like this, if scholars continue to

204. *Id.* at 1300.

205. *Id. See also* Vineyard Christian Fellowship of Evanston v. City of Evanston, 250 F. Supp. 2d 961, 966 (N.D. Ill. 2003) ("Vineyard . . . purchased the subject property, located in an O1 District, despite its knowledge that the use Vineyard intended for the property was not permitted under the Ordinance.").

206. 967 A.2d 232 (Md. Ct. App. 2009).

207. *Id.* at 239, n.9.

208. *Id.* at 234.

209. *Id.* at 250–51. Notably, the church pointed to a recently decided federal case in which a religious congregation's RLUIPA claim had succeeded in a Maryland district court. *Id.* at 250–52 (referring to Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp. 2d 766 (D. Md. 2008)). In response, the Maryland appellate court reasoned that the burden on Bethel World Outreach Church was not substantial because it was less severe than the burden on the Seventh Day Adventist congregation that had won in federal court. *Bethel World Outreach*, 967 A.2d at 251–53. Thus, precedent that would seem to support Bethel World Outreach's RLUIPA claim was used to defeat the claim. *See supra* Part II.A.1 (discussing the fact that favorable precedent does not necessarily yield favorable RLUIPA outcomes for religious institutions).

210. *Bethel World Outreach*, 967 A.2d at 252.

211. *Id.* at 253.

claim that RLUIPA empowers religious groups to ignore land use regulations, religious groups will ultimately pay the price.

While most churches that are denied necessary development permits may be able to recover some value by selling their property, those that opt to proceed with their development plans without local government approval may suffer severe economic losses. The case of *Redwood Christian Schools v. County of Alameda*[212] offers an illustrative example. In *Redwood Christian*, one of only a handful of RLUIPA cases to ever be tried by a jury, a Christian school seeking to build a new campus in rural Alameda County, California not only lost on its RLUIPA claim but also incurred costs of "more than $30 million in financing, construction delays, and lost tuition" during its six-year legal battle.[213]

It is unclear why a church would complete a purchase or pursue construction plans without the required zoning approval,[214] but given that they are generally represented by counsel, religious entities are probably well aware of local land use laws. Presumably, then, churches buy property assuming that they will be granted the requisite variances or permits. When their applications are denied, many churches appear willing to proceed with their development plans while relying on RLUIPA to aid them in negotiations or litigation. Insofar as the statute may lure religious institutions into believing that they will not be encumbered by general land use restrictions, RLUIPA may saddle religious groups with significant reliance costs.

C. Reputational Costs

Not all RLUIPA costs are financial, and perhaps the greatest expense religious land owners incur in bringing RLUIPA claims is the loss of goodwill they experience in their communities. Dalton says he has "never had a church that's wanted to file a lawsuit."[215] He explains that RLUIPA is invoked only as a last resort.[216] "Long after the case is dismissed . . . the church is going to be there. So they don't want to be seen as or viewed as a detriment to the community."[217] Given that religious institutions often depend on their social capital and positive reputations to maintain and increase membership, churches are

212. Redwood Christian Schs. v. County of Alameda, No. C-01-4282 SC, 2007 WL 781794 (N.D. Cal. Mar. 8, 2007).

213. Bob Egelko, *Christian School Loses Case Based on Religion*, S.F. CHRON., Mar. 3, 2007, *available at* http://articles.sfgate.com/2007-03-03/bay-area/17237395_1_religious-liberty-land-use-laws-becket-fund.

214. According to Dalton, it can be challenging for a religious institution to find property at the right price and with the right amount of space and parking. Dalton Interview, *supra* note 162.

215. *Id.*

216. *Id.*

217. *Id.*

probably keenly aware of the potential reputational costs involved in bringing or even threatening RLUIPA litigation.

RLUIPA's critics, for one, are aware of the statute's potential divisiveness. Hamilton claims that "RLUIPA has turned neighbor against neighbor and is one of the most religiously divisive laws ever enacted in the United States."[218] Ariel Graff has predicted that "[r]eligious discrimination and intolerance likely will be amplified where local communities perceive that the power of municipal government to legislate in furtherance of the common good has been abrogated by special accommodation to religious land use."[219] The proposition that RLUIPA has increased religious discrimination generally in its effort to reduce religious discrimination in the land use process is debatable. However, the reality of vitriolic disputes between religious institutions and their neighbors is well-documented.[220]

A RLUIPA dispute in Castle Hills, Texas exemplifies how nasty the battles can get. After a local Baptist church with a growing congregation was denied permits necessary to build new parking facilities and to complete construction of its building, the church filed suit under RLUIPA.[221] The church's complaint alleged that the city had "engaged in a campaign against places of worship," and the city's motion for partial summary judgment claimed that the church was growing like a "cancer."[222] When the city council met to discuss the matter, "Bob Anderson—the former mayor and leader of the movement against the church—was forcibly removed by the police for disrupting the meeting."[223] Not long afterwards, the new mayor resigned, citing the community's "extreme disharmony."[224]

Although not all RLUIPA battles result in such hostile behavior and acrimony, religious leaders are cognizant of the potential for animosity. Considering whether to file a lawsuit based on RLUIPA, one Rabbi explained, "I'm now facing a spiritual crisis in trying to preserve my commitment to love my

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218. HAMILTON, *supra* note 172, at 97. *See also* Marc O. DeGirolami, *Recoiling From Religion*, 43 SAN DIEGO L. REV. 619, 632 (2006) (lambasting Hamilton's book but contending that "Hamilton's criticisms of RLUIPA as a potentially aggravating force . . . ring at least partially true . . . ."). Similarly, Richard Schragger argues that "RLUIPA has generated a backlash against church influx by communities fearful that, once settled, congregations will have an unfettered ability to expand their operations without regard to local land-use concerns." Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1847–48 (2004).

219. Graff, *supra* note 28, at 520–21.

220. *See, e.g.*, Laura Incalcaterra, *Religious Land-Use Law Causing Friction*, J. NEWS, Jun. 27, 2005, *available at* http://www.rluipa.com/index.php/article/413.html.

221. *See* Lowery, *supra* note 27, at 415.

222. *Id.* at 415.

223. *Id.* at 415–16.

224. *Id.* at 416.

neighbor as myself while at the same time trying to have my rights and the rights of my faith community upheld."[225] For religious institutions that do attempt to vindicate their rights under RLUIPA, the lost goodwill may turn out to be worth more than the suit itself. Indeed, for some RLUIPA plaintiffs, a victory in the courtroom can be overshadowed by the social costs that are incurred as a result. "There are cases I've had," Dalton explains, "where at the end of the day, there's such acrimony between the church and the city leaders that the church thought, 'We are a community church, but the community doesn't want us, so we'll leave.'"[226] Understood in this light, the reputational costs attendant to RLUIPA litigation can be quite severe. Even if RLUIPA litigants win the right to remain on the property of their choosing, they may ultimately choose to exit areas where they are no longer welcome. In sum, RLUIPA litigation may not be the most promising path given that even winning cases can lead to substantial losses for religious institutions.

CONCLUSION

Several conclusions may be drawn from the fact that RLUIPA has often failed to significantly benefit religious land users—and has actually worked to their disadvantage in certain instances. Naturally, many readers might conclude that action should be taken to strengthen the statute. If, as I have argued, courts are creatively circumventing RLUIPA's mandates, it would seem necessary for Congress or the Supreme Court to announce clearer directives that would prevent lower courts from avoiding proper application of the law. The loopholes in the statute's inadequately defined language should be closed to give broader effect to RLUIPA. This would be a relatively easy fix. However, it is not the only plausible conclusion to be drawn from the body of case law that has limited RLUIPA's reach. Others might just as readily conclude that evidence of RLUIPA's ineffectiveness suggests that the statute should be scrapped entirely. That RLUIPA has been underenforced may counsel not in favor of reinforcement but repeal.

Still others, instead of criticizing judges for avoiding application of RLUIPA, might reasonably applaud judges for avoiding *unconstitutional* application of the statute. Indeed, federal judges are bound by a canon of constitutional avoidance that instructs courts to construe statutes "to avoid doubt as to their constitutionality, if reasonably possible."[227] This guiding principle of

225. Peter Fimrite, *Synagogue Expansion Fight Gets Ugly*, S.F. CHRON., Oct. 23, 2006, at B1.
226. Dalton Interview, *supra* note 162.
227. 16 C.J.S. *Constitutional Law* § 191 (2010).

statutory interpretation is longstanding[228] and has been reaffirmed on numerous occasions.[229] Supreme Court precedent teaches that it is generally appropriate for a court to construe a federal statute narrowly in order to avoid constitutional infirmity,[230] so long as the narrow construction is "fairly possible."[231] Even if a broader reading appears more appropriate, a fairly possible narrow reading may be required where the broader reading "would raise serious constitutional problems."[232]

While lower courts have not expressly justified their narrow constructions of RLUIPA as necessary to maintain the statute's constitutionality, it is possible to read many RLUIPA decisions as implicitly invoking the canon of constitutional avoidance. Several scholars have argued that RLUIPA's land use provisions unconstitutionally transgress the boundaries of the Establishment Clause.[233] According to these scholars, RLUIPA prescribes a preference for religious land users, thereby excessively entangling the government with religion and favoring religion over nonreligion in a manner that violates the First Amendment.[234] If this line of criticism is accurate, judges who appear to be circumventing RLUIPA's mandates may actually be fulfilling their judicial duty to read the statute in a constitutional manner.[235] The judiciary may be

228. *See, e.g.*, United States *ex rel.* Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

229. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail . . . ."); I.N.S. v. St. Cyr, 533 U.S. 289, 299–300 (2001); Jones v. United States, 526 U.S. 227, 239 (1999); Edmond v. United States, 520 U.S. 651, 658 (1997); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (describing constitutional avoidance as a canon that "has for so long been applied by this Court that it is beyond debate").

230. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985).

231. *See St. Cyr*, 533 U.S. at 299–300 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). Applying what appears to be an even more robust form of the constitutional avoidance canon, the Court in *DeBartolo* reasoned that a construction free of serious constitutional problems should be adopted "unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

232. *St. Cyr*, 533 U.S. at 299–300 (2001). According to the Court, the avoidance canon is premised on "the reasonable presumption" that Congress does not intend to enact unconstitutional statutes, and the canon is therefore "a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 381–82.

233. *E.g.*, Ruth Colker, City of Boerne *Revisited*, 70 U. CIN. L. REV. 455, 465, 472–73 (2002); Walsh, *supra* note 11, at 201–07. Though the Supreme Court has not ruled on the constitutionality of RLUIPA's land use provisions, the Court has held that RLUIPA's institutionalized persons provision does not violate the Establishment Clause. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

234. *See, e.g.*, Walsh, *supra* note 11, at 204–06.

235. *Cf.* Galvan, *supra* note 28, at 230–34 (arguing that RLUIPA could violate the Establishment Clause if it were interpreted broadly to protect "auxiliary enterprises that are merely tangential to a religious institution's mission—enterprises like fast food restaurants and banks").

properly narrowing RLUIPA to prevent the statute from operating as an impermissible government establishment of religion. Indeed, the statute itself contains a provision mandating a judicial construction that does not offend the Establishment Clause.[236] Thus, my analysis of the many cases denying relief to RLUIPA plaintiffs may lead readers to conclude that the Supreme Court should not interfere with the growing body of law that limits RLUIPA's reach.

But I leave the normative work to future scholars. My purpose in this Comment has been limited: I have sought to fill the gap in a growing body of scholarship that condemns RLUIPA's perceived effects without critically examining the body of case law that has narrowed the statute's scope. I have looked to the outcomes of RLUIPA litigation to illuminate the past shortsightedness and the current willful blindness of RLUIPA's myriad critics who believed and often continue to believe that because of RLUIPA, religious entities are able to subvert the zoning process and undermine the land use power of local governments. To be sure, I have not claimed that religious plaintiffs never win under RLUIPA. Such a claim would be inaccurate. However, more often than not, RLUIPA causes of action have failed in the courtroom. Meanwhile, religious institutions have come to understand that RLUIPA litigation comes with costs not only to local governments but also to religious plaintiffs. The statute has not been an unconditional boon to religious institutions. Thus, while much of legal academia remains convinced that RLUIPA has dramatically increased the power of religious land users at the expense of local governmental authority, in the decade since RLUIPA was enacted, the fears of the statute's opponents have largely proved unwarranted and their unrelenting criticism unjustified.

236. 42 U.S.C. § 2000cc-4 (2006) ("Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion . . . .").